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(FORM UPDATED: 08/11/2010)

# WISCONSIN STATE LEGISLATURE ...
# PUBLIC HEARING - COMMITTEE RECORDS

## 2005-06

(session year)

## Senate

(Assembly, Senate or Joint)

## Committee on ... Job Creation, Economic Development and Consumer Affairs (SC-JCEDCA)

## COMMITTEE NOTICES ...

- Committee Reports ... **CR**
- Executive Sessions ... **ES**
- Public Hearings ... **PH**

## INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

- Appointments ... **Appt** (w/Record of Comm. Proceedings)
- Clearinghouse Rules ... **CRule** (w/Record of Comm. Proceedings)
- Hearing Records ... bills and resolutions (w/Record of Comm. Proceedings)
  (**ab** = Assembly Bill) (**ar** = Assembly Resolution) (**ajr** = Assembly Joint Resolution)
  (**sb** = Senate Bill) (**sr** = Senate Resolution) (**sjr** = Senate Joint Resolution)
- Miscellaneous ... **Misc**

* Contents organized for archiving by: Mike Barman (LRB) (August/2012)

## Senate

# Record of Committee Proceedings

## Committee on Job Creation, Economic Development and Consumer Affairs

**Senate Bill 518**

Relating to: various duties of the Department of Revenue, including issuing declaratory judgments, conducting audits and assessments, asserting liability, allowing claims for refunds, awarding the costs of litigation to a prevailing party, imposing penalties related to a taxpayer's negligence, calculating interest on unpaid amounts, and requiring the exercise of rule-making authority.

By Senators Kanavas, Darling, Stepp, Grothman, Schultz, Brown, Olsen and Roessler; cosponsored by Representatives Strachota, Gard, J. Fitzgerald, Huebsch, Jensen, Wood, Hundertmark, Nischke, Mursau, Freese, Lothian, Krawczyk, Montgomery, Lamb, Kreibich, Towns, Gunderson, Ballweg, Loeffelholz, Vos, Albers, LeMahieu, Jeskewitz, F. Lasee, Pettis, McCormick and Musser.

January 23, 2006 — Referred to Committee on Job Creation, Economic Development and Consumer Affairs.

February 7, 2006 — **PUBLIC HEARING HELD**

Present: (4) Senators Kanavas, Zien, Reynolds and Lassa.
Absent: (1) Senator Decker.

Appearances For

- Ted Kanavas, Brookfield — Senator
- Pat Strachota, Madison — Representative, WI State Assembly
- Cynthia Rooks, Milwaukee — Harley-Davidson
- Kevin Scheunemann, Kewaskum — Dairy Queen Association
- Andrew Salamone, Milwaukee — CarSpot.com
- John Austin, Pewaukee
- Don Millis, Sun Prairie
- Jeff Schoepke, Madison — WMC
- Steve Baas, Milwaukee — MMAC
- Jeremy Shepherd, Madison — Wisconsin Bankers Association
- Charlie Miller, Mukwonago — Citizen's Bank of Mukwonago

Appearances Against

- None.

Appearances for Information Only

- Jeanine Kissinger, Hartland

Registrations For

- Alice O'Connor — WI Institute of CPAs

- Brandon Scholz, Madison — Wisconsin Grocers Association

<u>Registrations Against</u>
- Diane Hurdt, Madison — DOR

February 9, 2006 **EXECUTIVE SESSION HELD**

Present: (4) Senators Kanavas, Zien, Reynolds and Lassa.
Absent: (1) Senator Decker.

Moved by Senator Zien, seconded by Senator Reynolds that **Senate Bill 518** be recommended for passage.

Ayes: (3) Senators Kanavas, Zien and Reynolds.
Noes: (1) Senator Lassa.
Absent: (1) Senator Decker.

PASSAGE RECOMMENDED, Ayes 3, Noes 1

James Michel
Committee Clerk

# Record of Committee Proceedings

## Joint committee on Finance

**Senate Bill 518**

## SENATE BILL 518 (LRB -3610)

An Act to repeal 77.59 (3m); to amend 71.82 (1) (a), 71.82 (1) (b), 71.82 (1) (c), 71.82 (2) (a), 71.82 (2) (b), 71.82 (2) (c), 71.82 (2) (d), 71.83 (1) (a) 2., 71.83 (1) (a) 3., 71.84 (1), 71.84 (2) (a), 71.84 (2) (c), 71.90 (1), 71.90 (2), 71.91 (6) (d) 1., 71.91 (6) (e) 3., 71.91 (6) (f) 5., 71.91 (6) (g) 2., 73.01 (4) (e) 2., 73.03 (25), 77.59 (4) (a), 77.59 (8m), 77.60 (1) (a), 77.60 (1) (b), 77.60 (2) (intro.), 77.60 (3), 77.60 (4), 77.60 (5), 77.96 (5), 78.68 (1), 78.68 (2) (intro.), 78.68 (3), 227.12 (3), 227.41 (1), 227.41 (3), 227.41 (4), 227.485 (2) (a), 227.485 (3), 227.485 (5), 227.485 (7), 227.485 (10) (intro.) and 803.08; and to create 73.015 (3), 73.14, 227.12 (4), 227.41 (5) and 227.485 (3m) of the statutes; relating to: various duties of the Department of Revenue, including issuing declaratory judgments, conducting audits and assessments, asserting liability, allowing claims for refunds, awarding the costs of litigation to a prevailing party, imposing penalties related to a taxpayer's negligence, calculating interest on unpaid amounts, and requiring the exercise of rule-making authority. (FE)

**2006**

| | | | |
|---|---|---|---|
| 01-23. | S. | Introduced by Senators **Kanavas**, **Darling**, **Stepp**, **Grothman**, **Schultz**, **Brown**, **Olsen** and **Roessler**; cosponsored by Representatives **Strachota**, **Gard**, **J. Fitzgerald**, **Huebsch**, **Jensen**, **Wood**, **Hundertmark**, **Nischke**, **Mursau**, **Freese**, **Lothian**, **Krawczyk**, **Montgomery**, **Lamb**, **Kreibich**, **Towns**, **Gunderson**, **Ballweg**, **Loeffelholz**, **Vos**, **Albers**, **LeMahieu**, **Jeskewitz**, **F. Lasee**, **Pettis**, **McCormick** and **Musser**. | |
| 01-23. | S. | Read first time and referred to committee on Job Creation, Economic Development and Consumer Affairs | 547 |
| 02-07. | S. | Fiscal estimate received. | |
| 02-07. | S. | Public hearing held. | |
| 02-09. | S. | Executive action taken. | |
| 02-14. | S. | Report passage recommended by committee on Job Creation, Economic Development and Consumer Affairs, Ayes 3, Noes 1 | 596 |
| 02-14. | S. | Available for scheduling. | |
| 03-08. | S. | Placed on calendar 3-9-2006 by committee on Senate Organization. | |
| 03-09. | S. | Read a second time | 738 |
| 03-09. | S. | Senate substitute amendment 1 offered by Senator Kanavas **(LRB s0585)** | 738 |
| 03-09. | S. | Senate amendment 1 to Senate substitute amendment 1 offered by Senator Kanavas **(LRB a2775)** | 738 |
| 03-09. | S. | Referred to joint committee on Finance | 738 |
| 04-24. | S. | Placed on the April 2006 Extraordinary Session call by committee on Senate Organization | 790 |
| 05-18. | S. | Failed to pass pursuant to Senate Joint Resolution 1 | 866 |

