

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
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Our File No. 703

RULE REVIEW CHECKLIST

DATE RULE RECEIVED 5/15/81
DATE FOR REVIEW 5/26/81
DATE DUE 6/4/81

Adopted w/a hearing ✓
Adopted w/o a hearing _____
Temporary rule _____

Approved 6/3 Disapproved _____ Returned to Agency _____

Resubmitted _____ Due _____
Approved _____ Disapproved _____ Returned to Agency _____

Date filed w/Secretary of State 6/3

✓ Rule as Adopted

✓ Rule as Proposed see SR
✓ Amendments to Rules as Proposed

✓ Order Adopting 5.13.81 (combined w/ FofF)

✓ Notice of Intent to Solicit Outside Opinion
1.29.79

✓ Order for rulemaking
10.2.80 Date of Hearing

N/A Certificate of Board's Authorizing Resolution

✓ Notice of rulemaking
? Sufficiency

? Affidavit of Mailing Notice of rulemaking
8.26.80 At least 30 days prior to hearing/~~adoption~~

✓ Mailing list Certificate

✓ Publication in State Register
8.25.80 At least 30/~~20~~ days prior to hearing/~~adoption~~

✓ #1 Hearing Examiner's Report #2 HE Supplemental

✓ Chief Hearing Examiner's Report(s)
11.18.80 Approving H.E.'s Report
5.14.81 Approving agency action

✓ Agency's Findings of Fact combined with Order Adopting

N/A LCRAR Report or agency Affidavit

N/A Certificate of Board's Resolution Adopting Rules

✓ Order Approving Incorporation by Reference

✓ Statement of Need and Reasonableness

N/A Petition for Adoption of a Rule

✓ Record (includes transcript or tape, exhibits, comments received by agency, requests for a hearing, and other relevant materials)

✓ Certificate of Compliance w/Rulemaking Procedures

✓ Affidavit of Mailing Notice of Submission to Attorney General

✓ Notice of Submission to the Attorney General

✓ Petition for Reconsideration of Chief Hearing Examiner and HE
✓ #2 Supplemental Report of HE on Petition to Reconsider
✓ Supplemental Order of CHE

SF-00006-02

STATE OF MINNESOTA

DEPARTMENT ATTORNEY GENERAL

Office Memorandum

TO : CLYDE E. ALLEN, JR.
Commissioner of Revenue

DATE: June 3, 1981

ATTN : Dale Busacker, Income Tax Division

FROM : Jerry S. Anderson
Special Assistant
Attorney General

PHONE: 6-4692

SUBJECT: In the Matter of the Proposed Adoption of Proposed Amendments and New Rules Relating to Individual Income Tax and Property Tax Refund (13 MCAR Sections 1.6001-1.6004, 1.6020, 1.6030 and 1.6225

Enclosed herewith are the rules you have submitted for approval. These rules have been approved by this office and filed with the Secretary of State. Please note that they have not been filed with the State Register; this must be done promptly by your agency.

Upon receipt and before transmittal to your agency, however, it is important that you recheck these rules as to:

1. Affixation of stamps of the Attorney General and Secretary of State to the last page of the rules;

2. Coverage by these stamps of all rules submitted; and

3. Inclusion of all pages to the rules in the approved set.

If you have any questions in this regard, please contact me.

JSA:rjg

Enc.

cc: Susan Robertson
Duane Harves

AG copy

STATE OF MINNESOTA
DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED AMENDMENTS AND NEW RULES RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001-1.6004, 1.6020, 1.6030 AND 1.6225	FINDINGS OF FACT AND ORDER ADOPTING RULES

The above entitled matter came on for hearing before Jon L. Lunde, a hearing examiner appointed by the Chief Hearing Examiner, on the 2nd day of October, 1980 at 9 a.m. in Room 83, State Office Building, 435 Park Street, St. Paul, Minnesota, after proper notice required by Minnesota Statutes Section 15.0412, subd. 4 was served upon all persons, associations and other interested groups registered with the Department of Revenue for that purpose.

