CHAPTER 71.

INCOME TAX ACT.

71.01 Persons and subjects taxable. There shall be assessed, levied, collected and paid a tax on all net incomes as hereinafter provided, by every person residing within the state or by his personal representative in case of death; and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state, except as hereinafter exempted. Every natural person domiciled in the state of Wisconsin, and every other natural person who maintains a permanent place of abode within the state or spends in the aggregate more than seven months of the income year within the state, shall be deemed to be residing within the state for the purposes of determining liability for income taxes and surtaxes. This section shall not be construed to prevent or affect the correction of errors or omissions in the assessment of income of former years in the manner provided in sections 71.10 and 71.11. [*1931 c. 448 s. 4; 1935 c. 544*]

Note: The assessment of the normal income tax and surtax and the 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 Commission, 225 W 529, 275 NW 531.

A domicile once established is not lost until a new one is acquired. Dromey v. Tax Commission, 227 W 267, 278 NW 400.

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.

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. Department of Taxation, 246 W 611, 18 NW (2d) 331.

Taxability of remuneration paid officers and employes by federal agencies and instrumentalities discussed [prior to 1939 changes in state and United States laws on this subject]. 26 Atty. Gen. 68.

71.02 Definition of terms; what income taxable. (1) The term "person," as used in this act, shall mean and include natural persons, fiduciaries and corporations, and the word "corporation" shall mean and include corporations, joint stock companies, associations or common law trusts organized or conducted for profit, unless otherwise expressly stated. The term "net income" as used in this chapter shall mean "gross income" less allowable deductions.

(2) The term "gross income," as used in this act, shall include:

(a) All rent of Wisconsin real estate.

(b) All dividends derived from stocks and all interest derived from money loaned or invested in notes, mortgages, bonds or other evidence of debt of any kind whatsoever; provided, that the term "dividends" as used in this section shall be held to mean all dividends derived from stocks whether paid to its shareholders in cash or property of the corporation.

1. For the purpose of this section every distribution is presumed to be made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

2. Any earnings or profits accumulated, or increase in value of property accrued, before January 1, 1911, may be distributed exempt from tax, after the earnings and profits accumulated after January 1, 1911, have been distributed, but any such tax-free distribution shall be applied against and reduce the cost or other income tax basis provided in section 71.02 (2) (d). If such or any similar tax-free distributions exceed such cost or other income tax basis, any excess shall be included in the gross income of the year in which received.

3. Amounts distributed in liquidation of a corporation shall be treated as payment in exchange for the stock, and the gain or loss to the distributee resulting from such exchange shall be determined under the provisions of this paragraph and section 71.02 (2) (d). No amounts received in liquidation shall be taxed as a gain until the distributee shall have received amounts in liquidation in excess of his cost or other income tax basis provided in section 71.02 (2) (d), and any such excess shall be taxed as gain in the year in which received. Losses upon liquidation shall be recognized only in the year in which the corporation shall have made its final distribution. For the purposes of this paragraph a corporation shall be considered to be liquidating when it begins to dispose of the assets with which it carried on the business for which it was organized and begins to distribute the proceeds from the disposition of such assets, or the assets themselves, whether or not such disposition and distribution is made pursuant to resolution for dissolution; provided, that any distribution of current earnings of a corporation shall not be considered to be a distribution in liquidation unless the corporation making such distribution has ceased or is about to cease carrying on the business for which it was organized.

4. All dividends received by any person paid in any property other than cash shall be valued at the fair market value of such property on the date of the distribution.

5. A dividend paid by a corporation in its own capital stock shall not be subject to income tax as a dividend at the time of its receipt by a stockholder; but the sale of such stock may result in a gain or loss for income tax purposes, and the gain or loss from the sale of such stock and from the sale of the stock with respect to which it was issued, shall be determined as provided in this paragraph and in section 71.02 (2) (d). For the purpose of determining the profit or loss on the sale or other disposition of stock received as a stock dividend or of the stock with respect to which such stock dividend was issued, the cost or other basis of the old and of the new shares shall be such proportion of the previous cost or other basis of the old stock as is properly allocable to each, under regulations prescribed by the department of taxation. If before or after the distribution of any stock dividend the corporation proceeds to cancel or redeem its stock at such time and in such manner as to make the distribution and cancellation or redemption in whole or in part essentially equivalent to the distribution of a taxable dividend, the amount so distributed in redemption or cancellation of the stock to the extent that it represents a distribution of earnings or profits accumulated after January 1, 1911, shall be treated as a taxable dividend as herein defined.

(c) All wages, salaries or fees derived from services, including services performed for the United States or any agency or instrumentality thereof.

(d) All profits derived from the transaction of business or from the sale or other disposition of real estate or other capital assets; provided, that for the purpose of ascertaining the gain or loss resulting from the sale or other disposition of property, real or personal, acquired prior to January 1, 1911, the fair market value of such property as of January 1, 1911, shall be the basis for determining the amount of such gain or loss; and, provided, further, 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; and in case the taxing officers are unable to ascertain the cost of the property to such prior owner, if acquired after January 1, 1911, then the basis shall be the value thereof at or about the time it was acquired by him, and such value shall be determined from the best information obtainable. However, with respect to all gifts made after July 31, 1943, the basis for computing gain or loss resulting from the sale or other disposition of said property acquired by gift shall be the fair market value of said property at the time of the said gift or the valuation on which a gift tax has been paid or is payable. In computing profit or loss on the sale of property acquired by descent, devise, will or inheritance, or on the sale of property in a decedent's estate, since January 1, 1911, the appraised value of such property in the administration of the estate of the deceased owner as of the date of his death shall be on the basis for determining the amount of such profit or loss. The cost, or other basis mentioned above, shall be diminished by the amount of the deduction for ex-

haustion, wear and tear and depletion which have, since the acquisition of the property, been allowed as deductions under all Wisconsin income tax laws; and such basis shall also be diminished by the amounts of all income deferred by the taxpayer and used to reduce property, and all anticipated losses on such property which have been deducted from taxable income. If property, exclusive of inventories (as raw materials, goods in process and finished goods), as a result of its destruction in whole or in part by fire or other casualty, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof, is involuntarily converted into money which is within one year in good faith, under regulations prescribed by the department of taxation, expended in the replacement of the property destroyed or in the acquisition of other property similar or related in service or use to the property so destroyed, or in the establishment of a replacement fund which, within 2 years from date of the fire or other casualty is actually expended to replace the property destroyed or in the acquisition of other property similar or related in service or use to the property destroyed, no gain shall be recognized, and in the case of gain the property so replaced or acquired, for purposes of depreciation and all other purposes of taxation, shall be deemed to take the place of the property so destroyed. If any part of the money is not so expended, the gain, if any, shall be recognized, but in an amount not in excess of the money which is not so expended. A replacement of property by an insurance company shall be deemed to be an expenditure by the taxpayer of insurance moneys received by him from the insurance company for the purposes of this subsection. If shares of stock in a corporation acquired subsequent to January 1, 1934, are sold from lots acquired at different dates or at different prices, the basis for determining gain or loss shall be that of the specific shares sold. If the identity of the lots cannot be determined, the stock sold shall be charged against the earliest acquisitions of such stock. The basis for determining gain or loss on sales of stock acquired prior to January 1, 1934, shall be the average cost of all such shares of the same stock, determined in accordance with the regulations of the department of taxation in effect on January 1, 1934.

(df) The period within which fire or other casualty losses occurring since January 1, 1941, must be replaced, may be extended at the discretion of the commissioner of taxation for good cause shown beyond the two-year period specified in paragraph (d) for a period not to exceed two years after the termination of the present war as proclaimed by the President or the Congress. When such period has been extended by the commissioner any tax previously paid as specified in paragraph (d) upon the proceeds of insurance covering a loss occurring since January 1, 1941, shall be refunded in the manner provided in section 71.17.

(dm) When property other than cash is distributed by a corporation in payment of a dividend other than a dividend or distribution in liquidation the profit or loss that arises in so disposing of such property, shall be that of the corporation and shall be measured by the difference between the fair market value of such property at the time of such disposition and the income tax cost thereof to said corporation.

(e) All royalties derived from mines or the possession or use of franchises or legalized privileges of any kind.

(f) If any transfer of a reserve or other account or portion thereof is in effect a transfer to surplus, so much of such transfer as had been accumulated through deductions from the gross or taxable income of the years open to audit under sections 71.10 and 71.11 shall be included in the gross or taxable income of such years, and so much of such transfer as has been accumulated through deductions from the gross or taxable income of the years following January 1, 1911, and not open to audit under sections 71.10 and 71.11 shall be included in the gross or taxable income of the year in which such transfer was effected.

(g) Life insurance paid to the insured, and insurance paid to a corporation or partnership upon policies on the lives of its officers, partners or employes, after deducting from such insurance the cash surrender value thereof on January 1, 1911, and all net premiums paid thereafter and not deducted on Wisconsin income tax returns.

(h) And all other gains, profits or income of any kind derived from any source whatever except such as hereinafter exempted.

(i) 1. No gain or loss shall be recognized if stock or securities in a corporation a party to a reorganization are, in pursuance of the plan of reorganization, exchanged solely for stock or securities in such corporation or in another corporation a party to the reorganization.

2. No gain or loss shall be recognized if a corporation a party to a reorganization exchanges property, in pursuance of the plan of reorganization, solely for stock or securities in another corporation a party to the reorganization.

3. No gain or loss shall be recognized if property is transferred to a corporation by one or more persons solely in exchange for stock in such corporation, and immediately after the exchange such person or persons are in control of the corporation; but in case of an ex-

change by two or more persons this paragraph shall apply only if the amount of the stock received by each is substantially in proportion to his interest in the property prior to the exchange.

4. If there is distributed, in pursuance of a plan of reorganization, to a stockholder in a corporation a party to the reorganization, stock or securities in such corporation or in another corporation a party to the reorganization, without the surrender by such shareholder of stock or securities in such a corporation, no gain to the distributee from the receipt of such stock or securities shall be recognized.

5. The distribution, in pursuance of a plan of reorganization, by a corporation a party to the reorganization, of its stock or securities, or stock or securities in a corporation a party to the reorganization, shall not be considered a distribution of earnings or profits for the purpose of determining the taxability of subsequent distributions by the corporation.

6. The term "reorganization" means (a) a merger or consolidation (including the acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation, or substantially all the properties of another corporation), or (b) a transfer by a corporation of all or a part of its assets to another corporation if immediately after the transfer the transferor or its stockholders or both are in control of the corporation to which the assets are transferred, or (c) a recapitalization, or change in the form of capitalization, or (d) a mere change in identity, form or place of organization, however effected.

7. The term "a party to a reorganization" includes a corporation resulting from a reorganization and includes both corporations in the case of an acquisition by one corporation of at least a majority of the voting stock and at least a majority of the total number of shares of all other classes of stock of another corporation.

8. As used in this section the term "control" means the ownership of at least eighty per cent of the voting stock and at least eighty per cent of the total number of shares of all other classes of stock of the corporation.

9. No gain or loss shall be recognized upon the receipt by a corporation of property distributed in complete liquidation of another corporation in conformity with all the requirements of this subdivision. The corporation receiving such property must be, continuously from the date of the adoption of the plan of liquidation until the receipt of the property, the owner of stock in such other corporation, possessing at least eighty per cent of the total combined voting power of all classes of stock and the owner of at least eighty per cent of the total number of shares of all other classes of stock except nonvoting preferred stock. Such other corporation must have been organized prior to the enactment of this subdivision and must have made no distribution in liquidation to the receiving corporation prior to the enactment hereof. The property may be distributed in one or a series of distributions, but the final distribution must occur within one year from the adoption of the plan of liquidation and within one year from the first distribution. The assumption of liabilities of such other corporation by its stockholders, including the receiving corporation, shall not prevent a distribution from being considered as final. The adoption of a resolution authorizing the distribution of all of the assets of a corporation in complete cancellation or redemption of all of its stock shall be considered an adoption of a plan of liquidation even though such resolution specifies no time for the completion of the transfer of the property.

(j) 1. If property involved in transactions described in section 71.02 (2) (i) 1 and 2 was acquired by a corporation in connection with a reorganization the basis for determining gain or loss, depletion or depreciation shall be the same as it would be in the hands of the transferor. This paragraph shall be applicable only when the transaction involved was treated for income tax purposes as provided in section 71.02 (2) (i) 1 and 2.

2. If property was acquired by a corporation by the issuance of its stock or securities in connection with a transaction described in section 71.02 (2) (i) 3 the basis shall be the same as it would be in the hands of the transferor. This paragraph shall be applicable only when the transaction involved was treated for income tax purposes as provided in section 71.02 (2) (i) 3.

3. If the property consists of stock or securities distributed to a taxpayer in connection with a transaction described in section 71.02 (2) (i) 4, the basis in the case of the stock in respect of which the distribution was made shall be apportioned as in the case of stock dividends. This paragraph shall be applicable only when the transaction involved was treated for income tax purposes as provided in section 71.02 (2) (i) 4.

4. The basis of property received by a corporation without the recognition of gain or loss under subdivision 9 of paragraph (i) of subsection (2) of section 71.02 shall be the same as it would be in the hands of the transferor, and for the purpose of making the adjustments to such basis required by paragraph (d) of subsection (2) of section 71.02 the corporation receiving the property shall be considered as having been the owner thereof while the property was in the hands of the transferor.

(3) (a) Persons who customarily estimate their incomes or profits on a basis other than cash receipts and disbursements may, with the consent and approval of the department of taxation, return for assessment and taxation the income or profits earned during the income year, in accordance with the method of accounting regularly employed in keeping their books, except as hereinafter provided; but if no such method of accounting has been employed, or if the method used does not clearly reflect the income taxable under this chapter, the computation shall be made upon such basis and in such manner as in the opinion of the department of taxation will clearly reflect such income.

(b) The terms "paid" or "actually paid," as used in this chapter, are to be construed in each instance in the light of the method used in computing taxable income whether on the accrual or receipt basis; provided, that the deduction for federal income and excess profits taxes shall be confined to cash payments made within the year covered by the income tax return, and that reserves for contingent losses or liabilities shall not be deducted.

(c) For the purposes of taxation income from mercantile or manufacturing business, not requiring apportionment under paragraph 71.02 (3) (d) shall follow the situs of the business from which derived. Income derived from rentals and royalties from real estate or tangible personal property, or from the operation of any farm, mine or quarry, or from the sale of real property or tangible personal property shall follow the situs of the property from which derived. All other income, including royalties from patents, income derived from personal services, professions and vocations and from land contracts, mortgages, stocks, bonds and securities or from the sale of similar intangible personal property, shall follow the residence of the recipient, except as provided in section 71.095.

(d) Persons engaged in business within and without the state shall be taxed only on such income as is derived from business transacted and property located within the state. The amount of such income apportionable to Wisconsin may be determined by an allocation and separate accounting thereof, when, in the judgment of the department of taxation, that method will reasonably reflect the income properly assignable to this state, but otherwise in the following manner: There shall first be deducted from the total net income of the taxpayer such part thereof (less related expenses, if any) as follows the situs of the property or the residence of the recipient; provided, that in the case of income which follows the residence of the recipient, the amount of interest and dividends deductible under this provision shall be limited to the total interest and dividends received which are in excess of the total interest (or related expenses, if any) paid and allowable as a deduction under section 71.03 during the income year. The remaining net income shall be apportioned to Wisconsin on the basis of the ratio obtained by taking the arithmetical average of the following three ratios:

1. The ratio of the tangible property, real, personal, and mixed, owned and used by the taxpayer in Wisconsin in connection with his trade or business during the income year to the total of such property of the taxpayer owned and used by him in connection with his trade or business everywhere. Cash on hand or in bank, shares of stock, notes, bonds, accounts receivable, or other evidence of indebtedness, special privileges, franchises, good will, or property the income of which is not taxable or is separately allocated, shall not be considered tangible property nor included in the apportionment.

2. In the case of persons engaged in manufacturing or in any form of collecting, assembling, or processing goods and materials within this state, the ratio of the total cost of manufacturing, collecting, assembling, or processing within this state to the total cost of manufacturing, or assembling, or processing everywhere. The term "cost of manufacturing, collecting, assembling, or processing within this state and everywhere," as used herein, shall be interpreted in a manner to conform as nearly as may be to the best accounting practice in the trade or business. Unless in the opinion of the department of taxation the peculiar circumstances in any case justifies a different treatment, this term shall be generally interpreted to include as elements of cost within this state the following:

a. The total cost of all goods, materials, and supplies used in manufacturing, assembling, or processing within this state regardless of where purchased.

b. The total wages and salaries paid or incurred during the income year in this state in such manufacturing, assembling, or processing activities.

c. The total overhead or manufacturing burden properly assignable according to good accounting practice to such manufacturing, assembling, or processing activities within this state.