## Vote Record
# Committee on Job Creation, Economic Development and Consumer Affairs

Date: 2/7/2006
Moved by: Zien  Seconded by: Reynolds

AB ______ SB 518 Clearinghouse Rule ______
AJR ______ SJR ______ Appointment ______
AR ______ SR ______ Other ______

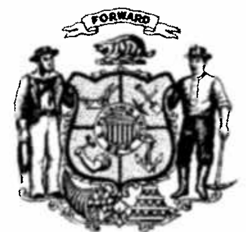
A/S Amdt ______
A/S Amdt ______ to A/S Amdt ______
A/S Sub Amdt ______
A/S Amdt ______ to A/S Sub Amdt ______
A/S Amdt ______ to A/S Amdt ______ to A/S Sub Amdt ______

Be recommended for:
☒ Passage ☐ Adoption ☐ Confirmation ☐ Concurrence ☐ Indefinite Postponement
☐ Introduction ☐ Rejection ☐ Tabling ☐ Nonconcurrence

| Committee Member | Aye | No | Absent | Not Voting |
|---|---|---|---|---|
| **Senator Ted Kanavas, Chair** | ☒ | ☐ | ☐ | ☐ |
| **Senator David Zien** | ☒ | ☐ | ☐ | ☐ |
| **Senator Thomas Reynolds** | ☒ | ☐ | ☐ | ☐ |
| **Senator Julie Lassa** | ■ | ☒ | ☐ | ☐ |
| **Senator Russell Decker** | ☐ | ☐ | ☒ | ☐ |
| **Totals:** | ____ | ____ | ____ | ____ |

☐ Motion Carried ☐ Motion Failed

WISCONSIN STATE LEGISLATURE



*Testimony of*

Jeremey Shepherd

**Representing the Wisconsin Bankers Association**

*Before the*

Senate Committee on Job Creation, Economic Development & Consumer Affairs

*in*

Support of Senate Bill 518

February 7, 2006

Chairman Kanavas and Members of the Senate Committee on Job Creation, Economic Development and Consumer Affairs, my name is Jeremey Shepherd. I am the director of legislative affairs at the Wisconsin Bankers Association. With me today is Mr. Charlie Miller, Chief Financial Officer of Citizens Bank of Mukwonago. Mr. Miller and I are testifying today in support of Senate Bill 518 (SB 518), relating to various duties of the Department of Revenue.

*The Wisconsin Bankers Association (WBA) is the state's largest financial industry trade association, representing 300 commercial banks and savings institutions, their nearly 2,300 branch offices and 27,000 employees.*

WBA is here today in support of legislation that will level the playing field for taxpayers with the Wisconsin Department of Revenue (WDOR). SB 518 offers taxpayers the right to challenge WDOR on its guidance, audit and appeal procedures. We believe this legislation provides the tools necessary for business and individual taxpayers to be able to effectively fight increasingly aggressive tax collection tactics that have turned predatory in recent years.

An example of WDOR's aggressive behavior is the issue of out-of-state banking subsidiaries. Wisconsin began allowing its banks to form out-of-state subsidiaries in the 1980s, because other states didn't tax government bonds that banks are required to hold, putting Wisconsin banks at a competitive disadvantage. Following the advice of WDOR in the 80's, many banks created these out-of-state subsidiaries in order to compete with banks in other states.

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Since that time, WDOR has asked the Legislature twice to change its tax laws regretting their initial ruling because of state budget shortfalls. Both times, the Legislature rejected it. Despite not having the consent of elected officials, WDOR has decided to interpret the rules as they see fit and have aggressively been auditing banks for the past couple of years.

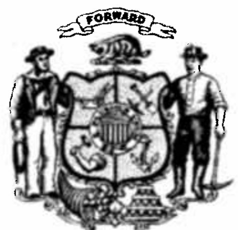
To summarize, banks had asked WDOR for the rules in writing on the out-of-state subsidiary issue and were giving a ruling that allowed banks to use out-of-state subsidiaries. Now, WDOR has changed the rules retroactively without any action by the legislature.

As of today, 158 banks have made the business decision to sign settlement agreements with WDOR rather than spend precious capital and energy to fight WDOR in court. But the fight continues, and not just for the remaining banks who have not settled.

WBA's goal in pushing for these needed reforms in SB 518 is to repair and protect the state's business climate by making WDOR more accountable and to create a consistent regulatory environment that reflects current law. We believe the guidance, audit and appeal provisions in this bill will provide businesses and individual taxpayers with the regulatory certainty that they deserve. A *Milwaukee Journal Sentinel* editorial stated it best: "Bureaucrats enforce laws; they don't enact them."

We appreciate your consideration of our comments, as well as those of the business community who testified today. WBA urges you to support SB 518 and continue your outstanding efforts on economic development and innovative initiatives, like Invest Wisconsin. We need state government to be a partner, not a regulatory hindrance, in helping Wisconsin businesses remain strong and successful. It's that kind of vibrant business climate that will inevitably produce the kinds of high-paying jobs we so desperately need in our great state.

WISCONSIN STATE LEGISLATURE



**To:** **Senate Committee on Job Creation, Economic Development and Consumer Affairs**

**From:** **Don Millis, Partner**
**Michael Best & Friedrich LLP**

**Date:** **Tuesday, February 7, 2006**

**Re:** **Support of Senate Bill 518**

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Thank you for the opportunity to testify here today. I appear today in my individual capacity to urge the Committee to recommend passage of Senate Bill 518. I am a partner in the law firm of Michael Best & Friedrich LLP, primarily representing individuals and businesses in tax disputes. I was previously a member and chairperson of the Wisconsin Tax Appeals Commission for 9 years. My experience as both member of the Tax Appeals Commission and as an advocate for taxpayers gives me a unique perspective on the proposals contained in SB 518. In the interest of full disclosure, I should also confess that I am a member of the Wisconsin Association of Manufacturer's and Commerce Technical Tax Advisory Committee that had some involvement in the development of SB 518.

At the outset, please note that SB 518 should not be considered a partisan bill. The problems that SB 518 is designed to address have existed for a number of years under both Republican and Democratic administrations. Let me also state that that the majority of the individuals employed by the Wisconsin Department of Revenue are dedicated public servants who honestly and sincerely attempt to enforce the tax laws in a fair and equitable manner. However, just as the framers of our Constitution understood that it was necessary to have a series of checks and balances to hold even the most benign and well-intentioned institutions accountable, so too is it important for the Department of Revenue to be bound by a series of checks and balances that promote fairness between the Department and taxpayers of all sizes. This is what SB 518 does and why I support it.

Let me highlight just a few of the problems SB 518 was designed to address. Take a situation in which a taxpayer has been assessed a tax by the Department of Revenue. The taxpayer researches the assessment and discovers that the assessment imposed by the Department of Revenue is contrary to one of the Department's own administrative rules. The taxpayer might then point this out to the Department. Imagine the frustration when a Department official acknowledges that taxpayer is correct but nevertheless insists that the rule is wrong but that the Department's new position is right and that the taxpayer must now pay the taxes, interest and penalty owed under this new view of the law. I think most of us would believe that this is a grossly unfair situation.

However, this can and does happen to taxpayers because the law currently makes it very difficult to hold the Department of Revenue to the guidance and rules that it promulgates. Recently I was negotiating with a Department of Revenue attorney and I pointed out that a transaction at issue was deemed to be exempt by one of the Department's own rules. This attorney then promptly pointed out that the attorney believed the rule was incorrect and in fact if the case came before

the Tax Appeals Commission, the attorney was going to argue that the rule was wrong. My feeling is that if the Department determines that one of their rules is incorrect the proper step is to fix the rule not disregard the rule adversely to taxpayers.