After affording interested persons an opportunity to present written and oral data, statements, and arguments, hearing all of the testimony, considering all of the evidence adduced and upon the records, files, and proceedings herein and applicable statutory standards or criteria, and confirming the need for and reasonableness of the above-captioned rules, and having now, therefore, reviewed the record of the hearing, including the exhibits and written materials submitted before the close of the record, the report and supplementary report of the hearing examiner, I do now adopt as my findings of fact in this matter, the findings of fact of the hearing examiner with the following two exceptions:

1. In his report on page 14 and his supplementary report on page 6 the hearing examiner found that I have no authority to adopt the proposed rule codified as 13 MCAR Section 1.6004, Part G. concerning nonresident athletes or in the alternative that I must adopt the duty days formula. I am withdrawing this part of this proposed rule from this package and I am not adopting it.

2. In his report on page 16 and in his supplementary report on page 8 the hearing examiner stated that the provision contained in proposed rule 13 MCAR Section 1.6030, Part B.1. must be changed to allow the taxpayer to reverse the nongame wildlife designation only when there is a mistake and not a change of intent. I have adopted the hearing examiner's finding with amendments to make the provision subject to easy and efficient administration. I have adopted a 90 day rule during which it will be presumed that a mistake was made by a taxpayer who is complaining that no designation was intended. This will avoid the very difficult question of ascertaining the taxpayer's actual intent. After 90 days it will be presumed that the taxpayer actually intended to make a gift and now has changed his mind. The taxpayer has waited more than three months to state that a mistake

has been made. The taxpayer has slept on his right to assert a mistake. However, two exceptions to the 90 day rule are provided in the proposed rule for taxpayers who were under a disability or who confused this designation with the estimated tax credit for the following year.

Now, therefore, it is ordered that these rules identified as rules of the Department of Revenue relating to Individual Income Tax and Property Tax Refund as published at State Register Volume 5, Number 8, pages 277 through 289, August 25, 1980 (5 S.R. 277-289) and as amended are adopted this 13th day of May, 1981, pursuant to authority vested in me by Minnesota Statutes Sections 290.52, 290.06, subd. 14, and 290A.20.

State of Minnesota
Department of Minnesota

Clyde E. Allen Jr.
CLYDE E. ALLEN, JR.
Commissioner of Revenue

Rules as Adopted

13 MCAR Section 1.6001 ~~2001(7)~~ Resident defined.

A. General statements.

1. The term "resident" means ~~any individual domiciled in Minnesota, and~~ any ~~other~~ individual person maintaining ~~an abode therein~~ a home in Minnesota during any ~~portion~~ part of a tax year who ~~shall~~ is, during ~~any portion~~ that part of such year, ~~have been~~ domiciled in Minnesota ~~within the state~~. The term "domicile" means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home.

2. ~~Residence, as defined in the Act, is practically synonymous with domicile.~~ The ~~residence~~ domicile of any person shall ~~is held to~~ be ~~in~~ that place in which ~~his~~ that person's habitation is fixed, without any present intentions of ~~removing~~ removal therefrom, and to which, whenever ~~he is~~ absent, ~~he~~ that person intends to return.

A person who leaves ~~his~~ home to go into another ~~state~~ jurisdiction for temporary purposes only is not considered to have lost ~~his~~ that person's ~~residence~~ domicile. But if a person ~~removes~~ moves to another ~~state~~ jurisdiction with the intention of remaining there permanently or for an indefinite time as a ~~place of permanent residence~~ home, ~~he~~ that person shall ~~be considered to~~ have lost ~~his~~ that person's ~~residence~~ domicile in this state. The presumption is that a person who leaves this state to accept a job assignment in a foreign nation has not lost that person's domicile in this state.

The presumption is that the place where a ~~man's~~ person's family ~~resides~~ is domiciled ~~shall be considered his residence~~ is that person's domicile.~~, and~~ The ~~residence~~ domicile of a ~~wife~~ spouse ~~is usually that of her husband~~ shall be the same as the other spouse, unless there is affirmative evidence to the contrary or unless the husband and wife are ~~permanently~~ legally separated or the marriage has been dissolved. When a ~~man~~ person has ~~taken up his~~ made a ~~abode~~ home at any place with the intention of remaining there and ~~his~~ the person's family neither ~~resides~~ lives there ~~with him~~ nor intends to do so, then ~~he~~ that person shall ~~be considered to~~ have established a ~~residence~~ domicile separate from that person's ~~of his~~ family.