3. In the case of trading, mercantile, or manufacturing concerns the ratio of the total sales made through or by offices, agencies, or branches located in Wisconsin during the income year to the total net sales made everywhere during said income year.

4. Where, in the case of any person engaged in business within and without the state of Wisconsin and entitled to an apportionment of his income as herein provided, it shall be shown, to the satisfaction of the department of taxation, that the use of any one of the three ratios above provided for gives an unreasonable or inequitable final average ratio because

of the fact that such person does not employ, to any appreciable extent in his trade or business in producing the income taxed, the factors made use of in obtaining such ratio, this ratio may, with the approval of the department of taxation, be omitted in obtaining the final average ratio which is to be applied to the remaining net income.

5. As used in this section the word "sales" shall extend to and include exchange, and the word "manufacturing" shall extend to and include mining and all processes of fabricating or of curing raw materials. If the income of any such person properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by either of the foregoing methods, then the same shall be apportioned and allocated under such rules and regulations as the department of taxation may prescribe.

(e) A foreign corporation whose principal business is carried on or transacted in Wisconsin shall be deemed a resident of this state for income tax purposes, and its income shall be determined and assessed as if it were incorporated under the laws of Wisconsin, notwithstanding its domicile is elsewhere.

(4) Whenever in the opinion of the department the use of inventories is necessary in order to clearly determine the income of any person, inventory shall be taken by such person upon such basis as the department may prescribe, conforming as nearly as may be to the best accounting practice in the trade or business and most clearly reflecting the income.

(5) (a) Individuals carrying on business in partnership shall be liable for income tax only in their individual capacity. There shall be included in computing the income of each partner his distributive share, whether distributed or not, of the net income of the partnership for the income year. Partners shall be required to file individual returns on the basis of a fiscal or calendar year which coincides with that upon which the partnership return is filed.

(b) The net income of the partnership shall be computed in the same manner and on the same basis as provided for computation of the income of persons other than corporations. [*1931 c. 448 s. 4; 1931 c. 453 s. 2, 3; 1933 c. 315; 1935 c. 505; 1937 c. 265; 1939 c. 282, 293; 1943 c. 20, 64, 369, 549; 1943 c. 553 s. 13; 1945 c. 4; 43.08 (2)*]

Note: If an income 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. The former mandate in this action was vacated upon motion for rehearing. Hence the note to this case under 71.03, page 476, Wisconsin Annotations 1930, is misleading in that it does not state the present law. Wisconsin O. I. & B. Co. v. Tax Commission, 202 W 355, 233 NW 72.

The corpus of an estate of a decedent in the hands of the executrix and which had paid an inheritance tax is not subject to an income tax imposed by a law thereafter enacted. Norris v. Tax Commission, 205 W 626, 237 NW 113; 238 NW 415; Smart v. Tax Commission, 205 W 632, 237 NW 114.

Additional assessment of portion of taxpayer's total profit from single sale of stock on deferred payments in excess of amount paid in tax year, as reported by taxpayer, was invalid. Katz v. Tax Commission, 210 W 625, 246 NW 439.

Amount received by stockholder for his shares on liquidation of corporation in excess of cost thereof is taxable, though transaction is but exchange of stock for corporation's property. In re Bellin's Estate, 210 W 670, 247 NW 331.

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, within (3) (c). State ex rel. Lerner v. Tax Commission, 213 W 267, 251 NW 456.

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 Commission, 213 W 273, 251 NW 242.

See note to 182.19, citing Estate of Paddock, 213 W 409, 251 NW 229.

Sec. 71.02 (3) (d) relates to a single taxpayer doing business within and without the state but not to a group of affiliated corporations, as such. Curtis Companies, Inc. v. Tax Commission, 214 W 85, 251 NW 497.

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" within (2). Walter Alexander Co. v. Tax Commission, 215 W 293, 254 NW 544.

Tax statute defining "income" as embracing "all dividends from stocks," including "any" distribution by corporation from profits, held unambiguous and includes all liquidating dividends; adjective "any" being equivalent to "every". Liquidating distributions of corporation from earnings in so far as exceeding those on which corporation had been assessed, and so far as exceeding cost of stockholders' investments, held assessable for income tax. (Sections 71.02 (2) (b) and 71.04 (4). Stats. 1921 and 1923.) Falk v. Tax Commission, 218 W 130, 259 NW 624.

Where stockholder transferred stock of corporation undergoing liquidation to his personal holding corporation, transferee's rights were same as those of any other stockholder, and all liquidating dividends received by transferee were legally of same kind as if received by transferor, and were assessable against transferee as "dividends," and were not assessable as "income from 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 Commission, 218 W 140, 259 NW 628.

Increase in value of stock received as gift from nonresident of state represented by difference between original cost to donor and market value as of date of gift held not taxable income under 71.02 (2) (d), Stats. 1929. Siesel v. Tax Commission, 217 W 661, 259 NW 839.

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. It was held that such taxation was intended by subsection (3) but that the statute was in-

valid. It is the rule established by the United States supreme court (and therefore recognized by our supreme court) that as to nonresidents there may 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. If subsection (3) be considered a condition precedent to the admission of a corporation to this state, the condition is unconstitutional. Newport Co. v. Tax Commission, 219 W 293, 261 NW 884.

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 Commission, 222 W 221, 267 NW 913.

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 Commission, 225 W 102, 273 NW 537.

An absolute contract of sale of a large block of corporate stock, a 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. This case seems to conflict with Katz v. Tax Commission, 210 W 625, 246 NW 439.

The transaction involved in this case was within the provision of the statute that no taxable gain or loss shall be recognized if securities in a party to a reorganization are, in pursuance of the plan exchanged solely for securities in another corporation—a party to the reorganization. Preferred stock, issued by the corporation transferring all of its voting stock and a majority of its other stock to a second corporation in exchange for stock held by the second corporation in a third corporation whose assets were acquired by the first corporation, was none the less a security of the first corporation because a fourth corporation, subsequently purchasing its common stock, guaranteed the payment of dividends thereon and the retirement of the preferred stock at an agreed price within a certain time. Cudahy v. Tax Commission, 226 W 317, 276 NW 748.

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 Commission, 226 W 342, 276 NW 759.

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 following the residence of the recipient. Dromey v. Tax Commission, 227 W 267, 278 NW 400.

The sum taken by the father as trustee of property he held in trust for his minor son's support was held to be taxable income of the father rather than reimbursement for the support of his son. Gilkey v. Wisconsin Tax Commission, 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 five or more persons for membership were taxable as "gross income." Ellinger v. Tax Commission, 229 W 71, 281 NW 701.

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 Commission, 229 W 71, 281 NW 701.

Under (2) (b) 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 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.

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 five 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 provisions 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 income of the husband. Friedmann v. Tax Comm., 235 W 237, 292 NW 894.

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 under 71.02 (3) (c), Stats. 1931. Trane Co. v. Tax Comm., 235 W 516, 292 NW 897.

The use of the ratio method in determining taxable income (as prescribed in 71.02 (3) (d), 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 sus-

tainable. Burroughs Adding Machine Co. v. Tax Comm. 237 W 423, 297 NW 574.

(3) (d) 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 Power Co. v. Tax Comm., 237 W 433, 297 NW 578.

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 under 71.02 (2) (i), 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. Department of Taxation, 240 W 564, 4 (2d) NW 180.

Under 71.02 (2) (b) 3 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.

Where a corporation, selling all of its property to a newly formed corporation, received shares of preferred stock in the buyer corporation as partial payment, 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. [Sec. 182.06, Stats 1937] [State ex rel. Van Dyke v. Cary, 181 W 564, and other cases, explained.] Fox River Paper Co. v. Department of Taxation, 241 W 321, 6 NW (2d) 187.

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 Engineering Corp. v. Dept. of Taxation, 241 W 324, 6 NW (2d) 198.

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; Wisconsin Ornamental I. & B. Co. v. Tax Comm., 202 W 355, distinguished.] Abel v. Department of Taxation, 241 W 350, 6 NW (2d) 232.

Where a patentee of a clutch and two associates formed a corporation to which the patentee assigned the patent, and in exchange therefor the three received stock in an amount which gave them control of the corporation, within 71.02 (2) (i) 8, and the amount of stock received by each was substantially in proportion to his interest in the property prior to the exchange, (2) (i) 3 applied so that there was no taxable gain to any of the parties in the exchange transaction, and hence, under (2) (j) 2, 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. Department of Taxation, 241 W 518, 6 NW (2d) 645.

An attorney, who was employed by an agency of the federal government at a monthly stipend to render services requested by the federal agency in the conduct of litigation, and who did not have charge of the litigation but was subject to the direction of the federal agency's general counsel, and whose employment was subject to summary termination, was an employe of the federal agency and not an independent contractor; hence the compensation so received by him during the period in question was not subject to income taxation against him by the state under then existing law. Ryan v. Department of Taxation, 242 W 491, 8 NW (2d) 393.

The law requires, in the case of a corporation doing business within and without the state, that the department of taxation assess the tax on the presumption that the dividend was paid out of Wisconsin earnings for the year preceding the declaration of the dividend; but when this presumption is rebutted, a tax may be levied on such portion of the dividend as is represented by Wisconsin earnings ascertained by application of the formula prescribed in 71.02 (3) (d), and the proportion between the sum so arrived at and the total assets available for dividends establishes the percentage of the dividend attributable to Wisconsin earnings. The validity of the formula is well established. International H. Co. v Department of Taxation, 243 W 198, 10 NW (2d) 169. [Affirmed, 322 US 435]

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 under 71.01, 71.02 (3) (c), (e). American Stores Dairy Co. v. Department of Taxation, 246 W 396, 17 NW (2d) 596.

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 held 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.

71.03 Deductions from gross income of corporations. Every corporation, joint stock company or association shall be allowed to make from its gross income the following deductions:

(1) Payments made within the year for wages of employes and salaries of officers if reasonable in amount, for services actually rendered in producing such income; provided, there be reported the name, address and amount paid each such employe or officer residing within this state to whom a compensation of seven hundred dollars or more shall have been paid during the assessment year.

(2) Other ordinary and necessary expenses and cash bonuses to employes, actually paid within the year out of the income in the maintenance and operation of its business and property, including a reasonable allowance for depreciation by use, wear and tear of property from which the income is derived and in the case of mines and quarries an allowance for depletion of ores and other natural deposits on the basis of their actual original cost in cash or the equivalent of cash; and including also interest paid during the

year in the operation of the business from which its income is derived; provided, the debtor reports the amount so paid, the form of the indebtedness, together with the names and addresses of the parties to whom interest was paid in the manner provided in subsection (3) of section 71.09.

(3) Losses actually sustained within the year and not compensated by insurance or otherwise, provided that no loss resulting from the operation of business conducted without the state, or the ownership of property located without the state, may be allowed as a deduction, and provided further that no loss may be allowed on the sale of property purchased and held for pleasure or recreation and which was not acquired or used for profit, but this proviso shall not be construed to exclude losses due to theft or to the destruction of property by fire, flood or other casualty. No deduction shall be allowed under this subsection for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property, and the property so acquired is held by the taxpayer for any period after such sale or other disposition. The amount any asset has been charged down or off by any corporation upon the demand or order of any state or federal regulatory authority, body, agency or commission or of the examining committee of any state bank in accordance with the provisions of section 221.09 shall be allowed as a deduction from gross income if the taxpayer so elects; the taxpayer must specify whether it so elects or elects to defer the actual deduction allowable if a loss is incurred upon the liquidation of the asset or any portion thereof, but the method selected must be followed without change and notice of the election must be given the assessing authority.

(4) Taxes other than special improvement taxes paid during the year upon the business or property from which the income taxed is derived, including therein taxes imposed by the state of Wisconsin and the government of the United States as income, excess or war profits and capital stock taxes, including taxes on all real property which is owned and held for business purposes whether income producing or not, provided that such portion of the deduction for federal income and excess profits taxes as may be allowable shall be confined to cash payments made within the year covered by the income tax return, and provided further that deductions for income taxes paid to the United States government shall be limited to taxes paid on net income which is taxable under this chapter; and provided further that income taxes imposed by the state of Wisconsin shall accrue for the purpose of this subsection only in the year in which such taxes are assessed.

(4a) The deduction for all United States income, excess or war profits and defense taxes shall be limited to a total amount not in excess of 10 per cent of the taxpayer's net income of the calendar or fiscal year as computed without the benefit of the deduction for said United States income, excess or war profits and defense taxes, and before the deductions of amounts permitted by subsection (7) of this section. In no event shall any taxpayer be permitted hereunder a total deduction in excess of the actual amount of United States income, excess or war profits and defense taxes paid, and otherwise deductible.

(5) Dividends, except those provided in section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this state. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71, except that deductibility of dividends received in the year 1926 shall be governed by the assessment of the income of the year 1925. If the net incomes of several affiliated corporations have been combined for the purpose of determining the amount of income subject to taxation under the statute, the location of the principal business of such group shall determine the taxable status of dividends paid, but inter-company dividends passing between affiliated corporations whose incomes are included in the taxable income of the group, shall not be assessed as group income.

(6) Amounts distributed to patrons in any year, in proportion to their patronage of the same year, by any corporation, joint stock company or association doing business on a co-operative basis (hereinafter called "company"), whether organized under chapter 185 or otherwise, shall be returned as income or receipts by said patrons but may be deducted by such company as cost, purchase price or refunds; provided that no such deduction shall be made for amounts distributed to the stockholders or owners of such company

in proportion to their stock or ownership, nor for amounts retained by such company and subject to distribution in proportion to stock or ownership as distinguished from patronage.

(7) Contributions or gifts made within the year to the state or any political subdivision thereof for exclusively public purposes, or to any corporations, community chest fund, foundation, or associations, operating within this state, organized and operated exclusively for religious, charitable, scientific, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of ten per centum of the taxpayer's net income of the calendar or fiscal year as computed without the benefit of this subsection.

(9) Amounts expended for the purchase of seeds and tree plants for planting, and for preparing land for planting and for planting and caring for, maintenance and fire protection of forest crops on "Forest Crop Lands" under the provisions of chapter 77, but the taxpayer may elect to defer the deduction of such amounts until the crop or the property, or any portion thereof, is sold or disposed of; except that the method so elected must be followed without change; and notice of the election of such method must be given to the assessing authority that such election is made.

(10) Amounts contributed for the given period to the unemployment reserve fund established in section 108.16 of the statutes, but not the amounts paid out of said fund.

(11) All amounts which any assets of a bank, trust company or any corporation subject to state or federal regulation are reduced in valuation within the taxable year pursuant to direction or order of any state or federal authority having power to make such direction or order. No deduction allowed hereunder shall exceed the amount which would have been deductible had the asset been sold for an amount equal to the value to which it is written down. The amount of any deduction allowed hereunder shall reduce the cost or other basis of the asset and any amount recovered with respect to such asset which exceeds such adjusted cost or basis shall be taxed in the year in which received or accrued. [*1931 c. 453 s. 2; Spl. S. 1931 c. 20 s. 4; 1933 c. 450 s. 2; 1933 c. 467 s. 2; 1935 c. 192; 1937 c. 343; 1939 c. 324, 444; 1941 c. 63*]

Note: The United States Leather Company, a strictly holding company, owned the stock in three 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 four million dollars. 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. It was held that 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 Commission, 212 W 412, 249 NW 322.

Where stockholder transferred stock of corporation undergoing liquidation to his personal holding corporation, liquidating dividends received by transferee held deductible to extent that dividends were attributable to taxable income of liquidating corporation on which such corporation had been assessed (71.03 (5), Stats. 1921 and 1923). Hope Inv. Co. v. Tax Commission, 218 W 140, 259 NW 628.

Privilege dividend taxes paid by a corporation are not deductible from its gross income, for income tax purposes as taxes on necessary business and corporate activities, since the act imposing the privilege dividend tax specifically lays the burden of such tax on the stockholder and requires the corporation declaring the dividend to deduct the tax from the dividend. Wisconsin G. & E. Co. v. Department of Taxation, 243 W 216, 10 NW (2d) 140.

To be deductible as expenses, advertising expenses must be reasonable. Advertising expenses paid for by a corporation are neither "ordinary" nor "necessary," within 71.03 (2), when the advertising cannot benefit the corporation. American Stores Dairy Co. v. Department of Taxation, 246 W 396, 17 NW (2d) 596.