Therefore, SB 518 prevents the Department from taking a position which is adverse to a taxpayer if that position is contrary to its own guidance or its own rules. This provision does not prevent the Department from recognizing its own errors and publishing guidance or a rule to correct the situation and then prospectively enforcing that new guidance or rule.

Let me highlight another issuen that is addressed by SB 518. Often one business will be subject to multiple audits over the years. Problems arise when the Department changes its view from audit to audit without advance warning. Specifically, there have been situations in which the Department in one audit will determine that a particular transaction or attribute is not taxable, but in a successive audit, after the taxpayer has relied upon the Department's forbearance, the Department will take a different position, now determining that that same transaction or attribute is taxable. This can be especially unfair in the sales tax context because if a taxpayer, in reliance upon a past audit, does not collect sales taxes it is now impossible for that taxpayer to go back to its customers and collect the sales tax after the Department has changed its mind. SB 518 addresses this by allowing taxpayers to rely upon the results of past audits. This is a very limited right and only applies to the actual taxpayer that went through the audit or related entities.

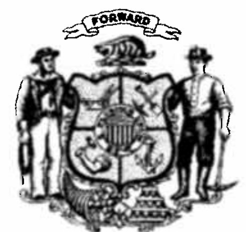
Let me address a few drafting issues. SB 518 changes the burden of proof on the imposition of the negligence penalty. Rather than have the taxpayer prove he or she was not negligent, the Department would bear the burden of proving negligence. The Department of Revenue fiscal estimate assumes that this provision would not allow the imposition of a negligence penalty unless the matter goes before the Tax Appeals Commission and states this will cost the state in excess of $11 million annually. I do not believe this is what SB 518 provides and it is certainly not the intent. The intent is that the Department could continue to impose negligence penalties but that when the matter comes to the Commission, the Department would face this burden. SB 518 could be amended to make the intent even clearer.

There is also then impression that SB 518 would preclude a retailer from refunding the sales tax to a consumer when the consumer returns an item for a refund. Again, I do not believe SB 518 stands for this. Nevertheless, I believe that the affected provisions can be amended to give greater assurance to all concerned.

I have been involved in discussions with officials from the Department and they have highlighted some other issues. I appreciate the sincerity and candor with which these officials have voiced their concerns. I believe that there is enough common ground that the concerns of all involved can be resolved. I am prepared to work with the authors, the Committee and the Department to iron out these differences.

Thank you again for this opportunity to testify.

WISCONSIN STATE LEGISLATURE



REPRESENTING WISCONSIN BUSINESS

**Wisconsin Manufacturers & Commerce**

**Memo**

| | |
|---|---|
| **TO:** | **Senate Committee on Job Creation, Economic Development and Consumer Affairs** |
| **FROM:** | **Jeff Schoepke, Director of Tax & Corporate Policy** |
| **DATE:** | **February 7, 2006** |
| **RE:** | **Support for Assembly Bill 518** |

Senate ?

Thank you for the opportunity to provide comments today on Senate Bill 518 (SB 518), landmark tax collection reform legislation. Wisconsin Manufacturers & Commerce (WMC) strongly supports this bill.

Wisconsin is one of the highest taxed states in America. It is all the more critical, therefore, that the Wisconsin Department of Revenue (DOR) and our tax collection system provide fairness, justice and impartiality for taxpayers. Unfortunately, that seems to be the exception rather than the rule as increasingly aggressive tax collection tactics have turned predatory in recent years. This has created a hostile environment for business.

Recently, WMC released a report entitled *Tax Collection in Wisconsin: Providing Fairness for Taxpayers*, which identifies specific problems and recommends specific tax procedure reforms to address those concerns. The report was developed with business survey data and information from focus groups and other trade associations and tax professionals. *Tax Collection in Wisconsin* found problems in three main areas: poor and inconsistent DOR guidance, aggressive tax audit practices, and the need for taxpayer appeal reforms. SB 518 includes many of these reforms.

Understanding the tax code is a difficult task; taxpayers, therefore, need good guidance from DOR to make certain they fully comply with the law. Unfortunately, DOR often gives inconsistent advice, fails to provide guidance on certain hot button issues, and gives tax "advice" in audits which it refuses to promulgate as a rule or publish for all taxpayers.

DOR also frequently disregards its own guidance and gives advice contrary to established law. Examples include DOR's imposition of sales tax on temporary help agencies and customized computer software.

If companies cannot rely on consistent, sound advice from the agency, and must file tax returns shooting at a "moving target," how are they to know if they are complying with the law?

SB 518 helps achieve the goal of reliable guidance, by requiring DOR to provide specific, written answers to specific tax questions (declaratory judgments) and by requiring DOR to promulgate administrative rules at the request of a taxpayer. SB 518 also provides that any taxpayer has the defense to an assessment or the denial of a refund based on guidance of any sort published by DOR. Taxpayers deserve good guidance and should be allowed to hold DOR to the advice is provides.

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Audit procedures generate the greatest degree of frustration from taxpayers, with coercive tactics causing grave concerns amongst business taxpayers. Different companies often receive different treatment for the same tax questions in separate audits. Auditors have also often changed positions from one audit to another for the same company.

Another particularly disturbing tactic is how DOR coerces taxpayers to agree to extend the statute of limitations on audits and/or waive their appeal and refund rights. This coercion happens under either an implicit or explicit threat of a larger than justifiable assessment. SB 518 ends this practice.

SB 518 also protects taxpayers that rely on past audit practices and reverse burden of proof on negligence penalties. Under current law taxpayers are "guilty" of owing a negligence penalty unless they can prove themselves innocent. Principles of American justice dictate that the burden should be on the accuser, not the accused.

Taxpayers also need a more level playing field for times when they want to challenge a decision by DOR. While the Wisconsin Tax Appeals Commission (TAC) is generally viewed as impartial and fair, it is often too difficult for taxpayers to get a case to the TAC as DOR officials obfuscate and delay.

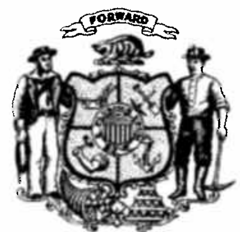
DOR will often "non-acquiesce" to commission decisions, meaning those decisions have no precedential value. It is time to eliminate costly delays in this process, and clarify that TAC decisions are "good law".

Taxes are the dominant political issue in this state and understandably so given Wisconsin has the fifth-highest taxes in the nation. DOR is raising business taxes even higher, however, through aggressive audits and new interpretations of the tax code. This must stop, as uncertainty leads to an unhealthy tax climate and hurts our ability to persuade companies to grow their businesses here.

SB 518 provides reasonable reforms to achieve this goal. Even if the criticisms leveled here against DOR are untrue, DOR should support this bill as eliminating the "chance" that coercive tactics could be employed. DOR should provide good guidance, and should not feel threatened by statutory requirements to do so. DOR should oppose predatory audit tactics, and should support efforts to eliminate them. DOR should also be supportive of an appellate process that allows fair hearing of taxpayer grievances.

Again, thank you for the opportunity to provide comments on SB 518 today. WMC strongly encourage the Committee on Job Creation, Economic Development and Consumer Affairs to swiftly recommend passage to the full Senate.