The ~~residence~~ domicile of a single ~~man~~ person is ~~his~~ that person's usual ~~place of abode~~ home. In case of a minor child who is not emancipated, the ~~residence~~ domicile of the child's ~~father, or of the mother if the father is deceased~~ parents is the domicile of the child. The domicile of the parent who has legal custody of the child is the domicile of the child. A person who is a permanent resident alien in the United States may have a domicile in this state. The domicile of a member of the armed forces will be governed by the facts just prior to becoming a member of the armed forces unless the person takes the necessary steps to establish a new domicile.

3. The mere intention to acquire a new ~~residence~~ domicile, without the fact of physical removal, does not change the status of the taxpayer, nor does the fact of physical removal, without the

intention to remain, change ~~his~~ the person's status. The presumption is that one's domicile is the place where ~~he~~ one lives. An individual can have only one domicile at any particular time. A domicile once shown to exist is presumed to continue until the contrary is shown. An absence of intention to abandon a ~~residence~~ domicile is equivalent to an intention to retain the existing one. No positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile but such intention may be proved by acts and declarations, and of the two forms of evidence, acts ~~are generally conceded~~ shall be given more weight than declarations. A person who is temporarily employed within ~~the~~ this state does not acquire a ~~residence~~ domicile in ~~the~~ this state, if during such period ~~he~~ the person is domiciled without ~~the~~ this state.

B. The following items listed will be considered in determining whether or not a person is domiciled in this state:

1. Location of domicile for prior years.
2. Where the person votes or is registered to vote. ~~While the exercise of one's voting franchise is presumptive evidence of residence, such evidence may be overcome by a showing of the facts involved in the determination of residence.~~ Casting an illegal vote does not ~~of itself~~ establish ~~residence~~ domicile for income tax purposes.
3. Status as a student.
4. Classification of employment as temporary or permanent.
5. Location of employment.
6. Location of newly acquired living quarters whether owned or rented.

7. The present status of the former living quarters, i.e., was it sold, offered for sale, rented or available for rent to another.
8. Homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and the homestead status of the former living quarters has not been renewed.
9. Ownership of other real property.
10. Jurisdiction in which a valid driver's license was issued.
11. Jurisdiction from which any professional licenses were issued.
12. Location of the person's union membership.
13. Jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles.
14. Purchased resident or nonresident fishing or hunting licenses.
15. Whether an income tax return has been filed as a resident or nonresident.
16. Whether the person has fulfilled the tax obligations required of a resident.
17. Location of any bank accounts, especially the location of the most active checking account.
18. Location of other transactions with financial institutions.
19. Location of the place of worship at which the person is a member.
20. Location of business relationships and the place where business is transacted.
21. Location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member.

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22. Address where mail is received.

23. Percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota.

24. Location of jurisdiction from which unemployment compensation benefits are received.

25. Location of schools at which the person, the person's spouse or children attend, and whether resident or nonresident tuition was charged.

26. Statements made to an insurance company, concerning the person's residence, and on which the insurance is based.

Any one of the items listed above will not, by itself, determine domicile.

13 MCAR Section 1.6002 ~~2038(1) JOINT RETURNS.~~ Income tax returns for husband and wife.

A. The determination of whether an individual is married shall be made as of the close of the taxable year; except that if a surviving spouse does not remarry during the taxable year such determination shall be made as of the date of death. An individual shall not be considered to be married if the marriage has been dissolved or if they are legally separated or if they do not live together, unless the spouse is only temporarily away from home. No joint or combined return can be made if the husband and wife have different taxable years. In the case where one spouse dies, a joint or combined return may be filed if the surviving spouse has not remarried before the close of their taxable year.