71.04 Deductions from incomes of persons other than corporations. Persons other than corporations, in reporting incomes for purposes of taxation, shall be allowed the following deductions:

(1) Payments made within the year for wages or other compensation for services actually rendered in carrying on the profession, occupation or business from which the income is derived. But no deductions shall be made for any amount paid for services actually rendered in the carrying on of the profession, occupation or business from which the income is derived unless there be reported the name and address and amount paid each person to whom a sum of $700 or more shall have been paid for services during the assessment year. Except as provided in subsection (13) of this section, no deduction shall be allowed under this section for any amounts expended for personal, living or family expenses.

(2) The ordinary and necessary expenses actually paid within the year in carrying on the profession, occupation or business from which the income is derived, including a reasonable allowance for depreciation by use, wear and tear of the property from which the

income is derived, and in the case of mines and quarries an allowance for depletion of ores and other natural deposits on the basis of their actual original cost in cash or the equivalent of cash.

(3) Losses actually sustained within the year and not compensated by insurance or otherwise, provided that no loss resulting from the operation of business conducted without the state, or the ownership of property located without the state, may be allowed as a deduction, and provided further that no loss may be allowed on the sale of property purchased and held for pleasure or recreation and which was not acquired or used for profit, but this proviso shall not be construed to exclude losses due to theft or to the destruction of the property by fire, flood or other casualty. No deduction shall be allowed under this subsection for any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property and the property so acquired is held by the taxpayer for any period after such sale or other disposition.

(4) Dividends, except those provided in section 71.02 (2) (b) 2 and 3, received from any corporation conforming to all of the requirements of this subsection. Such corporation must have filed income tax returns as required by law and the income of such corporation must be subject to the income tax law of this state. The principal business of the corporation must be attributable to Wisconsin and for the purpose of this subsection any corporation shall be considered as having its principal business attributable to Wisconsin if fifty per cent or more of the entire net income or loss of such corporation after adjustment for tax purposes (for the year preceding the payment of such dividends) was used in computing the average taxable income provided by chapter 71, except that deductibility of dividends received in the year 1926 shall be governed by the assessment of the income of the year 1925. If the net incomes of several affiliated corporations have been combined for the purpose of determining the amount of income subject to taxation under the statute, the location of the principal business of such group shall determine the taxable status of dividends paid, but intercompany dividends passing between affiliated corporations whose incomes are included in the taxable income of the group, shall not be assessed as group income.

(5) Interest paid within the year on existing indebtedness; provided, the debtor reports the amount so paid, the form of the indebtedness, together with the name and address of the creditor. But no interest shall be allowed as a deduction if paid on an indebtedness created for the purchase, maintenance or improvement of property, or for the conduct of a business, unless the income from such property or business would be taxable under this chapter.

(6) Taxes other than inheritance and special improvement taxes upon the property or business from which the income hereby taxed is derived paid by such persons during the year, including therein taxes imposed by the state of Wisconsin or the United States government as income taxes; provided, that such portion of the deduction for federal income taxes as may be allowable shall be confined to cash payments made within the year covered by the income tax return; and provided further, that deductions for income taxes paid to the United States government shall be limited to taxes paid on net income which is taxable under this chapter; and provided further that income taxes imposed by the state of Wisconsin shall accrue for the purposes of this subsection only in the year in which such taxes are assessed.

(6a) The deduction for all United States income, excess or war profits and defense taxes shall be limited to a total amount not in excess of 3 per cent of the taxpayer's net income of the calendar or fiscal year as computed without the benefit of the deduction for said United States income, excess or war profits and defense taxes, and before the deductions of amounts permitted by subsection (7) of this section. In no event shall any taxpayer be permitted hereunder a total deduction in excess of the actual amount of United States income, excess or war profits and defense taxes paid, and otherwise deductible.

(7) Contributions or gifts made within the year to any national organization of veterans of the armed forces of the United States or subordinate unit thereof, or to the state or any political subdivision thereof for exclusively public purposes, or to any corporation, community chest fund, foundation or association operating within this state, organized and operated exclusively for religious, charitable, scientific or educational purposes, or for the prevention of cruelty to children or animals, no part of the net income of which inures to the benefit of any private stockholder or individual, to an amount not in excess of 10 per cent of the taxpayer's net income of the calendar or fiscal year as computed without the benefit of this subsection.

(9) Amounts expended for the purchase of seeds and tree plants for planting, and for preparing land for planting and for planting and caring for, maintenance and fire protection of forest crops on "Forest Crop Lands" under the provisions of chapter 77, but the taxpayer may elect to defer the deduction of such amounts until the crop or the property, or any portion thereof, is sold or disposed of; except that the method so elected must be followed without change; and notice of the election of such method must be given to the assessing authority that such election is made.

(10) Amounts contributed for the given period to the unemployment reserve fund established in section 108.16 of the statutes, but not the amounts paid out of said fund.

(12) Any and all sums not to exceed eight hundred dollars paid by any person whose total income shall be three thousand dollars or less by way of alimony to a former spouse and not to exceed four hundred dollars each for the support of minor children under any order or decree of any court.

(13) Payment for expenses for hospital, nursing, medical, surgical, dental, and other healing services and for drugs and medical supplies incurred by the taxpayer on account of sickness or of personal injury to himself or his dependents in excess of $50 but not more than $500. [*1931 c. 453 s. 2; Spl. S. 1931 c. 20 s. 4; 1933 c. 159 s. 16; 1935 c. 192, 472; 1937 c. 343; 1941 c. 63; 1943 c. 484; 1945 c. 569*]

Note: Dividends issued by corporation out of income from corporation which had paid income tax held subject to income tax. Errors found on audit of income tax returns must be corrected as of year for which return was made under 71.04 (4), Stats. 1925. Witter v. Tax Commission, 210 W 207, 246 NW 318.

Under agreement that no dividend should be paid until repayment, with interest, of stockholders' advances, return to stockholder held interest, not deductible for income tax purposes as dividend. Baker v. Tax Commission, 210 W 557, 246 NW 695.

As used in (6) the words "taxable under this chapter" mean taxable under the normal income tax law and not under the emergency income tax act. Parker v. Tax Commission, 225 W 525, 275 NW 448.

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.

Payments made to employes of carriers under carrier taxing act of 1937 are not deductible from gross income under (6). 27 Atty. Gen. 655.

71.045 Deduction of losses. If a taxpayer in any year subsequent to the year 1932, sustains a net business loss, such loss, to the extent not offset by other items of income of the same year, may be offset against the net business income of the subsequent year and, if not completely offset by the net business income of such year, the remainder of such net business loss may be offset against the net business income of the following year. For the purposes of this section, net business income shall consist of all the income attributable to the operation of a trade or business regularly carried on by the taxpayer, less the deduction of business expenses allowed in sections 71.03 and 71.04. [*1931 c. 448 s. 2; 1935 c. 505*]

Note: 71.045 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 71.02 (3) (d). Bowman Dairy Company v. Tax Com., 240 W 1, 1 (2d) NW 905.

71.047 Taxation of trusteed assets of stabilized bank. Whenever any bank is operating under a stabilization and readjustment agreement pursuant to subsection (16) of section 220.07, [Stats. 1933] the trust created pursuant to such stabilization and readjustment agreement shall not be considered as a separate taxable entity. The assets assigned to trustees pursuant to such agreement shall for income tax purposes be considered as owned by the bank and such trust shall be considered as being operated by and as an integral part of such bank. This section shall apply to all returns of income of such banks filed after such assignment to trustees, and any adjustment of such returns heretofore made shall be revised to conform to this section. [*1935 c. 168*]

71.05 Exemptions. (1) There shall be exempt from taxation under this chapter income as follows, to wit:

(a) Pensions received from the United States.

(b) All inheritances, devises, bequests and gifts received during the year.

(c) All insurance received by any person or persons in payment of a death claim by any insurance company, fraternal benefit society or other insurer, except insurance paid to a corporation or partnership upon the policies on the lives of its officers, partners or employes.

(d) Income of mutual savings banks, mutual loan corporations, building and loan associations, insurance companies, steam railroad corporations, sleeping car companies, freight line companies as defined in section 76.39, and corporations or associations organized under sections 185.01 to 185.22, and of all religious, scientific, educational, benevolent or other corporations or associations of individuals not organized or conducted for pecuniary profit.

(f) Income received by the United States, the state and all counties, cities, villages, school districts or other political units of this state.

(g) Income of co-operative associations or corporations engaged in marketing farm products for producers, which turn back to such producers the net proceeds of the sales of their products; provided, that such corporations or associations have at least twenty-five stockholders or members delivering such products and that their dividends have not, during the preceding five years, exceeded eight per cent per annum; also income of associations and corporations engaged solely in processing and marketing farm products for one such co-operative association or corporation and which do not charge for such marketing and processing more than a sufficient amount to pay the cost of such marketing and processing and eight per cent dividends on their capital stock and to add five per cent to their surplus.

(h) All income received during the year 1942 and subsequent thereto from the United States for service as a member of the armed forces thereof including therein members of Women's Auxiliary organizations created by Congress. This paragraph shall be effective for the duration of the present war plus 6 months after the termination thereof as determined by the President of the United States or the Congress of the United States.

(1m) Whenever any bank has been placed in the hands of the banking commission for liquidation under the provisions of section 220.08, no tax under this chapter shall be levied, assessed or collected on account of such bank, which shall diminish the assets thereof so that full payment of all depositors cannot be made. Whenever the banking commission certifies to the department of taxation that the tax or any part thereof levied and assessed under this chapter against any such bank will so diminish the assets thereof that full payment of all depositors cannot be made, the said department shall cancel and abate such tax or part thereof, together with any penalty thereon, and shall certify its action to the county treasurer of the county, and the assessor of incomes of the district, wherein such bank is located. This subsection shall apply to taxes levied and assessed subsequent to the time the bank was taken over by the banking commission, which taxes have not been paid.

(1n) (a) A trust created by any employer as a part of a stock bonus, pension or profit-sharing plan for the exclusive benefit of some or all of his employes, to which contributions are made by such employer, or employes or both, for the purpose of distributing to such employes the earnings and principal of the fund accumulated by the trust, or investing said funds in various forms of insurance or annuity contracts for the benefits of participants, in accordance with such plan, shall not be taxable under this chapter, but any amount actually distributed or made available to any distributee shall be taxable to him in the year in which so distributed or made available to the extent that it exceeds the amount paid in by him; provided however that this exemption shall not apply if the employer's contribution under such plan is not deductible under this chapter.

(b) This subsection shall be applicable to the calendar year 1944, or the corresponding fiscal year, and each such year thereafter.

(2) There shall be deducted from the tax after the same shall have been computed according to the rates in section 71.06, a personal exemption for natural persons as follows:

(a) For an individual, eight dollars.

(b) For husband and wife or head of a family, seventeen dollars and fifty cents. For the purposes of this chapter, the term "head of a family" means a natural person who maintained a household and supported therein himself and one or more persons who were dependent upon him for support; but no additional exemption shall be allowed for those dependent upon the head of a family except in case of a widow or widower supporting children under the age of eighteen years.

(c) For each child under the age of eighteen years who is actually supported by and dependent upon the taxpayer for his support, an additional four dollars.

(d) For each additional person, except persons defined in section 71.05 (2) (c) who is actually supported by and dependent upon the taxpayer for his support an additional $4, except in case of head of a family. In computing taxes and the amount of taxes payable by persons residing together as members of a family, the income of the wife and the income of each child under 18 years of age shall be added to that of the husband or father, or if he be not living, to that of the head of the family and assessed to him except as hereinafter provided. The taxes levied shall be payable by such husband or head of the family, but if not paid by him may be enforced against any person whose income is included within the tax computation.

(e) If the status of the taxpayer, in so far as it affects the personal exemption for husband and wife, head of family, and/or dependents, changes during the taxable year, the personal exemption shall be apportioned, under rules and regulations prescribed by the department of taxation, in accordance with the number of months before and after such

change. For the purpose of such apportionment a fractional part of a month shall be disregarded unless it amounts to more than a half month, in which case it shall be considered as a month. [*1931 c. 448 s. 3, 4; 1931 c. 453 s. 2; 1931 c. 483 s. 4; 1933 c. 371; 1937 c. 295; 1939 c. 9; 1943 c. 8, 20, 369; 1945 c. 125*]

Cross Reference: Chapter 9, Laws 1939, amending (2) (e), applies to all taxes assessed in respect to income of 1938 and subsequent years; see sec. 2 of said act.

Note: The mere fact that the care and maintenance of crypts in a mausoleum may be "religious" in purpose does not exempt from taxation, under (1) (d), 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.

Combining incomes for taxation, see note to 71.09, citing Hoeper v. Tax Commission, 284 US 206.

Amendments of 71.095 (2), 71.09 (4) (c), 71.05 (2) (d), made by Laws 1931, are all in effect notwithstanding later chapters at same session reenacted sections without incorporating changes made by earlier chapters. 20 Atty. Gen. 716.

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

71.06 Rates of taxation. (1) The tax to be assessed, levied and collected upon the taxable incomes of all persons, other than corporations, shall be computed at the following rates, to wit:

(a) On the first one thousand dollars of taxable income or any part thereof, at the rate of one per cent.

(b) On the second one thousand dollars or any part thereof, one and one-fourth per cent.

(c) On the third one thousand dollars or any part thereof, one and one-half per cent.

(d) On the fourth one thousand dollars or any part thereof, two per cent.

(e) On the fifth one thousand dollars or any part thereof, two and one-half per cent.

(f) On the sixth one thousand dollars or any part thereof, three per cent.

(g) On the seventh one thousand dollars or any part thereof, three and one-half per cent.

(h) On the eighth one thousand dollars or any part thereof, four per cent.

(i) On the ninth one thousand dollars or any part thereof, four and one-half per cent.

(j) On the tenth one thousand dollars or any part thereof, five per cent.

(k) On the eleventh one thousand dollars or any part thereof, five and one-half per cent.

(l) On the twelfth one thousand dollars or any part thereof, six per cent.

(m) On any sum of taxable income in excess of twelve thousand dollars, seven per cent.

(2) The taxes to be assessed, levied and collected upon the taxable incomes of corporations shall be computed at the following rates, to wit:

(a) On the first one thousand dollars of taxable income or any part thereof, two per cent.

(b) On the second one thousand dollars or any part thereof, two and one-half per cent.

(c) On the third one thousand dollars or any part thereof, three per cent.

(d) On the fourth one thousand dollars or any part thereof, three and one-half per cent.

(e) On the fifth one thousand dollars or any part thereof, four per cent.

(f) On the sixth one thousand dollars or any part thereof, five per cent.

(g) On the seventh one thousand dollars or any part thereof, six per cent.

(h) On all taxable income in excess of seven thousand dollars, six per cent.

(3) (a) In assessing back taxes interest shall be added to such taxes at the following rates per annum from the date on which such back taxes if originally assessed would have become delinquent if unpaid, to the date on which such back taxes when subsequently assessed will become delinquent if unpaid: 5 per cent on back taxes assessed within the 3-year period provided by section 71.115 (1) (b); and 3 per cent on back taxes assessed within the additional period provided by section 71.115 (6).

(b) In crediting overpayments of income and surtaxes against underpayments or against taxes to be subsequently collected and in certifying refunds of such taxes, interest shall be added at the following rates per annum from the date on which such taxes when assessed would have become delinquent if unpaid to the date on which such overpayment was certified on the tax roll: 5 per cent on credits and refunds made within the 3-year period provided by section 71.115 (2); and 3 per cent on credits and refunds made within the additional period provided by section 71.115 (6). [*1931 c. 448 s. 3, 4; 1933 c. 410; 1945 c. 440*]

71.07 [*Renumbered section 73.06 by 1929 c. 263 s. 6*]

71.07 [*Repealed by 1943 c. 369*]

71.08 [*Renumbered section 73.07 by 1929 c. 263 s. 6*]

71.08 Information required for local assessors. Each person, firm or corporation except farmers and wholesalers subject to section 78.11 required under this chapter to file a return of income in which inventories are a factor, shall file for each taxing district on a form to be provided by the department of taxation the following information: (a) the inventory at the beginning and at the end of the fiscal year; (b) the total of merchandise purchased during the year; and (c) the total sales during the year. Such information shall be forwarded by the department on or before May 1 to the assessor in the local taxation district concerned. [*1943 c. 325*]

71.09 Power of assessment; filing returns; penalties. (1) The department of taxation and the assessors of income shall assess incomes as provided in this chapter and in the performance of such duty the department of taxation and the assessors of income shall respectively possess all powers now or hereafter granted by law to the department of taxation or assessors in the assessment of personal property and also the power to estimate incomes.