# WISCONSIN STATE LEGISLATURE



**Brandon Scholz - Wisconsin Grocers Association, Inc.**
**Testimony on SB 518**
**Senate Committee on Jobs Creation, Economic Development and Consumer Affairs**
**Tuesday, February 7, 2006 Brookfield Safety Building, Brookfield, WI**

Mr. Chairman, members of the committee, I'm Brandon Scholz, President of the Wisconsin Grocers Association representing the independent operators, chain stores, warehouse distributors and the hundreds of related companies and businesses of the grocery industry in Wisconsin.

I want to take this opportunity to thank the Chairman, Senator Kanavas and the members of the State Senate who are supporting SB 518, as well as State Representative Strachota and the members of the Assembly who support SB 518 and the Assembly companion, AB 968.

You may recall reading in WMC's Tax Collection In Wisconsin report, a paraphrased quote from a Wisconsin Department of Revenue auditor who, in to conduct an audit, introduced himself to a grocer as the "million dollar man" because he brings in more than a million dollars through fines and penalties each year for the Department.

If there ever was someone who epitomized the "Hello, I'm here from the government and I'm here to help you….," it has to be this fine gentleman from the Wisconsin Department of Revenue.

Try and put yourself in the shoes of a grocer who sits down with this auditor. Think you're going to get a fair shake? Are you relatively certain that the sales and use tax audit is going to go quickly? Most likely not.

Grocers like other retailers and businesses in Wisconsin work hard at complying with Wisconsin's sales and use tax laws. We have no interest in violating these laws and statutes; we want a clean bill of health when the auditor knocks on the door, we don't want to spend more than a year with this fella going through every transaction we've made with our customers and checking to see if we've recorded every bottle of toilet bowl cleaner we've used to cleaned the facilities for our customers.

One small mistake by a retailer can have significant financial consequences. For example, if they did not charge tax on a candy bar, and if they did charge tax, due to the high volume, the mistake can costs thousands of dollars, and that is just with a single store - imagine if you had two or three stores. We need correct and consistent information from the department.

And if we've made a mistake, we'll fess up, pay the fine, make sure it doesn't happen again and move on. Unfortunately, the auditors can take their time and are under no obligation to move the audit at a reasonable pace. Furthermore, they hold off on negotiating the fine or settlement on the use tax audit until the sales tax audit has been completed. Some of our members have told us that this could be more than a year between the conclusion of the two audits.

In July of 2004, we convened a number of members from our industry that had gone through sales and use tax audits. Let me read you a few snippets from that meeting:

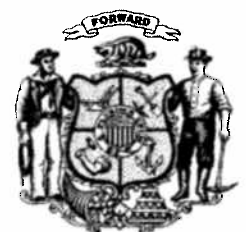
**GENERAL COMPLAINTS/COMMENTS**

- ⇒ Audits take many years
- ⇒ The interest rate is 12% if you have to pay DOR, but 9% if you get a refund.
- ⇒ There are no field people for DOR to provide warnings or assistance to retailers
- ⇒ When asked if an item is taxable or non-taxable, DOR will not provide a written response.
- ⇒ Responses are not consistent. There are conflicting analyses, even within DOR's items taxability.
- ⇒ The length of time an auditor can go back is too long (4 years)
- ⇒ One retailer was told that DOR auditors would no longer be providing credits for items that were taxed and are not-taxable.
- ⇒ The way coupons are taxed is not fair.
- ⇒ Better consideration as to time-table of the audit. We were audited over the 4th of July in 2001. This is our busiest time of year - We are a tourist area and also have our City's Yearly celebration on the 4th of July. Auditor was here in my office for 8 days.
- ⇒ Auditor should provide a detailed list of items that auditor will want before auditor arrives.
- ⇒ Better informed auditors about what is taxed. Auditor was not sure what items were to be taxed
- ⇒ Auditor audited one store, and assumed similar movement in all stores based on sales. This is not correct because: some stores do not even carry the product, sales mix varies from store-to-store; some stores display product, buy large quantities, others do not.
- ⇒ Auditor claimed all Atkins type products should be taxed as they are meal replacement items, which is not true.
- ⇒ Auditor used retail price at time movement was taken. This is wrong because: many items are sold at sale price, prices go up, new suppliers have different pricing structure
- ⇒ Auditor said, "items are taxable if I think they are" regardless of what others say.
- ⇒ State is very unclear in their definitions of grocery products and has no comprehensive list.

As I indicated, we are every pleased that Senator Kanavas has moved forward with SB 518 as we believe it will resolve some of the problems that plague grocers as they attempt to comply with very complicated sales and use tax laws and the audit process.

Thank you for your consideration today.

WISCONSIN STATE LEGISLATURE



**State of Wisconsin** • DEPARTMENT OF REVENUE

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***Jim Doyle***
*Governor*

***Michael L. Morgan***
*Secretary of Revenue*

Jobs Creation and Economic Development Committee, February 7, 2006 Committee Hearing,

**Senate Bill 518 - Various duties of the Department of Revenue, including issuing declaratory judgments, conducting audits and assessments, asserting liability, allowing claims for refunds, awarding the costs of litigation to a prevailing party, imposing penalties related to a taxpayer's negligence, calculating interest on unpaid amounts, and requiring the exercise of rule-making authority** (Senator Kanavas)

The bill is intended to provide greater clarity and certainty to taxpayers regarding their current and future tax liabilities. The bill imposes greater requirements on the Department of Revenue (DOR) to formally respond to taxpayer questions and greater constraints when conducting audits or negotiating settlements.

The bill will likely have many unintended effects as well. Consumers and small businesses, in particular, will be disadvantaged by many provisions of the bill. Some of the potentially adverse effects on consumers and small businesses as a result of the bill include:

- Reduced flexibility
- Less access to tax advice and guidance from DOR
- Reduced negotiations on audit assessments and more appeals
- More frequent and expanded audits
- Restrictions on sales tax refunds to consumers

The bill could reduce voluntary compliance and result in unequal tax treatment due to provisions related to reliance on past audits. DOR conducts limited scope audits only (particular deductions, credits, accounts, etc). The bill's direction that taxpayers may rely on audits to attest to all tax practices (even those not audited) will result in certain un-audited practices or items being exempt from tax even if Wisconsin law clearly subjects the items to tax.

RELIANCE ON PUBLISHED GUIDANCE

Under current law, positions taken by DOR are based on current statute, administrative rule or court cases. DOR believes that the current practice of relying on published guidance is good policy. DOR provides guidance in tax forms, instructions, publications, and the Wisconsin Tax Bulletin. DOR provides notice of changes in statutes, administrative rules, and court decisions through these same written communications.

The bill codifies current DOR practices wherein DOR is not allowed to take a position adverse to any taxpayer if that position is contrary to any rule that was in effect during the period of the audit, assessment, or claim or that is contrary to any guidance published by DOR prior to that period and not subsequently retracted, altered, or amended in any material way.

DOR currently practices the requirements of the bill with one proviso. While DOR publications and rules provide detailed interpretation of statutes and court cases, including examples, these written communications cannot address all sets of facts and situations. To provide assistance for individual situations, DOR informally responds to thousands of inquiries each year from taxpayers by telephone, email, and personal letters. This unpublished taxpayer assistance provides certainty to individuals and small businesses that might not otherwise seek assistance from tax professionals. Such assistance results in voluntary tax compliance.