~~Every person married and living with his spouse at the close of the taxable year must file a return if either of the following conditions exist.~~

~~(1)--The tax on his own taxable net income or the tax on the combined taxable net income of himself and his spouse exceeds the allowable specific credits as provided in M.S.A. 290.06; or~~

~~(2)--His gross income or the combined income of himself and his spouse exceeds $2,000.~~

~~See Reg. 2037(1).~~

~~If a husband and wife living together at the close of the taxable year each had separate income during the taxable year, they may either file a joint return or separate returns.--Regardless of whether a joint return or separate returns are filed, the total income of both spouses must be reported.--Example:--Gross income of the husband $5000, gross income of the wife $125.--The income of both the husband and wife must be reported either in a joint return or in separate returns.~~

B. A husband and wife may elect to file (1) a single return jointly (joint return), (2) separate returns, or (3) separately on one return ("combined" return).

C. If a husband and wife elect to each file a separate income tax return, or if they elect to file a combined return, each spouse must report that spouse's own federal adjusted gross income. On separate or combined returns, each spouse may claim only those deductions and credits that spouse is separately entitled to claim except that on separate or combined returns the married credit, or on a combined return,

itemized deductions, may be claimed in full by one spouse or may be divided between them in any manner. On separate or combined returns, deductions for which each spouse is equally liable and which are paid from a joint account may be considered as being paid by either spouse.

Income and losses from jointly held property must be divided based on percentage of ownership in the property. Income and losses from a partnership which operates a business must be reported on the basis of the partnership agreement. Income and losses from a business that is not governed by a partnership agreement must be reported on the basis of participation in and contributions to the partnership or joint business venture and this is determined according to the (1) percentage of contribution to the capital assets, (2) percentage of labor performed, and (3) percentage of participation in management decisions. Interest income from a joint bank account or jointly held bonds and dividends on jointly held stocks shall be divided equally unless it can be shown that a different allocation is more appropriate. A gain or a loss from the sale or exchange of a capital asset shall be reported by the spouse owning the capital asset. A gain or a loss from the sale or exchange of a capital asset owned jointly by the spouses shall be divided equally unless it can be shown that a different allocation is more appropriate.

D. If both husband and wife are residents of a community property state or nation, it is permissible for them to split their income and losses based on the law of their residence. Otherwise, it is not permissible for a husband and wife to split their income and losses or to assign it to the other spouse unless there is a business relationship or unless it is required under the provisions of the Internal Revenue Code.

E. The liability of each spouse on a separate return is limited to the tax liability on that return. If a combined return is filed and if later an adjustment is made to an item of income, or modification to income, which is attributable solely to one spouse, only that spouse is liable for any additional tax.

F. Where a husband and wife filed joint or combined returns and subsequently are no longer married within the definition of Part A., an amended return, claim for refund, or net operating loss or farm loss carryback claim filed by one of the former spouses shall be allowed if the item is attributable to that spouse to the extent of that spouse's tax liability. Where a joint return was filed, the spouse's tax liability shall be determined according to the following formula:

$$\frac{\text{Spouse's recomputed separate tax liability}}{\text{Both spouses' recomputed separate tax liability.}} \times \text{Recomputed joint tax liability} = \text{Spouse's share of joint tax liability}$$

The spouse's share of the joint liability is then subtracted from the spouse's contributions through withholding or estimated tax or other payments which were made to pay that joint liability. The amount of the refund to be made to the spouse cannot exceed the amount of the joint overpayment shown on the amended return or claim for refund. Where a combined return was filed, the spouse's tax liability shall be determined as if an amended combined return was filed.

When an amended joint or combined return is filed, items paid out of joint funds of the husband and wife shall be divided between the spouses to provide the greatest tax benefit to both spouses unless both spouses had previously elected another method. Joint estimated tax declarations shall be divided according to the provisions of

Income Tax Rule 2093(2). Where credits are not paid out of joint funds, the credit shall belong to the spouse who made the payment on which the credit is based. The homemaker credit and the married credit may be divided equally between the spouses. The homemaker credit and the dependent care credit are not allowed to be claimed on separate returns filed by a married couple.

When an amended joint or combined return or a claim for refund is filed under this part, no refund will be given to a spouse unless an amended return or claim for refund is filed by that spouse. No additional tax liability may be created and assessed against a spouse unless an amended return is filed by that spouse or there is an audit done by the department.