(2) Liability to taxation for income which follows the residence of the recipient in the case of persons, other than corporations, who move into or out of the state within the year shall be determined for such year by the ratio of time which the residence of such taxpayer in the state bears to the entire calendar or fiscal year. The deductions for personal exemptions provided for in section 71.05 shall be prorated on the basis of the time of residence within and without the state. The net income of such person assignable to the state for such year shall be used in determining the income subject to assessment under this chapter. The assessment of corporations shall be made by the department of taxation, and the assessment of persons other than corporations shall be made by the county assessors of income.

(3) Every corporation, whether taxable under this chapter or not, shall furnish to the department of taxation a true and accurate statement, on or before March fifteenth of each year (except that returns for fiscal years ending on some other date than December thirty-first, shall be furnished on or before the fifteenth day of the third month following the close of such fiscal year) in such manner and form and setting forth such facts as said department shall deem necessary to enforce the provisions of this chapter. Such statement shall be made upon the oath or affirmation of the president, vice president, or other principal officer and the treasurer of said corporation, and in the case of corporations in liquidation or in the hands of a receiver such return shall be made upon the oath or affirmation of the person responsible for the conduct of the affairs of such corporation. All corporations doing business in this state shall also file with the department of taxation on or before March fifteenth of each year on forms prescribed by the department of taxation, a statement of such transfers of its capital stock as have been made by or to residents of this state during the preceding calendar year. Such schedule shall contain the name and address of the seller and the purchaser, date of transfer, and the number of shares of stock transferred; and such corporation shall also file with the department of taxation on or before March fifteenth of each year any information relative to payments made within the preceding calendar year to residents of this state of salaries, wages, fees, rents, royalties, interest, dividends and liquidating dividends in amounts and in the manner and forms prescribed by the department of taxation; provided such corporation may upon notifying the department of taxation report salaries, wages and fees on the accrual basis for the calendar year 1939 and thereafter. Any corporation failing to file any such statement or form shall be subject to a fine of not less than 50 nor more than 500 dollars.

(4) (a) Whenever in the judgment of the assessor of incomes any person other than a corporation shall be subject to income tax in his district under the provisions of this chapter, he shall notify such person to make report to him on or before March fifteenth of each year in such manner and form as the department of taxation shall prescribe, specifying in detail the amounts of income received by him from all sources, together with the amounts of income received by his dependents, his wife and each child under 18 years of age residing together with him as members of the family, and such other information as the department shall deem necessary to enforce the provisions of this chapter. Every person other than a corporation who receives during the year a net income of $800 or over, if single; $1600 or over, if married; must report the same in the manner and form herein provided to the assessor of incomes whether notified to do so or not, and shall be subject to the same penalties for failure to report as those who receive notice; provided, however, that nothing contained in this section shall preclude the assessor of incomes from requiring any person other than a corporation to file an income tax return when in the judgment of the assessor of incomes a return should be filed.

(b) If any person required under this chapter to file an income tax return fails to file such return within the time prescribed by law, or as extended under the provisions of sub-

section (7) of this section, the department of taxation or the assessor of incomes shall add to the tax of such person $10 in the case of corporations and $5 in the case of persons other than corporations, and if no tax is assessed against such person the amount of this fee shall be certified for collection and collected as income taxes are collected, and no person shall be allowed in any action or proceeding to contest the imposition of such fee.

(c) Married persons living together as husband and wife may make separate returns or join in a single joint return. The tax shall be computed on the combined taxable income. On written request, a separate statement or tax bill shall be issued to husband and wife and in that event the exemptions provided for in subsection (2) of section 71.05 shall be allowed but once and divided equally and the amount of tax due shall be paid by each in the proportion that the income of each bears to the combined income.

(5) Every partnership shall furnish to the assessor of incomes a true and accurate statement, on or before March fifteenth of each year, except that returns for fiscal years ending on some other date than December thirty-first, shall be furnished within 75 days after the last day of such fiscal year, in such manner and form and setting forth such facts as the department of taxation shall deem necessary to enforce the provisions of this chapter. Such statement shall be made upon the oath or affirmation of one of the members of said partnership.

(6) In case of the failure on the part of any person to make a report of income within the time and in the manner prescribed by law, the department of taxation or assessor of incomes may enter an assessment against said person upon 10 days' notice in writing in a sum of not less than $500. Such notice may be served by mail. After the tax on such assessment has been entered on the assessment roll the person assessed shall be forever barred from questioning the correctness of the same in any action or proceeding.

(7) In case of neglect occasioned by the sickness or absence of a person, or of an officer of any corporation required to file a return, or for other sufficient reason, the department of taxation in the case of corporations and the assessor of incomes in the case of persons other than corporations may on written request allow such further time for making and delivering such return as they may deem necessary not to exceed 30 days. Income taxes payable upon the filing of the tax return shall not become delinquent during such extension period, but shall be subject to interest at the rate of 5 per cent per annum during such period. The granting of any extension of time for filing and return shall not serve to extend the discount date provided by section 71.10 (3) (c).

(8) Any person required to make an income tax return, who shall fail, neglect or refuse to do so in the manner and form and within the time prescribed by this chapter, or shall make a return that does not disclose his entire taxable income, shall be assessed by the department of taxation or the assessor of incomes as the case may be according to their best judgment.

(9) Any person failing to make an income tax report or making an incorrect income tax report, with intent in either case to defeat or evade the income tax assessment required by law, shall be assessed at twice the normal income tax rate by the proper taxing authority. Such increased assessment shall be in addition to all other penalties of section 71.09.

(10) If any person shall fail or refuse to make a return at the time or times hereinbefore specified in each year, or shall render a false or fraudulent return, such person shall be liable to a penalty of not less than $100 and not to exceed $5,000 at the discretion of the court.

(11) Any officer of a corporation required by law to make, render, sign or verify any return, who makes any false or fraudulent return or statement, with intent to defeat or evade the assessment required by this act to be made, shall upon conviction be fined not to exceed $500 or be imprisoned not to exceed one year, or both, at the discretion of the court, with the cost of prosecution.

(12) Any person, other than a corporation, who fails or refuses to make a return at the time hereinbefore specified in each year or shall render a false or fraudulent return shall upon conviction be fined not to exceed $500, or be imprisoned not to exceed one year, or both, at the discretion of the court, together with the cost of prosecution.

(13) Whenever in the judgment of the department of taxation or the assessor of incomes it is deemed necessary that a person subject to an income tax should keep records to show whether or not such person is liable to tax, the department of taxation or assessor of incomes may serve notice upon such person and require such records to be kept as will include the entire net income of such person and will enable the department of taxation or assessor of incomes to compute the taxable income. Thereafter, any taxes assessed upon information not contained in such records shall carry a penalty of 25 per cent of the amount of the tax. Such penalty shall be in addition to all other penalties provided in this chapter.

(14) An extension of time for filing returns of income for taxable years begun after December 31, 1941, shall be granted to all persons in the armed forces of the United

States who are located beyond the borders of the United States, for a period extending not more than 6 months after the termination of his period of military service. In case of any person residing or traveling abroad on duty for the United States or any department thereof or the American Red Cross, such extension shall be granted for a period up to and including the fifteenth day of the sixth month following the close of the taxable year. [*1931 c. 448 s. 4; 1931 c. 453 s. 2; 1933 c. 348 s. 2; 1933 c. 367 s. 3; 1939 c. 382; 1943 c. 20, 163; 1945 c. 440*]

Note: A statute (71.09 (4) (c), Stats. 1931) which provides that the taxable incomes of husband and wife shall be combined and the income tax computed on the total, thereby increasing the taxes, is unconstitutional. (Hoeper v. Tax Commission, 202 W 493, 233 NW 100, reversed.) Hoeper v. Tax Commission, 284 US 206; 207 W 208, 240 NW 847.

The assessors of incomes are state officers, possessing all powers granted by law to the tax commission or to assessors in the assessment of personal property, and by 71.11 (2) have authority to make investigations and audits of the books and records of individuals or firms to determine the taxability of their income or interests. Equity will not enjoin an apprehended illegal tax assessment, nor an alleged illegal assessment where there is an adequate legal remedy. Sections 71.12 to 71.16 provide an adequate remedy for an illegal assessment of income taxes, in the absence of extraordinary facts or circumstances. Wagner v. Leenhouts, 208 W 292, 242 NW 144.

Operator of coal docks in different counties cannot offset occupation taxes paid in one county against income tax payable in another. Statute authorizing offsetting coal dock operator's tonnage tax against income tax is valid. State ex rel. C. Reiss C. Co. v. Zimmerman, 210 W 599, 245 NW 687.

Subsection (2) 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 Commission, 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 (2), Stats. 1929, 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 Commission, 221 W 531, 266 NW 270.

Husband and wife do not have option of having their income taxes computed on joint or separate return. Frequent amendments of income tax law, after decision holding section requiring computation of income tax of husband and wife on combined income was unconstitutional, without repeal or change of such section, did not constitute reenactment of such portion of section as legislature had constitutional right to enact. Amerpohl v. Tax Commission, 225 W 62, 272 NW 472.

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 under (2) 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. Scobie v. Tax Commission, 225 W 529, 275 NW 531.

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. Department of Taxation, 241 W 145, 5 NW (2d) 749.

In sec. 6, ch. 15, Laws 1935, levying an emergency tax on the net dividend income of all persons received in 1933, the provision that such emergency tax shall be assessed and paid in the same manner, and subject to the same regulation as the normal income tax, brought into operation the provision in 71.09 (2), Stats. 1933, imposing proportional income taxation as to persons moving into or out of the state during the tax year, and indicated a legislative intent to apply the emergency tax to persons who, although not residents of the state when the act was enacted in 1935, were residents during 1933. [The court holds that the decision in Messinger v. Tax Comm., 222 W 156, involving sec. 2, ch. 363, Laws 1933, is erroneous.] Sec. 6, ch. 15, Laws 1935, as thus construed, is not unconstitutionally retroactive. Rahr v. Smith, 243 W 497, 11 NW (2d) 355.

Statute of limitations upon crimes specified in (11) and (12) runs from time of commission of such crimes. 25 Atty. Gen. 237.

71.095 Returns of fiduciaries; assessment of income of fiduciaries. (1) (a) Every executor and administrator shall file an income tax return with the assessor of incomes of the county in which the decedent resided at the time of his death, or in the county in which the executor or administrator resides if the decedent was a nonresident, in all cases where the decedent, if living, would have been required to file such return, and shall so file such return, if notified by the assessor of incomes to make a report to him. Such executor or administrator shall include in such return:

1. All income received by the decedent during that portion of the year covered by the return preceding the demise of the decedent.

2. All receipts by him from the estate of the deceased during the year covered by the return, if such receipts would have been taxable as income to the decedent, had he survived.

3. All receipts by him during the year from the estate of the deceased accrued at the date of death of the decedent but not reported by the decedent on the accrual basis, if such receipts would have been taxable as income to the decedent had he survived and made the return.

(b) If any person has been reporting income from any transaction on a deferred basis, the executor or administrator of the estate of such person shall during the administration of the estate of such person, account for the income arising from such transaction on the same basis as such transaction was reported by the decedent prior to his death and in the same manner as the decedent would have accounted for such income, had he survived and made the return. If all of such deferred income has not been reported and accounted for in the income tax returns before the executor or administrator is discharged, he shall report in his last income tax return as income the present value of such deferred income as yet unreported.

(c) The first return of an executor or administrator shall be filed in the form and manner and within the time that a return should have been filed by the decedent had he survived. Subsequent returns of such executor or administrator shall be filed in the form and within the time that the returns of income are required from persons other than corporations. The first return of such executor or administrator shall include the income received by the decedent during the portion of the year preceding the demise of deceased and also items specified in sections 71.095 (1) (a), 71.095 (1) (b) and 71.095 (1) (e). In computing the net income of an estate, a deduction shall be allowed for amounts paid as premiums on fidelity bonds of the executor or administrator.

(d) The same personal exemption shall be deducted from the tax of the executor or administrator as would have been deductible from the tax of the decedent under section 71.05 had he survived and made the return, except that,

1. No personal exemption under section 71.05 (2) (a) and 71.05 (2) (b) for the decedent shall be allowed except for the year of death.

2. If the decedent was a single person at the time of his death and was actually supporting children under the age of eighteen years, or was actually supporting any other person or persons dependent upon him for support, the personal exemption deductible under section 71.05 (2) (c) and (d) shall be allowed to the executor or the administrator until such children shall reach the age of eighteen years or until such other person shall cease to be dependent.

3. If the decedent was a married person at the date of his demise and if after his demise his widow is the head of a family as defined in section 71.05 (2) (b), the same personal exemption shall be allowed to the executor or administrator as is allowed to the head of a family under section 71.05 (2) (b). If such decedent was actually supporting children under the age of eighteen or any other person or persons dependent upon him for support, the same personal exemption shall be allowed to the executor as would have been allowed to any other head of a family under section 71.05 (2) (c) and (d) for such children and dependent person until such children shall reach the age of eighteen years or until such other person shall cease to be dependent.

(e) During the period of the administration of the estate the executor shall include in his return the income of the wife of the deceased if living and the income of all children under eighteen years of age, together with the income of any persons actually supported by and dependent upon the estate for support.

(g) The assessor of incomes shall certify the tax on the income of any decedent or on the income of his executor or administrator, as other taxes are certified, and the executor or administrator shall pay such tax when due.

(2) Guardians shall make returns of income to the assessor of incomes of the county in which their wards reside, which returns shall be made at the same time as returns of persons other than corporations are made, and shall show all the income from all sources received by or for the respective wards whom they represent. The net income of a guardian shall be ascertained in the same manner as the income of other persons is ascertained and shall be subject to the same deductions for personal exemptions which the ward would have been entitled to had he made the return, provided that if any of such wards are under 18 years of age and are the children of a person required by this chapter to file an income tax return, the personal exemption under section 71.05 (2) (c) shall be allowed to the guardian. The taxable income of any ward shall be assessed to the guardian making the report and such guardian shall pay the taxes assessed when due.

(3) Trustees of trust estates created by will or by contract or by declaration of trust or implication of law 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 or estate is being administered, showing the total taxable income received by them during the year, the names and addresses of distributees and the amounts severally distributable to them whether distributed or not, and also the amounts to be accumulated by them for unknown or unborn or undisclosed beneficiaries or for other reasons. The net income received by such trustees shall be ascertained in the same manner as the net income of persons other than corporations, except that the personal exemptions under section 71.05 (2) (a), (b), (c) and (d) shall not be allowed to such trustee. Distributees who receive or who are entitled to receive any

part of such net income shall return the same as income to the assessor of incomes in the district in which they respectively reside, together with all other income received by them and shall be assessed thereon as provided by this chapter. Such of said distributees as are nonresidents of this state shall be assessed on such income as they receive from the trust estate as the income of nonresidents is assessed. No personal exemption shall be allowed either resident or nonresident distributees unless they make a claim therefor in their income tax returns made in accordance with the terms of this act showing the total net income.

(4) All nondistributable, or contingently distributable income not distributed shall be assessed to the trustee in the same manner as income of persons other than corporations is assessed, except that the personal exemptions under section 71.05 (2) shall not be allowed to such trustee.

(5) All income taxes levied against the income of beneficiaries shall be a lien on that portion of the trust estate or interest therein from which the income taxed is derived, and such taxes shall be paid by the fiduciary, if not paid by the distributee, before the same becomes delinquent. Every person who as a fiduciary under the provisions of this chapter pays an income tax, shall have all the rights and remedies of reimbursement for any taxes assessed against him or paid by him in such capacity, as is provided in subsections (1) and (2) of section 70.19.

(6) An executor, administrator, guardian or trustee applying to a court having jurisdiction for a discharge from his trust and a final settlement of his accounts, before his application shall be granted, shall file with the assessor of incomes of the county in which the trust or estate is being administered a return of all incomes received in his representative capacity during the time between the last preceding January first and the date of his application for discharge and also similar returns of income received by the deceased during each of the years open to audit under section 71.115 if such returns have not heretofore been filed. Upon the receipt of such returns, the assessor of incomes shall immediately determine the amount of taxes to become due and shall certify such amount to the court and the court shall thereupon enter an order directing the executor, administrator, trustee or guardian, as the case may be, to pay to the department of taxation the amount of tax, if any, found due by the assessor of incomes, and take his receipt therefor. The certificate of the assessor of incomes shall contain the names of the taxing districts to which the tax is attributable under section 71.18, and a copy thereof shall be filed with the state treasurer and with the assessor of incomes of each county named in the certificate. The receipt of the department of taxation shall be evidence of the payment of the tax and shall be filed with the court before a final distribution of the estate is ordered, and the executor, administrator, trustee or guardian is discharged. The state treasurer, upon receipt of such taxes, shall enter the amount received on a ledger account termed "advance income taxes" and at the next quarterly settlement provided by paragraph (b) of subsection (4m) of section 71.10, the state treasurer shall pay to the county and local treasurers named in the certificate of the assessor of incomes, the portion of taxes payable to such county treasurer and to the local treasurers of his county. The assessor of incomes shall enter all such assessments upon the proper assessment and tax roll and shall enter thereon opposite each such assessment the words: "Paid by order of court." Any taxes found to be due from the estate for any of the years open to audit under section 71.115 shall be assessed against and paid by the executor or administrator; any taxes found to be due after the executor or administrator is discharged, shall be assessed against and paid by the beneficiaries in the same ratio that their interest in the estate bears to the total estate.