To the extent that this bill provides that neither the taxpayer nor DOR can rely on these informal rulings when an activity or condition is found in audit, taxpayers will be forced to petition for formal letter rulings. Petitions for formal letter rulings are complex and often require expert legal and accounting assistance. This will increase the complexity and cost of the process for taxpayers. This will be particularly burdensome for small businesses and individuals. To the extent that the bill will result in an increase in petitions for private letter rulings, the bill may actually delay the response provided to taxpayers. Determining whether a published position has been changed in "any material way" will create taxpayer confusion and could give rise to litigation.

DOR expects this provision to result in an unknown GPR revenue loss. DOR would also need an additional 1.0 FTE to comply with this provision.

RELIANCE ON PAST AUDITS

Under current law, DOR performs audits of limited scope, e.g., office or field audits of a particular deduction, credit or account. Even in more extensive field audits, DOR rarely reviews the entire tax information of an entity. DOR performs sales and use tax audits by sampling, which means examining a very small percentage of an entity's transactions. As a result, DOR does not attest to the accuracy of all tax information of a taxpayer or its subsidiaries or related parties.

Also, while DOR may request information in an audit, the taxpayer decides what will be provided in response to requests. Again, DOR does not attest to the accuracy of tax information of a taxpayer or its subsidiaries or related parties.

Under the bill, a taxpayer subject to an assessment or audit determination by DOR, including any subsidiary, heir, assignee or related party of the person, is not liable for any amount owed if the liability is a result of a condition, activity, attribute, or transaction that was present in a prior audit or assessment and was not asserted by DOR in that prior audit or assessment. A taxpayer is not liable if a DOR employee involved in the prior audit or assessment knew or should have known of the condition prior to completing the prior audit or assessment.

Under the bill, the taxpayer is not free from liability if a subsequent rule, published guidance or statute clearly and unequivocally imposes a liability on the condition, activity, attribute or transaction present in the prior audit.

While this provision is intended to provide certainty to taxpayers, the bill fails to recognize constantly changing market and economic conditions. For example, a large retailer who adds thousands of new products daily may challenge the taxability of an item on the grounds that DOR did not adjust the item when it conducted a previous audit by a sample of transactions and

has not published a rule or guidance that clearly and unequivocally imposes the liability on the product by name.

As noted above, while DOR published guidance and rules provide detailed interpretation of statutes, they may not address all sets of facts and situations. Taxpayers have to share the responsibility of determining, or at least asking about, the taxability of products and services.

Because of the limited scope of audits, the sampling of transactions in sales and use tax audits, and the related party provisions, the bill will have a significant and negative impact on voluntary tax compliance and state GPR tax revenues. For example:

- An individual taxpayer is audited for his business deductions. The taxpayer's brother (related party) may challenge amounts owed on his individual income tax return in a subsequent audit if he claims that the liability is a result of transactions that occurred during the audit period of his brother and the law and published guidance do not clearly and unequivocally impose the liability.

- A retailer who is audited by sampling of sales and use tax transactions will not have to be concerned about collecting taxes on items that were in inventory of the retailer during the audit period but not reviewed by the auditor in the sample. The retailer will be relieved of tax liability in any subsequent audit if it can show that the law and published guidance do not clearly and unequivocally impose the tax.

- A subsidiary of a large multi-state retailer is audited. The large multi-state retailer (related party) can argue that it does not have to comply with the sales and use tax laws in any subsequent sales and use tax audit because its subsidiary was audited and the law and published guidance do not clearly and unequivocally impose the tax.

On the one hand, the bill provides taxpayers with greater certainty regarding what is and is not lawful as determined by the initial audit. On the other hand, rather than the limited audits under current practice, taxpayers may be subject to more expanded audits if DOR is to attest to the accuracy of all taxpayer information after an audit.

The bill could result in unequal tax treatment for different taxpayers engaged in the same activity. One taxpayer could receive preferential tax treatment relative to another taxpayer solely on the basis of a prior audit. For example, it may not have come to the attention of the auditor that a business was engaged in a taxable service; therefore, no audit determination was made on the tax liability of that service. Thus, the business could argue it is not subject to tax on the basis of the audit. However, competitors of that business would be liable for the tax as provided under statute.

Other taxpayers not subject to audit may successfully challenge the unequal tax treatment resulting from a prior audit. The bill could result in a significant number of taxpayers receiving tax treatment that is in conflict with other provisions of current law. Thus, audit determinations could effectively determine tax treatment outside of the legislative process.

The bill will likely result in increased litigation over what DOR should have "reasonably" known in a given audit. Moreover, protection from future audits for a "related party of the person" subject to the prior audits appears excessively broad and also subject to litigation.

DOR expects this provision to result in an unknown and potentially large GPR revenue loss.

WAIVER OF TAXPAYER RIGHTS

Under current law, in the course of an audit, DOR and taxpayers often enter into agreements prior to an assessment. This is particularly the case in audits involving large, multi-state companies and is typically at the company's request. The ability to appeal by either party is always waived in closing agreements for purposes of finality. Without such finality, there is little incentive for either party to enter into an agreement.

Under the bill, the time that DOR has to act on the issuance of any assessment or audit determination may not be extended. Also, mutual agreements prior to assessment are prohibited. The bill invalidates any pending or future agreement or waiver of a taxpayer's right to appeal a determination or to file a claim for a refund if the agreement or waiver is executed prior to DOR issuing an appealable assessment or audit determination.

Extensions of statues of limitations are executed because the taxpayer wishes to reschedule the audit or seeks more time to review his or her records or because pending court cases may resolve the issues. Taxpayers may seek an extension so that the Wisconsin audit commences after a federal audit or at a time more convenient for the tax preparer. Of 45 states reviewed, all but three allow waivers to extend statutory limits.

Because DOR would, under the bill, be unable to extend an audit, assessment or claim for refund determination, DOR would be less able to accommodate taxpayers' requests for rescheduling an audit. Moreover, claims for refunds could no longer be held in audit pending the outcome of a court decision. DOR would have to deny the claim. The taxpayer would be forced to appeal to hold the claim open. To the extent that extensions are not allowed, DOR audits may cover fewer years to ensure that the determination is complete within the statutory time limits; as a result any particular audit may involve increased contact between the taxpayer being audited and DOR.

The bill effectively eliminates the ability for taxpayers to enter into agreements with DOR prior to an assessment being issued. Many taxpayers request a settlement agreement prior to an assessment to avoid having the assessment affect their financial reporting. These taxpayers would be adversely affected to the extent that the department may be less likely to negotiate settlements where controversial issues are involved, resulting in more assessments and more appeals.

DOR expects this provision to result in an unknown and potentially large GPR revenue loss.

FRAUD AND NEGLIGENCE DETERMINATIONS

The provision of the bill as drafted will effectively eliminate all tax fraud and negligence penalties. Under current law, DOR assesses penalties only for willful negligence as specified by law; on average, such penalties are imposed on approximately 21% of field audits. Fraud penalties are typically only assessed in a small number of criminal cases.

The bill would prevent DOR from imposing a fraud or negligence penalty on a taxpayer for negligence or for otherwise filing an improper return unless DOR proves by a preponderance of the evidence that the taxpayer's action was clearly contradicted by statute, rule, or DOR

guidance. The statute, rule, or guidance would have had to be established prior to the period for which the penalty is imposed.

To the extent that penalties cannot be proved until the matter is before the Tax Appeals Commission (TAC) or a higher court, no negligence or fraud penalties could be assessed unless there is a finding by the TAC or a higher court to this effect. However, attorneys arguing before TAC or other courts do not have authority to impose negligence and fraud penalties. Thus, the bill may effectively eliminate the ability of DOR to impose fraud or negligence penalties. As a result, the bill could eliminate approximately $11.3 million in penalty collections annually (GPR revenue loss).