~~If one spouse did not have separate income of his own, the spouse who did not have separate income cannot file a separate return. However, a husband and wife living together at the close of the taxable year may make a joint return even though one of the spouses had neither gross income nor deductions.~~

~~If the income of a husband and wife is included in a joint return, the tax is computed on the aggregate income and all deductions and credits shall be taken from such aggregate income. However, if separate returns are filed, each spouse must include only his separate income in his return.~~

~~In determining whether persons are married or single, the determination is made as of the last day of the taxable year.~~

~~No joint return can be made if the husband and wife have different taxable years. However, an exception to this rule is made in the case where one spouse died during the taxable year (see Reg. 2038(2).~~

~~In the case of a joint return, the liability with respect to the tax is both joint and several.~~

G. Persons who become married during the taxable year may file a joint, combined, or a separate return if they are married and living together at the close of the taxable year. Married persons who were legally separated or living apart during any part of the taxable year may file a joint, combined, or a separate return if they were ~~married and~~ living together at the close of the taxable year. ~~In either case, a joint return must include all of the income each spouse received during the taxable year, and the credit allowed for married persons must be prorated so that such credit is claimed only for the part of the taxable year the persons were married and living together. For proration of credits, see Reg. 2006(3)(d).~~

H. Except as provided by law in the case of a death of a spouse, a joint or a combined return must be signed by both husband and wife unless (a) the return is made by an agent of both the husband and wife, or (b) one spouse signs as the agent of the other. Any spouse who makes a joint or a combined return through an agent ~~assume~~ assumes the responsibility for making the return and ~~incur~~ incurs liability for the penalty provided for erroneous, false, or fraudulent returns. One spouse cannot sign as the agent of the other unless the return is accompanied by a power of attorney authorizing such action by the spouse not signing the return. Other agents must also submit their power of attorney with the return.

I. The election of a husband and wife to file joint ~~return~~, combined, or separate returns may be changed by ~~said~~ the husband and wife if (1) they both sign and file an amended return reflecting the change of election to file a joint or combined return or (2) each spouse signs and files an amended return reflecting the change of election to file a separate return. The change in the election may be made at any time within the period provided ~~by the statute~~ for the assessment of additional taxes~~, that is, three and one half years from the time of the filing of the return in question~~.

J. When a husband and wife file a joint federal income tax return and file a separate or combined Minnesota income tax return, they shall determine their Minnesota gross income separately as if their federal adjusted gross income had been determined separately. Any income exclusion or adjustment to income (such as the disability income exclusion), allowed in arriving at federal adjusted gross income which requires them to file a joint federal return will be allowed in determining Minnesota gross income even though they elect to file separate or combined returns for Minnesota. However, if a deduction allowed or a loss limitation provided in computing federal adjusted gross income (such as the capital loss limitation) is reduced by one half if separate federal returns had been filed, the Minnesota gross income of each spouse reflected on a separate or combined Minnesota return will be computed as though separate federal returns had been filed including the reduced deduction or loss limitation. As a result a spouse may have a different capital loss carryover for Minnesota than was allowed on the federal return.

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13 MCAR Section 1.6003 Minnesota gross income for individuals who are full-year Minnesota residents (Federal Adjusted Gross Income)

A. The beginning point in the determination of Minnesota gross income is federal adjusted gross income. Federal adjusted gross income for Minnesota residents should be the same as the federal adjusted gross income that is used for federal purposes. If no federal tax return was filed for that year, federal adjusted gross income for Minnesota must be calculated using the appropriate Internal Revenue Code as if a federal tax return had been filed. Federal adjusted gross income for Minnesota is defined in Minn. Stat. Section 290.01, subd. 20 as being the federal adjusted gross income as defined in the Internal Revenue Code on a certain date. Unless the legislature specifies otherwise, provisions that affect federal adjusted gross income for future years and which have been enacted by Congress as of December 31 of the year set by the legislature, become effective for Minnesota income tax purposes at the same time they become effective for federal income tax purposes. (If the federal change in the Internal Revenue Code is effective for years beginning after December 31, 1980, but is enacted as an amendment in 1979, the change is effective for Minnesota for taxable years beginning after December 31, 1980, also, since present conformity to the Internal Revenue Code includes federal amendments through December 31, 1979.) Provisions that affect federal adjusted gross income and which have been enacted by Congress after December 31 of the year set by the legislature do not become effective until the legislature passes a law to adopt the provisions or to update the reference to December 31, of a certain year.