(7) Returns of income required to be made by virtue of the next preceding subsection may be dispensed with by order of the court having jurisdiction in cases where it is clearly evident to the court that no income tax is due or to become due from the trust or estate. In computing the net income of a trust under will or a trust under agreement, a deduction shall be allowed for the fees and the commissions paid to the trustees, and for the ordinary and necessary expenses of administering the trust.

(8) A resident who receives income from a nonresident fiduciary shall be taxed the same as though such income had been received by such resident without the intervention of a fiduciary; and a resident fiduciary receiving income for a nonresident beneficiary shall report such income to the assessor of incomes of the district in which such fiduciary resides. [*1931 c. 158, 434; 1931 c. 448 s. 1, 4; 1931 c. 453 s. 1, 2; 1933 c. 367 s. 3; 1933 c. 450 s. 2a; 1941 c. 189; 1943 c. 20, 258, 369*]

Note: As 71.095 provides specifically (1) that the determination as to the amount of income taxes to be paid out of an estate on income received by either a deceased, or by his representative, including income received during each of the years open to audit under 71.115, is to be made by the assessor of incomes; (2) that by means of his certification the state's claim therefor is to be presented to the court having jurisdiction of the administration of the estate; and (3) that upon such assessor's certification as to the amount determined by him, the court shall order and direct the payment by the executor or other repesentative of the estate of the amount so determined and certified, 71.095 is controlling in respect to the manner of presenting the state's claim for income taxes, as well as

the official empowered to determine the amount which is due as such a tax and must be paid out of an estate before the court can order a final settlement and distribution thereof, etc. Because of those specific provisions in 71.095, all other statutory provisions which are applicable generally to the filing, allowance, and barring of claims are inapplicable to the state's claims 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.

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 (4), where the settlor, although having the power to revoke the trust, did not exercise such power during the year in question. First Wis. Trust Co. v. Department of Taxation, 237 W 135, 294 NW 868.

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 Commission, 228 W 297, 280 NW 406.

71.10 Computation of taxes and preparation of assessment and tax rolls, office audits, certification of taxes and refunds. (1) (b) All fiscal years ending between the July first preceding and the June thirtieth following the close of a calendar year shall correspond to such calendar year for the purposes of this chapter, and no fiscal year shall end on any date other than the last day of any month.

(2) The department of taxation or the assessor of incomes shall presume the incomes reported on the current return to be correct for the purpose of preparing initial assessment rolls, and shall enter on initial assessment rolls by taxation districts the taxable income computed according to the preceding subsection. Such assessment rolls and all subsequent assessment rolls shall remain on file in the office of the department of taxation or the assessor of incomes as the case may be. The department of taxation and the assessor of incomes shall make duplicate copies of such assessment rolls and all subsequent assessment rolls provided by this section, and such duplicate roll shall be known as the tax roll. The department of taxation and the assessors of incomes shall transmit a certified copy of such tax rolls to the state treasurer within 6 months after the close of the fiscal or calendar year of any taxpayer. Additional assessment rolls and corresponding duplicate tax rolls shall be prepared from time to time, which shall include corrections made by office audits of current returns, initial assessments on any return omitted from the first initial roll, initial assessments of fiscal year returns, and corrections made after field audit pursuant to sections 71.10 and 71.11.

(3) All income taxes shall be paid to the department of taxation. Income taxes payable by corporations shall be paid to the department of taxation at its office at Madison and income taxes payable by persons other than corporations shall be paid to designated representatives of the department of taxation located at the office of the assessor of incomes for the district in which the taxpayer resides.

(a) The initial payment of taxes on incomes of persons who file on a calendar year basis shall be paid on or before the fifteenth day of March following the close of the calendar year. Such initial payment shall be in an amount equal to at least one-third the total tax, and shall not be less than $5 if the total tax exceeds $5, nor less than the total amount of the tax if the same does not exceed $5. The balance of such tax shall be paid on or before the first day of August following the close of the calendar year.

(b) If the return is made on the basis of a fiscal year such initial payment shall be paid on or before the fifteenth day of the third month following the close of such fiscal year. The balance shall be paid on or before the first day of the eighth month following the close of such fiscal year.

(c) All taxes as computed on the return, paid in full on the date provided for the initial payment shall be discounted in an amount equal to 2 per cent of the total tax.

(d) Back assessments of income taxes omitted from initial rolls and additional income taxes assessed under sections 71.10 and 71.11 shall become due and payable on entry upon the assessment roll and certification of the tax roll.

(e) The department of taxation shall accept in advance income taxes and surtaxes from taxpayers desirous of making such payments before the same shall become due and payable. Advance payment of taxes under this provision shall not relieve the taxpayer from additional taxes which may result from subsequent legislation or from additional taxable income disclosed or discovered subsequent to such payment.

(f) Income taxes shall become delinquent if not paid when due as provided in this section, and when delinquent shall be subject to a penalty of 2 per cent on the amount of the tax and interest at the rate of one per cent per month until paid, and the department of taxation shall immediately proceed to collect the same. For the purpose of such collection the department of taxation or its duly authorized agent shall have the same powers as conferred by law upon the county treasurer, county clerk, sheriff and district attorney.

(4) At the time the tax rolls are transmitted to the state treasurer the department of taxation shall notify each taxpayer by mail of the amount of income taxes appearing

against him on said rolls, of the amount paid thereon, of the balance due, of the date when such balance shall be paid and of the date when the taxes become delinquent.

(4m) (a) The department of taxation shall accept payments of income taxes in accordance with the provisions of this chapter, and shall give a printed or written receipt therefor. Representatives of the department of taxation directed by it to accept payment of income taxes shall file bonds with the state treasurer in such amount and with such sureties as the state treasurer shall direct and approve. In collecting income taxes as provided in this chapter, the department of taxation shall be deemed to act as agents of the state, counties and towns, cities or villages entitled to receive the taxes collected.

(b) Within 15 days after receipt of any income tax payments the department of taxation shall transmit the same to the state treasurer. Upon the first day of March, June, September and December of each year the state treasurer shall apportion and pay income taxes collected and transmitted to him to the county and local treasurers in the manner provided by section 71.19.

(5) The department of taxation or the assessor of incomes shall as soon as practicable after each initial tax roll has been certified, audit each return filed in their respective offices and if it shall be found from such office audit that a person has been over or underassessed, or if it shall be found that no assessment has been made when one should have been made, the department of taxation or the assessor of incomes shall correct or assess the income of such person. Any assessment, correction or adjustment made as a result of such office audit shall be presumed to be the result of an audit of the return only, and such office audit shall not be deemed a verification of any item in said return unless the amount of such item and the propriety thereof shall have been determined after hearing and review as provided in section 71.12; and such office audit shall not preclude the department of taxation or assessor of incomes from making field audits of the books and records of the taxpayer and from making further adjustment, correction and assessment of income.

(6) The department of taxation or the assessor of incomes shall notify the taxpayer, as provided in section 71.12, of any adjustment, correction and assessment made pursuant to subsection (5) of this section.

(a) If the taxpayer requests a hearing, the additional tax or overpayment shall not be placed on the tax roll until after hearing and determination of the tax by the board of tax appeals. In the application for such hearing, filed pursuant to section 71.12, the taxpayer may offer to deposit the entire amount of the additional taxes, together with interest thereon, with the state treasurer. If such offer to deposit is made, the department of taxation or assessor of incomes, as the case may be, shall issue a certificate to the state treasurer authorizing him to accept payment of such taxes together with interest thereon to the first day of the succeeding month and to give his receipt therefor. A copy of such certificate shall be mailed to the taxpayer who shall thereupon pay such taxes and interest to said treasurer within 30 days. A copy of the receipt of the state treasurer shall be filed with the department of taxation or assessor of incomes. The department of taxation or the assessor of incomes shall, upon final determination of the appeal, certify to the state treasurer the amount of the taxes as finally determined and shall direct him to apportion and pay to the proper county and town, city or village treasurers the amounts of such taxes, together with the interest thereon, to which the counties and the towns, cities or villages are entitled under section 71.19 and shall also direct the state treasurer to refund to the appellant any portion of such payment which shall have been found to have been illegally assessed, including the interest thereon. Such certificate shall specify the counties and the local taxing districts to which the tax is attributable under section 71.18. The state treasurer shall make the payments directed by such certificate within 30 days after receipt thereof. Taxes paid to the state treasurer under the provisions of this paragraph shall be subject to the interest provided by section 71.06 (3) and section 71.16 (2) only to the extent of the interest accrued on said taxes prior to the first day of the month succeeding the application for hearing. Payments made by the state treasurer to the county and town, city or village treasurers shall not include interest which may have been earned during the time that the funds were in the hands of the state treasurer. Any portion of the amount paid to the state treasurer which is refunded to the taxpayer shall bear interest at the rate of 5 per cent per annum during the time that the funds were in the hands of the state treasurer.

(b) In all cases where there has been no request for hearing, and after decision where a hearing has been requested, the additional tax or overpayment shall be entered on the next tax roll.

(c) If the tax is increased the department of taxation shall proceed to collect the additional tax in the same manner as other income taxes are collected.

(d) If the normal income tax is decreased upon direction of the department of taxation or assessor of incomes the state treasurer shall refund to the taxpayer such part of the overpayment as was actually paid in cash, and the entry of such overpayment on the

tax roll by the department of taxation or the assessor of incomes shall be sufficient authorization to the treasurer for the refunding of such overpayment. No refund of income tax shall be made by the treasurer unless such refund is so certified.

(e) Such part of the overpayment paid to the county and the local taxation district shall be deducted by the state treasurer in his next settlement with the county and local treasurer. [*1931 c. 448 s. 1, 2, 4; 1933 c. 348 s. 2; 1933 c. 367 s. 1, 2, 3; 1933 c. 494 s. 4; 1939 c. 412; 1939 c. 517 s. 5; 1943 c. 20, 179; 1945 c. 440*]

Revisor's Note, 1933: Chapter 367, Laws 1933, changes the method of distribution of the fund by directing the state treasurer to apportion and pay to the several municipal treasurers. To harmonize chapters 348 and 367 on this point, paragraph (a) should be amended as indicated in the foregoing section. (Bill No. 438 S, s. 4)

Section 71.10, Stats. 1925, provided for the reassessment of incomes of corporations received after 1915. That section was repealed by chapter 539, Laws 1927. It was interpreted and applied in the following cases: Northwestern L. Co. v. Tax Commission, 202 W 372, 231 NW 865; Rust-Owen L. Co. v. Tax Commission, 202 W 385, 231 NW 870; John S. Owen L. Co. v. Tax Commission, 202 W 391, 231 NW 872; New Dells L. Co. v. Tax Commission, 202 W 396, 231 NW 873; First Nat. Bank v. Tax Commission, 202 W 423, 232 NW 843.

Under 74.73, Stats. 1923, providing that every action to recover an unlawful tax shall be brought within one year after payment, the lapse of one year without action put it beyond a taxpayer's reach to recover an unlawful tax, and 71.09 to 71.11, Stats. 1927, enabling taxing authorities to verify returns and search for income tax evasions, did not effect a revival. Simmons Co. v. Tax Commission, 209 W 232, 244 NW 610.

The provisions for giving two-thirds weight to the 1926 income and one-third weight to the 1927 income of the assessment in 1929 to determine the average three-year income for the purpose of putting into operation the scheme for a three years' average, though resulting in temporary inequality, was not discriminatory and did not produce ultimate inequalities so as to render the provision invalid. Hartman F. & C. Co. v. Milwaukee County, 39 F (2d) 104.

71.11 Field investigation. (1) Whenever in the judgment of the department of taxation or assessor of incomes it is deemed advisable to verify any return directly from the books and records of any person, or from any other sources of information, the department of taxation or assessor of incomes may direct any return to be so verified. In any case in which a reasonable showing is made in writing to the department of taxation that because of merger, consolidation, reorganization, or sale of an entire business, the extension provided for in section 71.115 (6) will result in undue burden to the taxpayer, the department shall conduct a field audit in the matter with the least possible delay, giving such audit preferential treatment, and in no event shall such audit be delayed beyond 3 years from the filing of such request.

(2) For the purpose of ascertaining the correctness of any return or for the purpose of making a determination of the taxable income of any person, the department of taxation or assessor of incomes shall have power to examine or cause to be examined by any agent or representative designated by it, any books, papers, records or memoranda bearing on the income of such person, and may require the production of such books, papers, records or memoranda, and require the attendance of any person having knowledge in the premises, and may take testimony and require proof material for their information. Upon such information as it may be able to discover, the department of taxation or the assessor of incomes shall determine the true amount of income received during the year or years under investigation.

(3) If it shall appear upon such investigation that a person has been over or underassessed, or that no assessment has been made when one should have been made, the department of taxation or assessor of incomes shall make a correct assessment in the manner provided in section 71.10.

(4) Assessment of additional normal income taxes may be made upon the income of any person received in the years 1920, 1921, 1922 and 1923, or corresponding fiscal years, only to the extent that the income tax exclusive of interest on the corrected total income exceeds the personal property tax assessed in the year in which the income was first assessable, provided such personal property tax was actually paid in cash. [*1931 c. 53; 1933 c. 348 s. 1; 1943 c. 20; 1945 c. 440*]

Note: Tax commission, having refrained from assessing income because of federal supreme court decision, was not precluded from levying assessment within time limited by statute and subsequent to overruling of such decision. Laabs v. Tax Commission, 218 W 414, 261 NW 404.

71.115 Years open to audit and adjustment. (1) Additional assessments and corrections of assessments by office audit or field investigation may be made of income of any taxpayer if notice pursuant to section 71.12 is given within the time specified in this subsection.

(a) Subsequent to the enactment of this subsection and prior to April 1, 1938, such notice may be given with respect to income received in any year or years subsequent to the calendar year 1926 or corresponding fiscal year. A notice pursuant to section 71.12 given prior to the enactment of this subsection shall not preclude the department of taxation or the assessor of incomes from giving a notice within the time herein specfied unless heretofore the assessment or correction based upon such prior notice has become final and

conclusive under the provisions of sections 71.12, 71.13, 71.14, 71.15 and 71.16. In instances where an additional assessment or correction of an assessment based upon such prior notice has not become final and conclusive, the record and proceedings in respect thereto shall be applicable to any notice given within the time herein specified unless, within 20 days after such latter notice, an application for hearing is filed in accordance with section 71.12 in which case the former record and proceedings shall be vacated and new proceedings taken in accordance with sections 71.12, 71.13, 71.14, 71.15 and 71.16.

(b) Subsequent to March 31, 1938, such notice may be given with respect to income received in any one or more of the six calendar or fiscal years next preceding that in which the notice is given, provided, however, that with respect to assessments of income received in the calendar year 1937, or corresponding fiscal year, and in subsequent years, such notice shall be given within three years after the close of the period covered by the income tax return.

(c) Irrespective of paragraphs (a) and (b) of this subsection, if any person has made an incorrect income tax return for any of the years since January 1, 1911, with intent to defeat or evade the income tax assessment provided by law, or has failed to file any income tax return for any of such years, income of any such year may be assessed when discovered by the proper assessing authority.

(2) In accordance with the provisions of and subject to the limitations of section 71.17, refunds or credits may be made of income taxes and surtaxes assessed on income received in any one or more of the six calendar or fiscal years next preceding that in which the claim therefor is filed, provided, however, that with respect to claims for refund of taxes paid on income received in the calendar year 1937, or corresponding fiscal year, and in subsequent years, such claim may be filed only within three years after the close of the period covered by the income tax return.

(3) The limitation periods provided in subsection (1) may be extended by written agreement between the taxpayer and the department of taxation or the assessor of incomes entered into prior to the expiration of said limitation periods or any extension thereof.

(4) All additional assessments of back income taxes shall be deemed to have been made within the limitation period provided by section 71.11 (5) of the statutes for 1927, 1929 and 1931, if notice thereof pursuant to section 71.12 was given to the taxpayer while the years the income of which is included in such assessments were open to adjustment and correction under section 71.11 (5) of said statutes. This subsection shall not restrict or limit the operation of any other subsection of this section.