DOR would support a change in the law that imposes on the department the burden of producing evidence of negligence. Such a change would mirror the department's current practice.

EQUITABLE RECOUPMENT – APPLYING EXPIRED CREDITS & LIABILITIES

Current case law provides that DOR may offset a taxpayer's credits and liabilities from the same year, income tax period or audit period.

Under the bill, a person could offset a liability with a refund of any tax or fee administered by DOR regardless of whether the time for claiming the refund had expired or if the year and transaction related to the liability are the same as the refund. Current law typically provides closure to tax years and periods after 4 years. (The person could not apply a refund from a time prior to the audit or assessment period.)

As a result of the bill, future liabilities of the state would be uncertain. The GPR revenue loss is unknown.

DOR supports a statutory change that codifies case law. This would enable a taxpayer to offset tax liabilities with stale or expired tax credits within the same year, income tax period, or audit period.

SALES TAX REFUNDS

Under current law, a buyer who paid an incorrect amount of sales tax on the purchase of an item at retail may apply for a refund of the tax. Typically, the buyer would apply to the seller. A buyer may apply for a refund of sales tax with DOR if the amount of the claim is at least $50 or if the buyer is being field audited, the seller has ceased doing business or the seller may no longer file a claim.

The bill requires that all refund claims be filed with DOR. Sellers would not be liable to any buyer for amounts that the seller collected and paid to the department.

While the language is unclear, sellers may no longer be required to refund any sales tax collected on overcharges or returned items. Consumers who return an item or who are overcharged for an item could be required to get a refund for the item from the retailer and a refund from DOR for the tax paid on the item. This would create delays and additional paperwork for the consumer.

Consumers seeking small refunds may fail to do the necessary paperwork, thereby foregoing a refund due. The bill appears to conflict with the Taxpayer Friendly Bill of 2005 (Act 49) that requires sellers to refund sales tax to buyers if the tax should not have been charged and imposes a penalty when refunds are not made timely.

Under the bill, the seller would still be able to claim a sales tax refund from DOR. To the extent that the seller would not be liable for remitting the refund to the buyer, consumers would have no recourse, since DOR had already refunded the tax to the seller.

The bill will result in an increase in administrative costs for DOR, including the need for an additional 4.5 FTE. (See fiscal note).

CLASS ACTION LAWSUITS INVOLVING TAX REFUNDS

The bill prohibits all pending and future class action lawsuits against the state or any other party if the relief sought by the plaintiffs includes the refund of any tax administered by the state.

TAX APPEALS COMMISSION - NONACQUIESCENCE

Under current law, DOR can choose not to appeal a ruling by the TAC. DOR can instead file a notice of nonacquiescence with the commission. As a result of this filing, the TAC decision is binding on the parties, but DOR is not bound by the TAC's legal reasoning in future cases. DOR files these notices very infrequently.

Under the bill, although DOR may file a notice of nonacquiescence, the decision may be cited by the commission and the courts in future cases.

TAX APPEALS COMMISSION - RECOVERY OF COSTS

Under current law, an individual, small nonprofit corporation or small business that prevails in a contested legal matter with a state agency may seek the recovery of costs from the State of Wisconsin unless the hearing examiner determines that the losing state agency was substantially justified in taking its position or that special circumstances existed to make the award unjust. The recovery of these costs are allowed only for individuals whose federally adjusted gross income was less than $150,000 in each of the three preceding years and for small businesses with less than $5 million in gross sales. These provisions apply to contested matters with all state agencies.

Under the bill, the recovery of costs incurred in TAC proceedings is not limited to small businesses or individuals with federal adjusted gross income below $150,000. Businesses of any size would be able to seek recovery of costs. However, no recovery of costs may be awarded if the TAC determines that DOR was substantially justified in taking its position or that special circumstances existed to make the award unjust.

Current limits on cost recovery are modeled after the federal Equal Access to Justice Act, which Congress passed with the aim of reducing "the disparity in resources between individuals, small businesses, and other organizations with limited resources and the Federal Government". It is unclear why the bill seeks to provide wealthy individuals and larger businesses with advantages meant to reduce disparities for those with limited resources.

To the extent that DOR is, in almost all cases, found to be justified in its position, the expansion of the cost recovery will have no fiscal effect. However, it could increase state administrative costs associated with increased litigation. It is unlikely DOR would be subject to this provision, but DOR considers the expansion of the cost recovery to be bad public policy.

INTEREST RATES

Under current law, DOR requires interest payments at 12% per year on any amount that is past due but not delinquent. Amounts that are delinquent are charged interest at 18% per year. Amounts owed by DOR to taxpayers are subject to interest at 9% per year.

The bill would tie interest rates charged for late and delinquent payments to the two-year U.S. treasury rate as of December 1 of each year. Under the bill, non-delinquent amounts owed by taxpayers to DOR and amounts owed by DOR to taxpayers would be subject to annual interest rates equal to the two-year U.S. Department of the Treasury rate plus 4%. Under the bill, delinquent amounts would be charged interest at the two-year U.S. Department of the treasury rate plus 10%.

The bill provides taxpayer relief for late and delinquent payment of taxes and establishes interest charges more in line with market conditions; however, the bill is unclear how interest charges would be calculated for a period of more than one year.

The revenue loss of reducing the rate applied to late delinquent payments is expected to be between $18 million and $23.5 million annually.

DOR would incur one-time programming costs of $572,700 to conform to these changes.

PROMULGATING RULES AND DECLARATORY RULINGS

Under current law, taxpayers can file a petition with a state agency, including DOR, to have that agency promulgate a rule. Agencies must respond to the petition within a reasonable amount of time. Agencies may deny the petition but must provide reasons for the denial.

Also under current law, any state agency, including DOR, may, upon petition, issue a declaratory ruling regarding the applicability of any rule or statute it enforces. Agencies are required, within a reasonable time after receipt of the petition, to either deny the petition or schedule a hearing on the petition. The agency may deny the petition but must provide reasons for the denial. These rulings bind the agency and all parties on the statement of facts alleged, unless it is altered or set aside by a court. Appeal of a ruling is made through the Circuit Court.

Under the bill, if a petition filed with DOR alleges that DOR has established a standard but has not promulgated a rule to adopt that standard, DOR must begin the process to promulgate the rule within 90 days of receiving the petition and must submit the rule to the legislature within 180 days of receiving the petition.

The bill establishes that DOR must deny or schedule a hearing on a petition within 30 days of receipt. Moreover DOR may deny the petition only for procedural reasons. DOR must hold a hearing and issue a ruling within 90 days after receipt of the petition. Appeal of a DOR ruling is made through the Court of Appeals.

While the bill expedites the process for administrative rules and declaratory rulings through tighter deadlines, it will require DOR to promulgate rules and issue rulings for every petition, regardless of its merit.

With no ability to deny a petition for either an administrative rule or declaratory ruling, DOR would be required to go through the entire administrative rules process (including public hearings) on potentially frivolous issues. For example, DOR would be forced to address by either administrative rule or by a declaratory ruling the contention that wages earned in Wisconsin are not taxable if the federal government is not on the gold standard or that wages are in exchange for work and thus not taxable income. DOR would also be required to defend any declaratory ruling in the courts thus expending scarce state resources on issues declared by state and federal courts as nonsensical.