B. All income and losses, regardless of the source, are assignable to Minnesota. Pay received by a member of the military who is a Minnesota resident and who is outside of the state of Minnesota while receiving the pay is includible for Minnesota purposes, as is income received by any other resident.

Income and gains from the sale or other disposition of property which is reported on the installment method and is included in federal adjusted gross income is included in Minnesota gross income even though the property was located outside of Minnesota and the sale occurred prior to 1978. For purposes of computing the amount of the gain that would be included in Minnesota income, the basis will be determined under the provisions of Part D.2. of this rule. HE 17

C. Losses.

1. Losses included in federal adjusted gross income which were incurred in connection with out of state income are allowable in full with the following exception. Out of state losses are reduced by the taxpayer's tax preference items which are attributable to those losses but only to the extent of those losses. The preference items of depletion and capital gains deduction shall not be used to reduce a taxpayer's out of state loss.

   The preference item, intangible drilling costs, is defined as being the amount of the excess intangible drilling costs arising in the taxable year which exceed the amount of the net income from productive wells of the taxpayer from oil, gas, and geothermal properties for the taxable year.

2. Each loss will be considered separately for the purpose of making this computation. A separate loss would consist of:

a. Each separate operation within an individual proprietorship.

b. Each separate operation within a partnership, limited partnership, joint venture, or small business corporation.

c. Each transaction regarding the sale of a capital asset or an asset utilized in a trade or business provided that the sale of such asset is not part of an ongoing operation.

3. When an out of state loss is reduced by a tax preference item which is reflected in the computation of the adjusted basis of property, the reduction in basis which was made for federal purposes would not be made for Minnesota purposes to the extent of the amount of the loss which was reduced by that specific preference item. The taxpayer may elect to not reduce the basis of a depletable asset or the taxpayer may reduce the amount of otherwise taxable income subsequently produced by that asset in subsequent taxable years by the amount of the reduction that was required to be made to the out of state loss because of these tax preference items.

4. A net operating loss carryback or carryforward which has been used in the calculation of federal adjusted gross income must be reduced by the amount of tax preference items attributable to the out of state loss.

5. A modification increasing federal adjusted gross income in the amount of the losses that are disallowed must be made.

D. As provided in B., all income and losses are assignable to Minnesota. The following are types of income or losses from sources outside of Minnesota:

1. Farm income or loss from a farm located outside of Minnesota.

2. Income, gains, or losses from tangible property, such as real estate, which is located outside of Minnesota. Oil, gas, coal and mineral leases are interests in real property. The following would also be out of state income or losses if incurred in connection with real estate located outside of Minnesota: option income or expenses, exploring, securing, and developing the real estate, and equipment used on the real estate.

The basis of tangible property acquired while a Minnesota resident and which is utilized in a trade or business outside of Minnesota shall be cost less depreciation allowable for Minnesota income tax purposes. However, prior to 1978, a Minnesota resident need not reduce the basis of out of state property which was held while a Minnesota resident. The amount of depreciation allowable in any year is the amount claimed in arriving at federal adjusted gross income and would not be modified because of a higher Minnesota basis. When property is utilized in a trade or business outside of Minnesota and is held by a Minnesota resident who acquired the property prior to the date of becoming a Minnesota resident, the federal adjusted basis of that property shall be the Minnesota basis.