(5) Section 370.06 shall have no application to the provisions of this section.

(6) In recognition of an existing shortage of skilled and competent professional manpower created by the existing war emergency, the notices provided for in this section may be given with respect to adjustments of income of the calendar years 1942, 1943 and 1944, or corresponding fiscal years, within 5 years after the close of the period covered by the income tax return, and refunds or credits may be made, and claims for refund may be filed, of taxes paid on income of the calendar years 1942, 1943 and 1944, or corresponding fiscal years, within 5 years after the close of the period covered by the income tax return, notwithstanding any other limitations expressed in this section. [*1933 c. 348 s. 3; Spl. S. 1937 c. 1 s. 1, 3, 4; 1943 c. 20; 1945 c. 440*]

Cross Reference. See sections 2 to 5, chapter 293, Laws 1939, as to assessment of taxes on income derived from United States or any agency thereof prior to 1939.

Note: 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 Commission, 203 W 639, 234 NW 701.

The assessor of incomes, to make an additional assessment, is required to determine, upon such information as he is able to secure, the amount of the additional assessment; if he errs, the taxpayer is required to avail himself of the remedy given by appeal to the board of review, and, successively, appeals to the tax commission and the courts, or be foreclosed from questioning the assessment. Milwaukee County v. Dorsen, 208 W 637, 242 NW 515.

Assessment is completed when person and income to be taxed have been properly listed and amount determined so as to be ready for certification to treasurer. To constitute an "additional assessment" the assessment must be finally determined within time limit entitling it to entry on assessment roll. Weyenberg S. Mfg. Co. v. Kelley, 210 W 638, 246 NW 418.

Where a taxpayer appeared before the board of review, stipulated the facts relating to a proposed additional assessment, made full and complete disclosure and was given a full hearing on all the issues, all within the four-year period limited by 71.11 (5), Stats. 1929, and all after the enactment of 71.115, Stats. 1933, allowing additional assessments to be made, and providing that they be deemed timely made, if notice thereof was given to the taxpayer while the years the income of which was included in such assessments were open to adjustment, the taxpayer could not be heard to say that he did not have the notice prescribed; and such notice so operated that the additional assessment was made as of the date of the notice and therefore within the statutory limitation period. Cudahy v. Tax Commission, 226 W 317, 276 NW 748.

Section 71.115 (1) (a), enacted in 1937, authorizing additional assessments with respect to income received in any year subsequent to 1926, is not unconstitutional as depriving recipients of previously unassessed income of vested rights allegedly acquired by reason of the prior running of a similar limitation of six years contained in 71.11 (5), since a statutory limitation of this kind is not a limitation in favor of the taxpayer and

against the state, but rather a limitation on the commission's authority to go back and make new assessments. [State ex rel. Globe Steel Tubes Co. v. Lyons, 183 W 107, followed; Weyenberg Shoe Mfg. Co. v. Kelley, 210 W 638, explained.] Schuette v. Tax Comm., 234 W 574, 292 NW 9.

71.12 Notice and hearing. No additional assessment by office audit or field investigation shall be placed upon the assessment roll without notice in writing to the taxpayer. Such notice shall be served as a circuit court summons or by registered mail. Service of such notice by regular mail shall also be sufficient notice of such assessment if receipt thereof is admitted by the person assessed, or if there is other satisfactory evidence of the receipt thereof. Any person feeling aggrieved by such notice of assessment shall, within 30 days, after receipt thereof, make application to the department of taxation in case of corporations, or the assessor of incomes in the case of persons other than corporations, for abatement of the tax. The tax commissioner or the assessor of incomes shall grant or deny such application within 6 months after it is filed. Upon denial of said application for abatement, the taxpayer, if aggrieved thereby may appeal to the board of tax appeals by filing a petition with the clerk thereof as provided by law and the rules of practice promulgated by the board. If no application for abatement is made or if a petition is not filed with the board within the time provided in this chapter, the assessment shall be final and conclusive. [*1931 c. 453 s. 2; 1939 c. 412; 1939 c. 517 s. 6; 1943 c. 20*]

Note: Notice to the taxpayer that the tax commission has in mind the imposition of an additional assessment of income taxes is a sufficient compliance with this section. Curtis Companies, Inc. v. Tax Commission, 214 W 85, 251 NW 497.

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 Commission, 219 W 293, 261 NW 884.

71.13 [*Repealed by 1939 c. 412 s. 1*]

71.14 Exclusive original jurisdiction. No person against whom an assessment of income tax has been made shall be allowed in any action either as plaintiff or defendant, or in any other proceeding to question such assessment unless the requirements of section 71.12 shall first have been complied with, and unless such person shall have made full disclosure under oath at the hearing before the board of tax appeals of any and all income received by him. The requirements of this section may be waived by the department of taxation. [*1933 c. 348 s. 2; 1939 c. 412; 1943 c. 20*]

Note: Under the provisions of the income tax statutes, and particularly those of 71.09, 71.10, 71.13, this section, 71.16 and 71.17, the taxpayer making an erroneous initial assessment of income against himself, and failing to present objections and make disclosure as required by this section has no right to a court review to correct errors. But the failure of a taxpayer to object to an initial assessment of income 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 Commission, 207 W 58, 240 NW 804.

Failure of a taxpayer to make timely objection before the county board of review to an additional income tax assessment barred his right to any judicial relief. Lehman v. Tax Commission, 207 W 517, 242 NW 151.

Under the statutory plan of assessment and taxation a taxpayer who does not appear before the board of review and object to the tax sought to be imposed cannot thereafter question the tax imposed. Milwaukee County v. Dorsen, 208 W 637, 242 NW 515.

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.

71.15 [*Repealed by 1939 c. 412 s. 1*]

71.155 [*Repealed by 1927 c. 539 s. 17*]

71.16 Contested assessment, effect on collection, payment, apportionment and penalty. (1) As soon as the appellant shall have filed a petition with the Wisconsin board of tax appeals, all collection proceedings except proceedings under section 71.37 shall be stayed until final determination of the appeal and any review thereof, but such proceedings shall not operate to stay the delinquent penalty and interest on unpaid amounts as provided in subsections (2) and (3) of this section.

(2) (a) Any person who shall contest an assessment before the board of tax appeals or in court shall state in his petition or notice of appeal what portion if any of the tax is admitted to be legally assessable and correct. The department of taxation or the assessor

of incomes, as the case may be, shall apportion the tax so admitted to the various counties and taxing districts when an apportionment is necessary, and shall file a certificate of such apportionment with the circuit court in which the case is pending and with the state treasurer, and shall serve a copy thereof on the appellant or his attorney by registered mail. Within 5 days after the receipt of the certificate of apportionment the appellant shall pay to the department of taxation the whole amount of the admitted tax and upon transmission to the state treasurer such tax shall be divided as provided in section 71.19 at the next quarterly settlement provided by paragraph (b) of subsection (4m) of section 71.10. Any such payment shall be considered an admission of the legality of the tax thus paid, and such tax so paid cannot be recovered in the pending appeal or in any other action or proceeding. The state treasurer shall not accept payment of any tax included in a contested assessment unless he shall have received proper certificate for the collection of such tax.

(b) Any part of an income tax assessment which is contested before the board of tax appeals or the courts, which after hearing shall be ordered to be paid, shall be considered as a delinquent tax from the date on which it would have become delinquent under section 71.10 if such contest had not been made, and any such tax so ordered to be paid shall be subject to a penalty of 2 per cent on the amount of the tax and interest at the rate of one per cent per month from the date of such delinquency until paid. Any tax so contested shall be subject to the provisions of section 71.37, but shall not be subject to the provisions of section 71.36 during the pendency of such appeal.

(3) After final decision and return of the record to the department of taxation or the county clerk, the department of taxation shall proceed to collect the taxes in the same manner as other delinquent income taxes are collected. [*1933 c. 367 s. 3; 1935 c. 519; 1939 c. 412; 1943 c. 20*]

Note: The transfer by Wisconsin executors of the full legal title to stock 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 Commission, 204 W 614, 236 NW 526.

Statute requiring appeal to be heard only on record made before tax commission did not unconstitutionally deprive taxpayer of trial or deny due process or equal protection. Baker v. Tax Commission, 210 W 557, 246 NW 695.

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

71.17 Refunds and credits. (1) The provisions for refunds and credits provided in this section shall be the only method for the filing and review of claims for refund of income and surtaxes, and no person shall be allowed to bring any action or proceeding whatever for the recovery of such taxes other than is provided in this section.

(3) No refund shall be made and no credit shall be allowed on any item of income or deduction, assessed as a result of an office audit, the assessment of which shall have become final and conclusive under the provisions of sections 71.12, 71.14, 73.01 or 73.015; and no refund shall be made and no credit shall be allowed for any year, the income of which was assessed as a result of a field audit, and which assessment has become final and conclusive under the provisions of section 71.12, 71.14, 73.01 or 73.015.

(4) It shall not be necessary for any person to file a claim for refund or credit after such refund or credit has been certified on the tax roll.

(5) Every claim for refund or credit of income or surtaxes shall be filed with the department of taxation in case of assessments made by it, and with the assessor of incomes in case of assessments made by him, and such claim shall set forth specifically and explain in detail the reasons for and the basis of such claim. After such claim has been filed it shall be considered and acted upon in the same manner as are additional assessments made under sections 71.10 and 71.11, and if any portion of such claim is disallowed the person filing the same shall have the same right of hearing as is provided in section 71.12. If after hearing before the board of tax appeals any portion of the claim is disallowed, the person filing the same shall have the right to review as provided in section 73.015.

(6) No action or proceeding whatsoever shall be brought against any town, village, city, county or the state or the treasurer thereof for the recovery, refund or credit of any income or surtaxes; except in case the state treasurer shall neglect or refuse for a period of sixty days to refund any overpayment of normal income tax so certified on the income tax roll, the taxpayer may maintain an action to collect the overpayment against the treasurer so neglecting or refusing to refund such overpayment, without filing a claim for refund with such treasurer, provided that such action shall be commenced within one year after the certification of such overpayment on the tax roll.

(7) If the department of taxation or assessor of incomes shall fail or neglect to act on any claim for refund or credit within one year after the receipt thereof, such neglect shall have the effect of allowing such claim and the department of taxation or assessor of incomes shall certify such refund or credit.

(8) If the renegotiation of any war contract or subcontract by the government of the United States or any agency thereof or the voluntary adjustment of prices, costs or profits on any such contract or subcontract results in a reduction of income, the amount of any repayment or credit pursuant to such renegotiation or adjustment (including any federal income or excess profits taxes credited as a part thereof) shall be allowed as a deduction from the taxable income of the year in which said income was reported for taxation. Any federal income tax or excess profits tax previously paid upon any income so repaid or credited shall be disallowed as a deduction from income of the year in which such tax was originally deducted, to the extent that such tax constituted an allowable deduction for said year. Any taxpayer affected by such renegotiation or voluntary adjustment may within one year after the final determination thereof file a claim for refund and secure the same without interest, and the department of taxation shall make appropriate adjustments on account of said tax deductions without interest, notwithstanding the limitations of sections 71.115 and 71.17 (3) or other applicable statutes. This subsection shall apply to the calendar or fiscal year 1940 and all subsequent years. [*1933 c. 348 s. 1; 1933 c. 367 s. 3; 1933 c. 450 s. 3; 1939 c. 412; 1939 c. 517 s. 7; 1943 c. 20, 197*]

Cross Reference: See sections 2 to 5, chapter 293, Laws 1939, as to assessment of taxes on income derived from United States or any agency thereof prior to 1939.

Note: For procedure as to refund where there is a field audit, see note to 71.12, citing Newport Co. v. Tax Commission, 219 W 293, 261 NW 884.

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.

71.18 Situs of taxation; apportionment of income; collection of taxes on apportioned incomes; application of property tax laws to income tax collection; settlement between districts and counties for taxes erroneously received. (1) In their return for purposes of assessment persons deriving incomes from within and without the state, or from more than one political subdivision of the state, shall make a separate accounting of the income derived from without the state and from each political subdivision of the state in such form and manner as the department of taxation may prescribe.

(2) The entire taxable income of every person deriving income from within and without the state or from within different political subdivisions of the state, when such person resides within the state, shall be combined and aggregated for the purpose of determining the proper rate of taxation. The department of taxation or the assessor of incomes, as the case may be, shall compute the tax on the combined taxable income of such person. The income so computed, in the manner provided in section 71.10, shall be apportioned, in the manner provided in paragraph (c) [(d)] of subsection (3) of section 71.02, to the several towns, cities and villages in proportion to the respective amounts of income derived from each, counting that part of the income derived from without the state when taxable as having been derived from the town, city or village in which said person resides. The tax on the combined taxable income shall be apportioned on the tax roll to the various towns, cities and villages in proportion to the respective amounts of taxable income so attributed to each.

(3) All laws not in conflict with the provisions of this act, relating to the assessment, collection and payment of taxes on personal property, the correction of errors in assessment and tax rolls, and for the collection of delinquent personal property taxes except the provisions for the compromise or cancellation of illegal taxes and the refund of moneys paid thereon, shall be applicable to the income tax herein provided.

(4) Whenever any county, city, town or village shall have received in final settlement a portion of an income tax that under the income tax law ought not to have been received by such county, city, town or village, but by the provisions of the income tax law should have been received by another county, town, city or village, such portion of the tax shall be paid by the county, town, city or village erroneously receiving the same to the county, town, city or village entitled thereto; provided, however, that no such payment shall be made except on the written approval of the assessor of incomes who made the assessment, or of the department of taxation in the case of assessments made by it, specifying the reasons for such payment, and provided further that a claim for such tax shall have been made within 3 years after the receipt of the tax. The return of any such overpayment, to any county, city, town or village to another county, city, town or village entitled thereto, in the event that such overpayment has not been settled or paid voluntarily by any such county, city, town or village, shall be effected by the department of taxation by with-

holding the amount of overpayment from the June 1 apportionment of income taxes next following the allowance of the adjustment, to the county, city, town or village which has received the overpayment. In the event that after the initial withholding there is still a balance due, then the department of taxation shall withhold all or a part of the apportionment due on each succeeding June 1 until the balance of the overpayment has been adjusted. The amounts thus withheld shall be credited in the apportionment to the county, city, town or village which did not receive its full amount of income taxes in the said previous distributions. [*1931 c. 448 s. 4; 1933 c. 367 s. 3; 1943 c. 20, 150*]

Note: See note to 74.66, citing Petition of the State, 210 W 9, 245 NW 844.

The failure of the tax commission to grant the town a hearing before ordering a refund of income taxes erroneously paid to the town was not unconstitutional procedure, and the failure of 71.18 (4), authorizing the refund of income taxes erroneously received by municipalities, to provide for a hearing on an order of the commission approving such a refund would not invalidate it as a denial of due process and equal protection, since such taxes are not paid to or held by the municipality in a proprietary capacity. State ex rel. Greenfield v. Conway, 221 W 369, 266 NW 907.

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 71.02 (3) (d), although 71.18 (2) referred to 71.02 (3) "(c)" as the one to follow in making the apportionment, which (c) described no method of apportionment and dealt specifically with business not requiring apportionment; it being plain that the intended reference was to (d). State ex rel. Greenfield v. Conway, 221 W 369, 266 NW 907.

71.19 Division of revenue. (1) Annually, beginning July 1, 1939, out of the moneys collected for normal income taxes, there shall be set aside the amount of the appropriation made by section 20.09 (4). The amount of said appropriation shall be borne by the state, the counties, and the towns, cities and villages in the proportion that normal income taxes were distributed to the state and to each such instrumentality during the next preceding fiscal year. The pro rata share of said appropriation to be borne by the state and by each such instrumentality shall be set aside out of the first moneys collected for normal income taxes and distributable to the state and to each such instrumentality. The remainder of all normal income taxes collected, after setting aside that portion of the appropriation made by section 20.27 which is chargeable to the normal income tax, shall be divided as follows, to wit: Forty per cent to the state, 10 per cent to the county, and the balance to the town, city or village from which the income was derived as provided in section 71.18, except that when such balance in any calendar year exceeds 2 per cent of the equalized value of all taxable property in such town, city or village for the preceding year under section 70.61, such excess shall be paid to the county to be distributed and paid to all of the several towns, cities and villages of the county, according to the school population therein. If, subsequent to January 1, 1937, there shall be paid over to any town, city or village in any calendar year any amount in excess of 2 per cent of the equalized value of all taxable property therein for the preceding year, such excess payment shall be recoverable by the county. The 2 per cent limitation above mentioned shall revert to one per cent of the equalized value of all taxable property in such town, city or village for the preceding year under section 70.61 after the date upon which the second annual income tax payment is due said municipalities after the termination of the present war as proclaimed by the President or the Congress.