To avoid this, DOR recommends that such petitions be allowed unless the issue is under appeal, is frivolous, is based on facts that cannot be substantiated or is governed by the Internal Revenue Code.

To the extent that this provision increases frivolous petitions, DOR expects an unknown increase in GPR costs and the need for 1.0 additional FTE.

*Administrative Impact/Fiscal Effect*

The bill would result in a significant increase in DOR workload, particularly with respect to the administration of sales tax refunds, the review and revision of all prior DOR publications and the increase in future published guidance. Annual costs would increase $537,300 related to salaries and benefits for 6.5 FTEs and other administrative costs. One time costs of $572,700 will also be required to make programming changes to conform to the variable interest rate calculations.

See the attached February 1 memo for the Department's technical concerns with the language of the bill.

The attached table summarizes the fiscal effect and administrative cost of the bill.

*DOR Position*

While DOR supports changes to improve the efficiency, effectiveness and fairness of tax administration, this bill, as drafted, does not accomplish those goals. It will dramatically reduce DOR's ability to effectively enforce tax laws and ensure fairness and equity in the tax system. Moreover, many of the provisions in the bill are not taxpayer friendly, particularly to consumers and small business. In particular, the bill would result in:

- Unequal tax treatment for taxpayers
- Reduced flexibility
- Less access to tax advice and guidance from DOR
- Reduced negotiations on audit assessments
- More frequent and expanded audits
- Restrictions on sales tax refunds to consumers

DOR opposes this bill as drafted but would welcome the opportunity to seek better solutions to many of the issues raised.

Prepared by: Rebecca Boldt, (608) 266-6785
February 6, 2006

RB:skr
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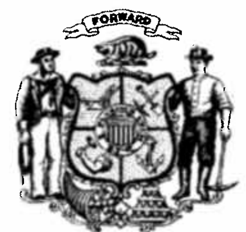
| SB 518 PROVISION | ESTIMATED FISCAL EFFECT |
|---|---|
| Reliance on Published Guidance | GPR revenue loss of unknown amount<br><br>1.0 FTE |
| Reliance on Past Audits | GPR revenue loss of unknown amount |
| Waiver of Taxpayer Rights | Unknown GPR revenue loss |
| Elimination of Penalties | GPR revenue loss of $11.3 million annually |
| Equitable Recoupment | GPR revenue loss of unknown amount |
| Sales Tax Refunds | Unknown<br><br>4.5 FTEs |
| Class Action Lawsuits Involving Tax Refunds | Unknown |
| Tax Appeals Commission – Nonacquiescence | Minimal GPR revenue loss |
| Tax Appeals Commission – Recovery of Costs | Minimal GPR revenue loss |
| Declaratory Rulings/Promulgating Rules | Could increase frivolous petitions<br><br>1.0 FTEs |
| Interest Rate Reduction | GPR revenue loss of between - $18 million and -$23.5 million annually for delinquent taxes.<br><br>$572,700 in one-time programming costs |

Source: Wisconsin Department of Revenue

WISCONSIN STATE LEGISLATURE



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February 8, 2006

State Senator Ted Kanavas
Chair, Senate Committee on Job Creation,
Economic Development and Consumer Affairs
Wisconsin State Senate
P.O. Box 7882
Madison, Wisconsin 53707

Dear Senator Kanavas:

Enclosed, please find a copy of the testimony I had hoped to present to the Committee at the hearing yesterday in Brookfield on SB 518.

I appreciate the number of bills the committee reviewed and the greater-than-anticipated number of people who attended and appeared at the hearing. Prior commitments in Madison forced me to leave the hearing after observing the proceedings for several hours.

The Wisconsin Grocers Association is grateful for your leadership on this issue and many of our members have experienced numerous problems with the Department of Revenue on the Sales and Use Tax issue.

We would be pleased to sit down with you, and individual members of the committee to discuss additional concerns we have regarding audit procedures and sales and use tax matters.

Thank you again for your efforts on this issue.

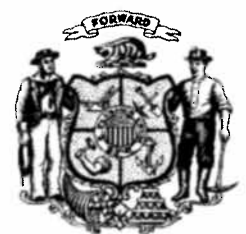
Sincerely,

Brandon Scholz
President & CEO

Attachment - Scholz Testimony SB 518

cc: Senator Dave Zien
Senator Tom Reynolds
Senator Julie Lassa
Senator Russ Decker
Representative Pat Strachota

# WISCONSIN STATE LEGISLATURE



**WNA**

PETER D. FOX
*WNA Executive Director*
Peter.Fox@wnanews.com

# WISCONSIN NEWSPAPER ASSOCIATION

*...world's oldest press association, established 1853.*

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PAT REILLY
The Dodgeville Chronicle

KATHY TOBIN
Tomahawk Leader

WNA Executive Director
PETER D. FOX

**February 10, 2006**

Senator Ted Kanavas, Chair
Committee on Job Creation, Economic Development and Consumer Affairs
Room 10 South
State Capitol
PO Box 7882
Madison, WI 53707-7882

Dear Senator Kanavas and Members of the Committee:

On behalf of the Wisconsin Newspaper Association (WNA), I am writing in support of **Senate Bill 518**. WNA is appreciative of Senator Kanavas' leadership in on this important issue.

For years, WNA members have viewed Wisconsin Department of Revenue (WDOR) field audits as unpredictable, arbitrary and, quite frankly, lacking in common sense. But on the other hand, the prospects of mounting a legal challenge against the WDOR and its domination of the appellate process were considered too daunting to be worth the time, expense and effort. It is a regrettable fact that Wisconsin businesses believed it better to pay what was considered to be unfair and unreasonable taxation rather than take on the WDOR.

Our purpose in writing is to provide the Committee on Job Creation, Economic Development and Consumer Affairs with specific examples of what we believe to be misconduct by WDOR that would be addressed and corrected if SB 518 becomes law.

Let me begin by explaining that the newspaper industry in Wisconsin is considered a manufacturing entity. In the early 1970s, our production process began a monumental change that continues today. We no longer use hot metal, Linotypes and other complicated machinery to put words and pictures on newsprint; today computers and custom software are integral components of our production process. It has been 30 years, but the reality of our business doesn't seem to be understood by WDOR despite our many efforts to demonstrate and explain those changes in hopes that knowledge might be helpful to the audit process.

WNA members understand that WDOR audits are a necessary activity to ensure businesses are compliant with tax codes and contributing to the local and state communities. However, audits that turn into fishing expeditions for even more revenue – including interest and penalties – discourage businesses from making further investments in Wisconsin or moving here from another state. And the unduly adversarial, dismissive and even arrogant stance taken by WDOR causes some Wisconsin businesses to consider moving or outsourcing to a more tax-friendly environment.

The following are comments from WNA members concerning audits of their businesses conducted by WDOR:

> "The hardest part of the pill to swallow is the department's willingness and aggressiveness to change their interpretation to suit their perceived revenue needs. For example, the production process used to extend through the packaging process. It now stops at the inserting machine. Repairs on the inserting machine are also taxable even though the equipment and the process is exempt. Some of this is spelled out and some of it is left to the auditor's discretion and becomes a bargaining issue. Typically, most controllers will give in on a few questionable interpretations simply to ward off the auditor expanding the scope of their audit."
>
> – and –
>
> "We were audited in June 2005. I was told that we … needed to fit the audit into a very short period of time. The proposed time of June is an extremely busy time of the year for the finance office because it is in the busiest part of our budgeting process. However, the auditor was not flexible in the time that the audit could be done because she said that everything on her end had to be wrapped up very quickly.
>
> "We received a letter in the mail stating that the audit would be conducted on fixed asset purchases and disposals, and packaging materials. We were to have all of the above item's supporting documentation pulled by the time of the audit. Upon the auditor's arrival, the documentation was reviewed and we were informed that they actually did not need documentation on production process asset purchases. Knowing this ahead of time would have saved us a lot of hours, especially during a time when we needed them to prepare our budget.
>
> "The auditor expanded the scope of the audit into purchases other than packaging materials and fixed assets. She randomly choose categories (office supplies, repairs & maintenance of computers, service contracts, etc.) to audit that were not on the original audit list. During the audit, we were receiving conflicting information and she had to check with her supervisor on numerous issues and questions that we had. **We still to this day** are receiving conflicting information regarding our commercial printing charges."