HE 18

See HE 19

3. The income or losses from a business located outside of Minnesota.
4. Income or losses from trusts, estates, partnerships, joint ventures, or Minnesota electing small business corporations to the extent that the income results from business conducted or tangible property located outside of Minnesota.
5. Income or losses from intangible assets owned by a Minnesota resident is not out of state income. Generally an intangible

asset is a legal relationship between persons (which in fact has no geographic location) and is so associated with the owner that it is taxable at the place of the owner's domicile. The following is a listing of some intangible assets and includes the income or losses HE20 from these assets:

a. Stocks, notes and bonds even if secured by liens on property.

b. The right to receive payments under a contract for deed or mortgage.

c. The right to withdraw contributions to a retirement fund.

d. Dividends received.

e. Gains or losses from the sale or exchange of stocks, bonds or notes.

f. Interest received on a savings account.

g. Distributions received from a corporation which has made a federal election to be treated as a small business corporation but which has not made a similar election for Minnesota.

E. The amount of a net operating loss that may be carried back or carried forward shall be the same dollar amount allowed in the determination of federal adjusted gross income. However, as provided in Part C., no deduction is allowed for or with respect to that portion of losses which constitute tax preference items. An adjustment must also be made for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code. A net operating loss shall be allowed to be carried back or carried forward only to the extent that loss was assignable to Minnesota in the year the loss occurred or in the year to which the loss was carried, whichever would allow more of the loss to be allowed for Minnesota purposes. An individual who is a nonresident in the loss year and a

HE 21

HE21

resident in the carryover year or an individual who was a resident in the loss year and a nonresident in the carryover year should use this part to determine the amount of their net operating loss.

The taxpayer may also make an adjustment for gains or losses which result from the sale or other disposition of property having a higher adjusted basis for Minnesota income tax purposes than for federal income tax purposes subject to the limitations contained in Section 290.01, subd. 20(b)(2) and (4). A taxpayer may make an adjustment to federal adjusted gross income for the modifications that affect shareholders of a small business corporation which has made an election for federal purposes but not for Minnesota purposes as provided in Section 290.01, subd. 20(c). HE 22

The net operating loss carryback or carryover applied as a deduction in the taxable year to which the net operating loss is carried back or carried over shall be equal to the net operating loss carryback or carryover applied in the taxable year in arriving at federal adjusted gross income subject to the following modifications: added see HE 23

1. Increase the amount of carryback or carryover applied in the taxable year by the amount of losses and expenses not assignable to Minnesota incurred in the taxable year.
2. Decrease the amount of carryback or carryover applied in the taxable year by the amount of income not assignable to Minnesota earned in the taxable year and the amount of federal jobs credit or WIN credit earned in the taxable year.
3. A taxpayer who is not a resident of Minnesota during any part of the taxable year and who has no income assignable to Minnesota

added HE 2

during the taxable year shall apply no net operating loss carryback or carryover in the taxable year.

The net operating loss carryback or carryover to the next consecutive taxable year shall be the net operating loss carryback or carryover as calculated in this Part less the amount applied in the taxable year(s) as above. No additional net operating loss carryback or carryover shall be allowed if the entire amount has been used to offset Minnesota income in a year earlier than was possible on the federal return. A net operating loss carryback or carryover that was allowed to offset federal income in a year earlier than was possible on the Minnesota return shall still be allowed to offset Minnesota income but only if the loss was assignable to Minnesota in the year the loss occurred.

F. To the extent a capital loss carryover is allowed in determining federal adjusted gross income, the capital loss carryover will be allowed in Minnesota even though the capital loss was incurred on the sale of out of state property prior to 1978. However, see the special rules for husband and wife returns contained in Part J. of Section 1.6002. HE 24

13 MCAR Section 1.6004 Minnesota gross income for individuals who are part year residents or nonresidents of Minnesota (Federal Adjusted Gross Income)

A. Gross income.

1. An individual who was a part year resident or a nonresident of Minnesota should use the appropriate federal adjusted gross income that was computed for federal income tax purposes as the beginning point in the determination of Minnesota gross income.

2. Modifications should be made to remove:

a. Income from personal and professional services performed outside of Minnesota,

b. other income from intangible assets, and

c. income and losses from tangible property located outside of Minnesota, which income or loss was received or earned while that person was a nonresident of Minnesota. After removing capital gains and losses not assignable to Minnesota, the taxpayer shall recompute the amount of capital gains that are included in Minnesota gross income. The taxpayer shall also recompute any capital loss limitation and capital loss carryover to remove those amounts that are not assignable to Minnesota.