(2) Out of the first moneys received and retained from cash collected from such income taxes in any city of the first class, however organized, there shall be transferred and paid to the firemen's pension fund provided for by chapter 165 of the laws of 1903 and laws amendatory thereof, a sum each year sufficient to make the said firemen's pension fund on the first day of March in each year not less than one hundred and seventy-five thousand dollars, to be used for the purpose of paying pensions to disabled and superannuated members of the fire department and their beneficiaries mentioned in said laws.

(3) The department of taxation shall account for and pay all delinquent taxes collected by it, to the state treasurer, who shall apportion and pay the same to the several county, town, city and village treasurers entitled thereto at the time of the next division of revenues as provided for in subsection (4m) of section 71.10.

(4) This section and the provisions of this chapter relating to the apportionment of taxable income to the several counties, towns, cities and villages and those relating to the collection of the income tax by the department of taxation, shall not apply to telegraph companies, or transportation companies as defined in subsection (4) of section 76.02 and in section 76.39, respectively. All such telegraph companies and transportation companies shall pay their taxes under this chapter directly into the state treasury, and such taxes shall not be apportioned or distributed to the taxing districts within which the properties lie, but shall be retained entirely by the state. [*1931 c. 448 s. 3; 1933 c. 140 s. 3; 1933 c. 367 s. 3; 1933 c. 494 s. 5, 6; 1937 c. 249; 1939 c. 142; 1943 c. 20, 164, 525; 1943 c. 553 s. 14*]

Note: Provision of 71.19 (1), Stats. 1935, limiting amount of income taxes apportioned to municipality to percentage of assessed valuation, applies to year in which taxes are collected. 27 Atty. Gen. 64.

This section governs distribution of income taxes among state, county and local municipality and 71.10 (4) (d), Stats. 1931, providing for collection by county and retention of penalties and interest by county, which statute was repealed in 1933, has no application to collection commenced prior to such repeal and compromise subsequent thereto, where no penalties and interest were in fact collected. 27 Atty. Gen. 316.

71.195 [*Repealed by 1933 c. 367 s. 1*]

71.20 Income returns partially privileged. No person shall divulge or circulate for revenue or offer to obtain, divulge, or circulate for compensation any information derived from an income tax return; provided, that this shall not be construed to prohibit publication by any newspaper of information derived from income tax returns for purposes of argument nor to prohibit any public speaker from referring to such information in any address. Any person violating the provisions of this subsection shall upon conviction be punished by a fine of not less than one hundred dollars nor more than five hundred dollars, or by imprisonment in the county jail for not less than one month nor more than six months, or by both such fine and imprisonment. [*1933 c. 449*]

71.21 [*Repealed by 1925 c. 57 s. 1*]

71.22 Rules, clerks, specialists. (1) The department of taxation is hereby empowered to make such rules and regulations as it shall deem necessary in order to carry out foregoing provisions.

(2) The department of taxation is hereby authorized to employ such clerks and specialists as are necessary to carry into effective operation this act. Salaries and compensations of such clerks and specialists shall be charged to the proper appropriation for the department of taxation. [*1943 c. 20*]

Note: In determining the taxable income derived 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 by (1) is a reasonable administrative measure which does not tax as income that which is not income, nor result in a fictitious cost but establishes the actual cost. Long v. Tax Commission, 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 71.095 (4), 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 Fourteenth Amendment. First Wis. Trust Co. v. Department of Taxation, 237 W 135, 294 NW 868.

The taxpayer claims "that there was no * * * publication of the rule of the tax commission * * * until 1932. The taxpayer contends that until that time under our constitutional provision, sec. 21, art. VII, that 'and no general law shall be enforced until published,' the rule of the tax commission did not become operative until published. Surely if no general law enacted by the legislature becomes effective until published, a rule of an administrative body does not become effective as a general law until published, and if the fact be that there was no publication of the rules of the tax commission until 1932, its rules up to that time were not effective as public laws. What may constitute a publication is discussed in Sholes v. State, 2 W 499, 511. There is no evidence that the rule of the tax commission relied on by the department was published in any of the ways there indicated or in any other way likely to give notice to the general public. In such situation should we hold the rule of the tax commission adopted prior to 1932 presumptively published and in force, or ineffectual for absence of proof of its publication? * * * We consider that we should presume here that the tax commission in adopting the rule invoked did what was necessary to render it effective." Whitman v. Department of Taxation, 240 W 564, 577, 4 (2d) NW 180.

71.23 [*Repealed by 1943 c. 179*]

71.24 Correction of errors. Whenever an incorrect income tax assessment has been certified or no assessment has been certified when one should have been certified and such error shall be discovered after the income tax roll has been certified to the state treasurer, the department of taxation, in case of assessments made by it, and the assessor of incomes, in case of assessments made by him, may correct such error at any time before the tax becomes delinquent by certifying the tax properly due, or if no tax is due, by certifying that fact to the state treasurer. Whereupon such treasurer shall enter upon the tax roll the words "Reduced to .... dollars," or "Increased to .... dollars," or "Canceled," "by direction of the assessor of incomes," or "by direction of the department of taxation," as the case may be, and shall be required to account in his settlement with the county and local treasurers only for the amount appearing on the roll as corrected. [*1933 c. 367 s. 3; 1943 c. 20*]

71.25 Corporate tax evasion prevented. (1) When any corporation liable to taxation under this act conducts its business in such a manner as either directly or indirectly to benefit the members or stockholders thereof or any person interested in such business, by selling its products or the goods or commodities in which it deals at less than the fair price which might be obtained therefor, or where a corporation, a substantial portion of whose capital stock is owned either directly or indirectly by another corporation, acquires and

disposes of the products of the corporation so owning a substantial portion of its stock in such a manner as to create a loss or improper net income, the department may determine the amount of taxable income of such corporation for the calendar or fiscal year, having due regard to the reasonable profits which but for such arrangement or understanding might or could have been obtained from dealing in such products, goods or commodities.

(2) For the purpose of this chapter, whenever a corporation which is required to file an income tax return, is affiliated with or related to any other corporation through stock ownership by the same interests or as parent or subsidiary corporations, or whose income is regulated through contract or other arrangement, the department of taxation may require such consolidated statements as in its opinion are necessary in order to determine the taxable income received by any one of the affiliated or related corporations. [*1943 c. 20*]

Note: Subsection (1) is not applicable if the intercorporate 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. Subsection (2) 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 (1). Curtis Companies, Inc. v. Tax Commission, 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 Commission, 215 W 293, 254 NW 544.

The tax commission, where an intercorporate agreement falls within the description of (1), 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. Burroughs Adding Machine Co. v. Tax Comm., 237 W 423, 297 NW 574.

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 jurisdiction 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 Power 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. Department of Taxation, 246 W 396, 17 NW (2d) 596.

Sales of automobiles in Michigan by a corporation's Wisconsin branch held subject to income tax. Reassessment under this section does not deprive a taxpayer of property without due process. The computation of the 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 M. Co. v. Milwaukee, 48 F (2d) 801.

71.26 Surtax on incomes. (1) In addition to the income tax imposed by sections 71.01 to 71.26, inclusive, and the surtax imposed by section 5 of chapter 5 of the laws of the special session of 1919, there shall be levied, collected, and paid upon the incomes of all individuals, copartnerships and fiduciaries, except as otherwise provided by law, a surtax on taxable income assessable under the provisions of chapter 71 or any amendment that may hereinafter be made to chapter 71, computed as follows: From the normal tax computed pursuant to subsection (1) of section 71.06, deduct the exemption provided for in section 71.05 or 71.095 and thirty-seven dollars and fifty cents, and divide the remainder by six.

(2) In addition to the income tax imposed by sections 71.01 to 71.26, inclusive, and the surtax imposed by section 5 of chapter 5 of the laws of the special session of 1919, there shall be levied, collected, and paid upon the incomes of corporations, joint stock companies or associations, or common law trusts, except as otherwise provided by law, a surtax on taxable income assessable under the provisions of chapter 71 or any amendment that may hereinafter be made to chapter 71, computed as follows: From the normal tax computed pursuant to subsection (2) of section 71.06 deduct seventy-five dollars and divide the remainder by six.

(3) The surtax provided for herein shall be based upon the taxable income assessable as hereinafter defined, and shall apply to the income received during the calendar year ending December 31, 1920, or corresponding fiscal year, and to the taxable income assess-

able annually thereafter, and shall be assessed and collected in the same manner as the income taxes provided for in chapter 71, except as otherwise herein provided.

(4) The term "taxable income assessable" as used in this section shall be construed to mean the amount to which the rates provided for in section 71.06 are applied in the computation of the income taxes provided for in chapter 71.

(5) In the collection of said surtax the tax collector shall give his separate receipt therefor.

(6) The whole amount collected as surtax shall, through the same channel as other income taxes are paid, be paid into the state treasury, and section 71.19 shall not apply to said surtax. The amount of said surtax herein imposed is hereby levied and shall be collected as herein set forth and shall be paid into the general fund of the state treasury and set apart for the retirement deposit fund and the contingent fund as provided in this act. The state treasurer shall, in the same manner as other income taxes are remitted and paid, annually remit and pay to the city treasurer of each city of the first class in which a teachers' annuity and retirement fund is maintained under the provisions of section 38.24, forty per cent of the amount of said tax levied and collected from the taxpayers in such city, and it shall be the duty of the city treasurer of such city to pay the whole amount, so remitted and paid, into the general fund of such teachers' annuity and retirement fund of such city to constitute a part of said fund.

(7) Whenever in any year the receipts from the surtax herein provided for shall not be sufficient to provide the necessary moneys to carry out the provisions of this act, the deficit shall be paid out of the general fund of the state treasurer, and if in any year such surtax provides more money than is needed, such excess shall be paid into the general fund of the state treasury. [*1931 c. 67 s. 51; 1931 c. 453 s. 2; 1933 c. 159 s. 17*]

71.27 Refund of excess supertax. Whenever it shall be certified to the state treasurer by the department of taxation as to corporations, joint stock companies and associations or by the proper assessor of incomes as to copartnerships, individuals or fiduciaries that excess payment has been made for the soldiers' bonus tax or soldiers' educational surtax or teachers' retirement fund surtax within 6 years next preceding the date of such certificate, then the said state treasurer shall within 5 days after receipt of such certificate draw an order against the fund in the state treasury into which such excess was paid, reimbursing such payor for the amount of such excess payment so certified. Provided, however, that after January 1, 1927, such excess payments of surtaxes may be certified only for the period during which corrections in assessments may be made under section 71.115. [*1931 c. 67 s. 166; 1933 c. 450 s. 4; 1943 c. 20*]

71.35 Instalment payment; and compromise of delinquent tax. (1) Any taxpayer who is unable to pay the full amount of his delinquent income taxes may apply to the department of taxation in the case of corporations and to the assessor of incomes in the case of other persons to pay such taxes with interest and penalties in instalments. Such application shall contain a sworn statement of the reasons such taxes cannot be paid in full and shall set forth the plan of instalment payments proposed by the taxpayer. Upon approval of such plan by the assessor of incomes or the department and the payment of instalments in accordance therewith collection proceedings with respect to such taxes shall be withheld; but on failure of the taxpayer to make any instalment payment, the department shall proceed to collect the unpaid portion of such taxes in the manner provided by law. Each instalment when made shall be applied first in discharging penalty and interest and other lawful charges accrued to the date of payment and the balance applied on the principal of the tax, an additional interest shall be computed only on the principal amount of the tax remaining due.

(2) Any taxpayer may petition the department of taxation in the case of corporations or the assessor of incomes in the case of other persons to compromise his delinquent income taxes including the penalties and interest thereon. Such petition shall set forth a sworn statement of the taxpayer and shall be in such form as the department shall prescribe and the department or assessor may examine the petitioner under oath concerning the matter. The assessor, in case the petition is to him, shall indorse on said petition his recommendations concerning such compromise and shall transmit the same to the department of taxation. If the department finds that the taxpayer is unable to pay the taxes, penalties and interest in full it shall determine the amount of taxes he is able to pay and shall enter an order reducing such taxes, penalties and interest in accordance therewith. Such order shall provide that such compromise shall be effective only if paid within 10 days. The department or its collection agents upon receipt of such order, a copy of which in case of persons other than corporations shall be forwarded to the assessor, shall accept payment in accordance therewith. The department or the assessor shall thereupon enter the unpaid portion of the principal amount of such taxes on the next credit roll and make appropriate record of the unpaid amount of penalties and interest accrued to the date of such order.

If within 3 years of the date of such compromise order the department or assessor shall ascertain that the taxpayer has an income or property sufficient to enable him to pay the remainder of the tax including penalty and interest the department shall reopen said matter and order the payment in full of such taxes, penalties and interest.

Before the entry of such order a notice shall be sent to the taxpayer by registered mail advising of the intention of the department of taxation to reopen such matter and fixing a time and place for the appearance of such taxpayer if he desires to be heard in regard thereto. Upon entry of such order the department of taxation shall, in the case of persons other than corporations, forward a copy to the assessor and the department or assessor shall make an entry of the principal amount of such taxes ordered to be paid on the next tax roll and such taxes shall be immediately due and payable upon entry upon such roll and shall thereafter be subject to the interest provided by paragraph (f) of subsection (3) of section 71.10, and the department shall immediately proceed to collect the same together with the unpaid portion of penalty and interest accrued to the date of the compromise order.

(3) The provisions of subsections (1) and (2) shall apply only to income taxes which shall have become delinquent on or before December 31, 1945.

(4) The following clause contained in subsection (3) of section 71.18 is repealed in so far as it is in conflict with any of the provisions of this section: "except the provisions for the compromise or cancellation of illegal taxes and the refund of moneys paid thereon."

(5) If any delinquent income tax has been referred by the department to the attorney-general in order to effect collection of same and it shall appear to said attorney-general, after having fully investigated the matter, that it would be to the best interest of the state to compromise said tax, the attorney-general may make a written recommendation to the department stating the terms upon which he believes the tax should be compromised and his reasons therefor. After receipt of such recommendation the department shall notify the attorney-general of its approval or disapproval of such recommendation, and if approved the attorney-general may thereupon enter into a stipulation with the taxpayer providing for the compromise of such tax on the terms set forth in said recommendation and upon compliance therewith by the taxpayer the tax shall be fully discharged. The attorney-general shall furnish the department with a copy of such stipulation, and the department or its agents charged with the collection of income taxes may accept payment of such tax in accordance with the terms of such stipulation and upon payment being made shall enter the unpaid portion of said tax on the next credit roll. The provisions of this subsection shall be in addition to all other powers of the attorney-general and the department of taxation with respect to compromise or settlement of income taxes.

(6) As used in this section, "principal amount" or "principal" of the tax means the tax and interest added thereto in accordance with subsection (3) of section 71.06 and subsection (7) of section 71.09. [*1933 c. 467 s. 1; 1937 c. 32; Spl. S. 1937 c. 1 s. 3, 4; 1939 c. 229; 1943 c. 20, 369; 1945 c. 80*]

Note: This section does not authorize tax commission to cancel delinquent income taxes even where petitioner makes affidavit of no assets. 22 Atty. Gen. 1007.

71.36 Collection of delinquent income taxes. (1) If any income tax be not paid within 30 days after the same becomes delinquent, the department of taxation shall issue a warrant to the sheriff of any county of the state commanding him to levy upon and sell sufficient of the taxpayer's real and personal property found within his county to pay such tax with the penalties, interest and costs, and to proceed upon the same in all respects and in the same manner as upon an execution against property issued out of a court of record, and to return such warrant to the department and pay to it the money collected, or such part thereof as may be necessary to pay such tax, penalties, interest and costs, within 60 days after the receipt of such warrant, and deliver the balance, if any, after deduction of lawful charges to the taxpayer.