"The other issue that we dealt with during our audit is their determination that all of our editorial and creative graphic computers and systems were determined by the state to be part of the non-production process. In the past, we have always considered these to be part of the production process. We received no notification of this change in their opinion and we were then forced to back pay four years of penalties and interest on purchases, service contracts and repairs and maintenance for these computers and systems.

"When the auditor left, the audit itself was not finalized by the state until the end of September, even though we had to rush to accommodate them in June because they needed it wrapped up very quickly."

– and –

"Perhaps the biggest issue I've had with WDOR is that the department makes new tax-law interpretations related to the manufacturing exemption, and to my knowledge only communicates these interpretations as part of the audit process. This has been the case for the two Wisconsin sales tax audits I've been involved in. In both cases we were assessed interest and penalties on equipment purchases that had been considered exempt in previous audits but were now redefined as not part of production.

"Here is an example. A sales-tax exemption exists for personal property purchased for use in the manufacturing process; this 'manufacturing process' is pretty vaguely defined. During a 2005 audit, WDOR provided a clarification as to the start of the production process for creation of individual advertisements. Historically, our computer equipment used for ad production was considered exempt. During the recent audit, the auditor told us WDOR now defined ad production as 'creative' and not part of production. We tried to show from customer layouts that our graphics people were not creating ads but merely transferring written instructions into an electronic format suitable for publication. At the time of our audit, this interpretation had been in place for a number of years; WDOR was not willing to listen to any arguments supporting manufacturing exemption. In addition to being subject to back taxes, these purchases were assessed interest and penalties even though we were making good faith attempts to comply with tax laws that were consistent with past WDOR experience."

WNA concurs with the assessment given numerous times by other business groups and individuals that WDOR is "broken" in the sense that it does not know how to deal with its customers – the tax-paying citizens of our state. Issues that are being aired now have been present in both Republican and Democrat administrations; this emphatically is not a partisan issue. Rather, we believe it is a matter of an agency that has become insular and antagonistic toward the public it is supposed to serve with fairness, equity and honesty.

We are gratified to see this "well-known secret" finally achieving wide public attention. Our industry does not shirk its responsibilities but we wish to be treated with fairness in an atmosphere of mutual respect and understanding. What has emerged as a result of businesses talking with other business is the picture of a state agency disconnected with reality. Seemingly, many of the WDOR staff who conducted audits of WNA members don't ***want*** to discuss – much less understand – the changes our industry has undergone.

In summary, because the WDOR audit system is so fundamentally flawed and prejudiced against business taxpayers, our members have only two real options in reacting to these audits: either swallow hard and pay the assessment (and often penalities and fines) or pay much more for what can reasonably be expected to be a protracted legal battle on uneven ground. Key aspects of the relief we seek, which can come through enactment of SB 518, include:

- WDOR must exemplify fairness, impartiality and justice in its dealings with all citizens. Too often now, the agency is inconsistent, intransigent and arbitrary in applying its powers.
- Through its predatory audit process, WDOR is acting outside its authority by imposing new taxes on businesses. WDOR is a state agency, not the Legislature.
- Citizens deserve and have the right to expect consistent guidance and application of rules from WDOR. Currently, guidance is inconsistent among individual auditors, from location to location, and even from day-to-day. Baselines appear to move or evaporate at the individual discretion of WDOR representatives.
- Particularly in the area of customized software, WDOR guidance and decision-making is not in compliance with established law. Clear exemptions in the statutes and administrative code somehow shrink or disappear while the range of taxable items balloons.
- Unless the Legislature imposes a new tax or repeals an exemption, businesses should be able to rely on WDOR treatment in a previous audit communication.

Finally, WDOR leadership and staff must understand that the "collective personality" of the agency that has emerged is that of a close-minded bully reveling in its ability to wield its power. Business operations of WNA members have changed dramatically over the past 30 years or so. Continued innovation and productivity are keys to the success of our industry because we contribute to an overall healthy and vibrant Wisconsin. The slightest improvements in technology become an excuse to ignore past audits, exemptions and WDOR's own examples in the Administrative Code. The Wisconsin newspaper industry is willing to work cooperatively with the WDOR. But we are tired of fighting it with our hands tied behind our backs.

Sincerely,

Peter D. Fox
Executive Director

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*Executive Director*
Peter.Fox@wnanews.com

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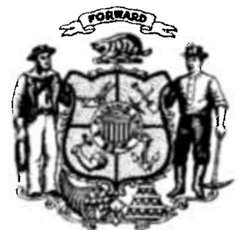
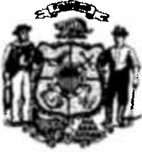
# WISCONSIN STATE LEGISLATURE





SB 518
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# State of Wisconsin • DEPARTMENT OF REVENUE

AUDIT BUREAU • 2135 RIMROCK RD., 5th FLOOR / Mail Area #5-257• MADISON, WISCONSIN 53705
TELEPHONE (608) 266-2772 • FAX (608) 261-4902 • http://www.dor.state.wi.us

## FIELD AUDIT QUESTIONNAIRE

### Summary of Taxpayer Responses for FYE June 30, 2005

Questionnaires Sent to Taxpayers..... 275
Number of Responses Received ....... 155
Response Rate................................. 56%

1. In making the appointment to begin the audit, did the auditor explain the scope of the examination?
   Yes – **100.0%** No – **0.0%**

2. Before starting or during the audit, did the auditor describe the procedures to be used?
   Yes – **96.7%** No – **3.3%**

3. Did the auditor adhere to the normal working hours of your business?
   Yes – **100.0%** No – **0.0%**
   If not, what hours did the auditor normally work? ____________________

4. Was the audit conducted in a businesslike manner?
   Yes – **96.7%** No – **3.3%**

5. Now think for a moment about fairness, but only in terms of how you feel the Wisconsin Department of Revenue has treated you and ***NOT*** in terms of how you feel about Wisconsin tax laws.

   Do you think you were treated fairly?
   Yes – **84.3%** No – **9.8%** Not Sure – **5.9%**

6. Did the auditor display a good knowledge of Wisconsin tax laws applicable to your business?
   Yes – **91.9%** No – **8.1%**

7. Was a proposed audit report submitted to you and fully explained at the conclusion of the audit?
   Yes – **97.3%** No – **2.7%**

8. Were you given sufficient time to respond to the proposed report?
   Yes – **98.0%** No – **2.0%**

9. Did the auditor explain appeal procedures?
   Yes – **92.7%** No – **7.3%**

Please explain all **"No"** responses below, and add any other information you wish to share with us about the auditor and how the audit was conducted.

**COMMENTS:**

________________________________________

________________________________________

________________________________________

________________________________________

**Name:** ____________________ **Title:** ____________ **Date:** __________