(2) The sheriff shall within 5 days after the receipt of the warrant, file with the clerk of the circuit court of his county a copy thereof, unless the taxpayer shall make satisfactory arrangements for the payment thereof with the department of taxation, in which case, the sheriff shall, at the direction of the department, return such warrant to it. The clerk shall docket the warrant as required by section 270.745, and thereupon the amount of such warrant, together with interest as provided by section 71.10 (3) (f) shall become a lien upon the real property of the taxpayer against whom it is issued in the same manner as a judgment duly docketed in the office of such clerk. The clerk of circuit court shall accept, file and docket such warrant without prepayment of any fee, but the clerk shall submit a statement of such proper fees semiannually to the department of taxation covering the period from January 1, to and including June 30 and July 1 to and including December 31, and such fees shall then be paid by the state in the manner provided by section 71.36 (7), but the fees provided by section 59.42 (42) shall be added to the amount of such warrant and collected from the taxpayer when satisfaction or release is presented for entry;

provided, that in counties wherein the clerk is compensated otherwise than by salary such fees may be paid by the state in the manner provided by section 71.36 (7) and added to the amount of the warrant and collected as herein provided. The sheriff shall be entitled to the same fees for executing upon said warrant as upon an execution against property issued out of a court of record, to be collected in the same manner. Upon the sale of any real estate the sheriff shall execute a deed of the same, and the taxpayer shall have the right to redeem the said real estate as from a sale under an execution against property upon a judgment of a court of record.

(3) A like warrant may be issued to any agent of the department authorized to collect income taxes, and in the execution thereof and collection of said taxes such agent shall have the powers of a sheriff, but shall not be entitled to collect from the taxpayer any fee or charge for the execution of such warrant in excess of actual expenses paid in the performance of his duty. When a warrant is issued to such agent he may proceed upon the same in any county of the state designated in the warrant, in the same manner as herein provided with respect to sheriffs of such counties.

(4) If a warrant be returned not satisfied in full, the department of taxation shall have the same remedies to enforce the claim for taxes, penalties, interest, and costs as upon a judgment against the taxpayer for the amount of same.

(5) The department, if it finds that the interests of the state will not thereby be jeopardized, and upon such conditions as it may exact, may issue a release, of any warrant with respect to any real property upon which said warrant is a lien or cloud upon title, and such release shall be entered of record by the clerk upon presentation to him and payment of the fee for filing said release and the same shall be held conclusive that the lien or cloud upon the title of the property covered by the release is extinguished. Any person desiring that such release be issued shall present to the department a written application in affidavit form requesting that the release be issued. Such application shall give the reasons for the request and shall clearly describe the property with respect to which the release is desired. In support of the request, the applicant shall furnish the department with proof sufficient to establish satisfactorily the fair market value of the property, the amounts, character and dates, both of execution and of record, of all incumbrances of record prior to the warrant lien, as well as the amount and character of any unrecorded incumbrances believed to be prior to the warrant lien, including information as to how and when all such incumbrances arose. Appropriate references shall be made to the pages and volumes of the recording books in which any such incumbrances have been recorded. The department may require a certified copy of any record referred to in such application to be furnished by the applicant, at his expense, from the officer in whose office such record is kept.

(6) When the taxes set forth in a warrant together with penalties and interest to date of payment and all costs due the department of taxation have been paid to it, the department shall issue a satisfaction of the warrant and deliver or mail it to the taxpayer and the warrant shall be satisfied of record by the clerk upon presentation to him of such satisfaction and payment by the taxpayer of the fees due such clerk. When such warrant has not been paid or discharged, but the taxes for which such warrant was issued have been canceled or credited, the department shall issue a satisfaction of the warrant and file it with the clerk and said warrant shall be immediately satisfied of record by such clerk. When such warrant has not been paid or discharged but the enforcement of same would, in the opinion of the department, result in depriving the taxpayer of a substantial right, the commission may issue a release of said warrant and file same with the clerk who shall immediately make an entry of same of record, and it shall be held conclusive of the extinguishment of the warrant and all liens and rights created thereby, but shall not constitute a release or satisfaction of the taxes for which such warrant was issued.

(7) All fees and compensation of officials or other persons performing any acts or functions required in carrying out the provisions of this section, except such as are by the provisions of this section to be paid to such officials or persons by the taxpayer, shall, upon presentation to the department of taxation of an itemized and verified statement of the amount due, be paid by the state treasurer upon audit by the secretary of state on the certificate of the commissioner of taxation and charged to the proper appropriation for the department of taxation. No public official shall be entitled to demand prepayment of any fee for the performance of any official act required in carrying out the provisions of this section.

(8) The state may be made a party defendant in any action to foreclose a mortgage, land contract, or other lien upon any real property affected by such warrant lien, and the summons may be served by delivering a copy to the attorney-general or leaving it at his office in the capitol with his assistant or clerk. But no judgment for the recovery of money or personal property or costs shall be rendered against the state in any such action.

(9) The provisions of this section shall be in addition to all other methods for the collection of income taxes, and the department of taxation may exercise the powers vested in

it by virtue of subsection (20) of section 73.03, section 73.04, and subsection (9) of section 70.64 or any of the powers vested in it by virtue of any other section of the statutes for the purpose of enforcing collection of income taxes. [*1935 c. 519; Spl. S. 1937 c. 1 s. 2, 3, 4; 1943 c. 20, 323*]

Cross Reference: See 270.745 on delinquent income tax docket.

Note: Clerk of circuit court should charge fees for filing and docketing income tax warrants, in accordance with 59.42 (1) and (2). 25 Atty. Gen. 110.

Income tax warrants need be entered by clerk of circuit court only in delinquent income tax docket. 59.42 (4) and (37) do not apply to income tax warrants. 25 Atty. Gen. 246.

Delinquent income tax warrant should be issued in name of state of Wisconsin. Filing of transcript of delinquent income tax warrants with proper officer operates as quasi-garnishment of wages of public employe. Return on delinquent income tax warrant should be made to both clerk of court and tax commission. Principal of delinquent income tax continues to bear interest after docketing at rate provided by 71.10, (3) (f). In foreclosing mortgage against debtor in delinquent income tax warrant state should be made party. 25 Atty. Gen. 526.

Clerk of circuit court of Milwaukee county is entitled to charge same fees in respect to income tax warrants as any other clerk of circuit court as provided by 59.42 (42), Stats. 1937. 26 Atty. Gen. 615.

Clerk of court paid salary must collect fees for filing delinquent income tax warrant from taxpayer at time such warrant is satisfied or released. 71.36 (7) applies only where clerk is not paid on salary basis. In so far as 59.43 and 71.36 (2) conflict, latter controls. 28 Atty. Gen. 168.

State proceeding under 71.36 cannot reach firemen's pension by order of court in supplementary proceedings but can reach pension only by proceeding under 304.21. 28 Atty. Gen. 220.

71.37 Jeopardy assessments. The department of taxation may also proceed under section 71.36 for the collection of any additional assessment of income taxes or surtaxes, after notice thereof has been given under section 71.12 and before the same shall have become delinquent, when it has reasonable grounds to believe that the collection of such additional assessment will be jeopardized by delay. In such cases notice of the intention to so proceed shall be given by registered mail to the taxpayer, and the warrant of the department of taxation shall not issue if the taxpayer within 10 days after such notice furnishes a bond in such amount, not exceeding double the amount of the tax, and with such sureties as the department of taxation shall approve, conditioned upon the payment of so much of the additional taxes as shall finally be determined to be due, together with interest thereon as provided by paragraph (a) of subsection (3) of section 71.06. Nothing in this section shall affect the review of additional assessments provided by sections 71.12, 71.14, 73.01 and 73.015 and any amounts collected under this section shall be deposited with the state treasurer and disbursed after final determination of the taxes as are amounts deposited under paragraph (a) of subsection (6) of section 71.10. [*1935 c. 519; 1939 c. 412; 1943 c. 20*]

[71.50] (Ch. 15, Laws 1935, as amended) Sec. 3 of ch. 15, Laws 1935, **emergency inheritance tax**, was renumbered 72.74 by ch. 490, Laws 1943. See Revisor's Note to 72.74. All other parts of ch. 15 are omitted. They may be found by reference to the session laws or to the 1941 and earlier editions of the statutes.

[71.60] (Ch. 505, Laws 1935, as amended) Sec. 1 of ch. 505, **emergency surtax**, is omitted because it has expired. Subsection (3) of said sec. 1, created by ch. 74, Laws 1943, sets up a **"post-war rehabilitation trust fund,"** consisting of the proceeds of the surtax on 1942 incomes. Said subsec. (3) was renumbered 20.037 and amended by 1945 c. 293 and 580. Sec. 3 of ch. 505, **privilege dividend tax**, was renumbered 71.61 by ch. 490, Laws 1943.

71.61 Privilege dividend tax. (1) For the privilege of declaring and receiving dividends, out of income derived from property located and business transacted in this state, there is hereby imposed a tax equal to 3 per cent of the amount of such dividends declared and paid by all corporations (foreign and local), except those specified in section 71.05 (1) (d) and (g), after September 26, 1935* and prior to July 1, 1947. Such tax shall be deducted and withheld from such dividends payable to residents and nonresidents by the payor corporation.

(2) Every corporation reporting its income under chapter 71 upon a calendar year basis shall on or before January 31, 1946, make return of its dividend payments on the forms prescribed by the department of taxation and make remittance to the department of taxation of privilege dividend taxes deducted and withheld from dividends paid during the period July 1, 1945, to December 31, 1945. Every corporation reporting its income under chapter 71 upon a fiscal year basis shall, on or before the last day of the first month following the close of such year, make return of its dividend payments

*__Revisor's Note:__ September 26, 1935 is the publication date of the original act imposing a privilege tax on dividends (sec. 3, ch. 505, laws of 1935). The rate then established was 2½ per cent "of such dividends declared or paid . . . after the passage and publication of this act and prior to July 1, 1937." The rate was changed to 3 per cent by ch. 198, laws of 1939, published June 30, 1939. See sec. 2 of that act as to what dividends were affected by the change. Many other amendments have been made to this law; see history note to 71.61.

on the forms prescribed by the department of taxation and make remittance to the department of taxation of privilege dividend taxes deducted and withheld from dividends paid between July 1, 1945, and the close of its fiscal year. Thereafter all corporations required to deduct and withhold any tax under this section shall make return and remittance of such taxes to the department of taxation on or before the last day of the first month following the close of their fiscal or calendar years.

(3) Every such corporation hereby made liable for such tax, shall deduct the amount of such tax from the dividends so declared.

(4) In the case of corporations doing business within and without the state of Wisconsin, such tax shall apply only to dividends declared and paid out of income derived from business transacted and property located within the state of Wisconsin. The amount of income attributable to this state shall be computed in accordance with the provisions of chapter 71. In the absence of proof to the contrary, such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin under the provisions of chapter 71, for the year immediately preceding the payment of such dividend. If a corporation had a loss for the year prior to the payment of the dividend, the department of taxation shall upon application, determine the portion of such dividend paid out of corporate surplus and undivided profits derived from business transacted and property located within the state.

(6) The provisions of this section shall not apply to dividends declared and paid by a corporation out of its income which it has reported for taxation under the provisions of chapter 71, to the extent that the business of such corporation consists in the receipts of dividends from which a privilege dividend tax has been deducted and withheld in the distribution thereof to its stockholders. Dividends paid by a subsidiary corporation to a parent corporation, both of which corporations are organized under the laws of Wisconsin, shall not be subject to the tax herein imposed, provided the subsidiary and its parent report their income for taxation under the provisions of chapter 71 on a consolidated income return basis, or both corporations report separately.

(7) For the purposes of this section dividends shall be defined as in section 71.02, except that the tax herein imposed shall not apply to stock dividend or liquidating dividends.

(8) The tax hereby levied, if not paid within the time herein provided, shall become delinquent and when delinquent shall be subject to a penalty of 2 per cent on the amount of the tax and interest at the rate of one-half per cent per month until paid.

(9) The tax hereby imposed shall, when collected by the department of taxation, be paid by it into the state treasury and shall be used to provide rehabilitation for returning veterans of World War II, construction and improvements at state institutions and other state property, and post-war public works projects to relieve post-war unemployment.

(10) Except as they are inconsistent with this section, the provisions of paragraph (b) of subsection (3) of section 71.06, sections 71.09 and 71.10 to 71.17, subsection (3) of section 71.18, sections 71.36, 71.37, 73.01 and 73.015 of the statutes shall apply to the tax imposed by this section, but the discount provisions of paragraph (c) of subsection (3) of section 71.10 shall not apply. [*1935 c. 505 s. 3; 1935 c. 552; 1937 c. 283; 1937 c. 309 s. 3; 1939 c. 198; 1939 c. 412 s. 4; 1939 c. 535 s. 1a; 1941 c. 63 s. 3; 1943 c. 20; 1943 c. 367 s. 2; 1943 c. 368; 1943 c. 490 s. 15; 1945 c. 159, 333*]

Note: The tax imposed by sec. 3, ch. 505, Laws 1935, as amended by ch. 552, Laws 1935, on the transaction by which corporate dividends are declared and received out of income derived from property located or business transacted within the state, and requiring the corporation to deduct and withhold the tax from the dividend to each stockholder, is an excise or privilege tax on the transaction involved of transferring the dividends from the corporation to its stockholders, and is valid. State ex rel. Froedtert G. & M. Co. v. Tax Commission, 221 W 225, 265 NW 672, 267 NW 52.

Ch. 15, Laws 1935, levying an emergency relief tax on dividend income of persons received in 1933 from domestic corporations is not violative of section 1, Amendment XIV, U. S. Constitution. Welch v. Henry, 226 W 595, 277 NW 133.

The Froedtert case, 221 W 225, is now the law. That case was overruled as to foreign corporations in J. C. Penney Co. v. Tax Comm., 233 W 286, 289 NW 677, but the decision in the last cited case was overruled by the U. S. supreme court Dec. 16, 1940 in State of Wisconsin v. J. C. Penney Co., 61 Sup. Ct. Rep. 246; 311 U. S. 435.

On remand of the Penney case from the supreme court of the United States, 311 U. S. 435: The tax imposed by sec. 3, ch. 505, Laws 1935, as amended, "for the privilege of declaring and receiving" corporate dividends out of income derived from property located and business transacted within the state is an excise or privilege tax rather than an income tax, and so considered the tax is valid as applied to the declaration of dividends by a foreign corporation, and the state has jurisdiction to levy the tax, to the extent that the dividend represents income earned within the state, even though the dividend was declared under the law of another state and the transaction of declaring the dividend took place within another state where the disbursement was made and the recipient of the dividend was not a Wisconsin resident. In determining to what extent dividends declared by a corporation doing business within and without the state represent income earned within the state, the provision that such dividends shall be presumed to have been paid out of earnings of such corporation attributable to Wisconsin for the year immediately preceding the payment of such dividend "in the absence of proof to

the contrary," is valid and the taxpayer is required to go forward with the evidence, but the presumption ceases when evidence is introduced which rebuts it. J. C. Penney Co. v. Tax Comm., 238 W 69, 298 NW 186.

Where a manufacturing corporation sold its products at less than normal market prices to a stockholder-parent corporation, the benefit thereby conferred on such stockholder-customer was not a "dividend" so as to be subject to the privilege dividend tax imposed by ch. 505, Laws 1935, as amended. Northwest Engineering Corp. v. Dept. of Taxation, 241 W 324, 6 NW (2d) 198.

Under the provision in sub. (6) of sec. 3, ch. 505, Laws 1935, as amended by ch. 552, Laws 1935, [71.61 (6)] where a Wisconsin holding corporation received dividends attributable only partly to Wisconsin income and, consequently, under sub. (4), a privilege dividend tax had been deducted and withheld only on that part, the entire amount of the dividends subsequently declared and paid by the holding corporation out of such dividend income is not exempt but only such part thereof as was previously subjected to the tax is exempt. Comet Co. v. Department of Taxation, 243 W 117, 9 NW (2d) 620.

A stockholder is not entitled to recover from a corporation an amount withheld by the corporation from dividends on preferred stock and paid to the state on account of dividend privilege taxes, since the specific requirements of the act imposing the privilege dividend tax, held to be valid, are that the tax be withheld by the corporation and deducted from the dividend payable to a stockholder. Blied v. Wisconsin Foundry & Machine Co., 243 W 221, 10 NW (2d) 142.

Section 3, chapter 505, Laws 1935, as amended by ch. 552, Laws 1935, so-called privilege dividend tax law, does not apply to national bank association shares. 25 Atty. Gen. 182.

Payments made by a corporation of the tax levied by the Wisconsin Dividends Tax Act (1935 c. 505, s. 3; c. 552) are not deductible from gross income for federal income tax purposes. The payments were not deductible under section 23 (c) (d) of the Revenue Act of 1934. The payments were not deductible under (c) as "taxes paid" since within the meaning of applicable treasury regulations the tax was not "imposed" on the corporation; nor were the payments deductible under (d) as "taxes imposed upon a shareholder of the corporation upon his interest as shareholder which are paid by the corporation without reimbursement from the shareholder" since within the meaning of the section the tax was not "paid by the corporation without reimbursement from the shareholder." Wisconsin Gas Co. v. U. S. 322 U. S. 526.