A modification should also be made to remove the amount of certain qualified pension payments which are received while a nonresident of Minnesota.

A part year resident would apply these modifications and this rule to the income and losses received during that part of the year the individual was a nonresident of Minnesota. Income and losses received during that part of the year the individual was a resident of Minnesota would be governed by the rule concerning full year residents.

3. The following types of income received by a nonresident in Minnesota are to be included in that individual's Minnesota gross income and are assignable to Minnesota:

a. Wages, salaries, tips, fees, commissions, bonuses, or similar earnings for personal or professional service performed with-

in Minnesota. Two conditions must be met before a taxpayer's income can be deemed personal or professional service income. First, the income producing activity itself must be the rendition of personal or professional services; and, second, the taxpayer must personally render such services; it is not enough to employ others to render them. The following are some examples of taxpayers who may be deriving income or earnings from the performance of personal or professional services: carpenter, plumber, bricklayer, repairman, barber, beautician, accountant, attorney, doctor, dentist, architect, engineer, or an insurance agent. While the ownership and management of a shopping center or hotel which furnishes business space is business income, it is not a personal service business.

b. Rents, royalties and any other income received from land, buildings, machinery, or other tangible property located in Minnesota.

c. Gains or losses from the sale or other disposition of land, buildings, machinery, or other tangible property located in Minnesota.

d. Business income or losses. HE 27

(1) Income or losses from

(a) a business,

(b) a farm,

(c) that portion of the distributive share of income or losses of a partnership which are attributed to Minnesota, and

(d) that portion of the distributed and undistributed net income or loss, which is attributed to Minne-

sota, of a small business corporation which has elected to be taxed as a partnership for Minnesota purposes, which income or loss is derived from the operation of a business in Minnesota or which is income or loss from tangible property located within Minnesota is assignable to Minnesota.

(2) Business conducted within Minnesota and which has a nexus within Minnesota so that the business is subject to Minnesota income tax would include income or losses from sales within Minnesota and a business dealing in personal and professional services where such services were performed in this state. Trade or business income or loss assignable to Minnesota and earned by a nonresident individual as a proprietorship or partnership which was carried on partly within and partly without Minnesota is subject to the three-factor apportionment formula contained in section 290.19 or apportionment under section 290.20 except for construction business on which the three-factor formula is not permitted. A nonresident individual who has farm income from within Minnesota and from outside of Minnesota may also use the apportionment formulas contained in sections 290.19 and 290.20.

B. The definition of federal adjusted gross income is the same definition as is used for Minnesota residents and which is determined by the legislature by adopting the reference to the Internal Revenue Code for use in or application to that particular taxable year.

C. Income received by a nonresident, which is the distributive share of

partnership income from personal or professional services which are performed in Minnesota, is assignable to Minnesota in the same proportion as the partnership income is assignable to Minnesota even though the nonresident partner performed no personal or professional services in Minnesota during that year.

D. Minnesota gross income for a nonresident of Minnesota does not include income that is received as compensation for military or naval services performed within Minnesota.

E. The United States Government has entered into numerous tax treaties with different nations which provide that when a nonresident alien is employed in the United States the gross income which they earn is not subject to taxation in the United States as long as that nonresident alien is employed only temporarily in the United States. Since that income is not taxable for federal purposes, it would not be taxable for Minnesota purposes. Each tax treaty has somewhat different terms and each case must be examined on its own.

F. Minnesota gross income does not include personal or professional service income earned in Minnesota by a resident of Wisconsin or North Dakota who customarily returns at least once a month to their residence in that state. Wisconsin and North Dakota are the only two states that have reciprocity exclusion agreements with the state of Minnesota. The income subject to reciprocity exclusion is compensation for the performance of personal or professional services which the taxpayer personally renders. It is not enough to employ others to render these services.

1. The reciprocity exclusion does not apply where the personal or professional service income is earned as part of a business operated by the taxpayer which has employees that do more than incidental duties for the business or where there is the sale

HE29

or delivery of goods which are more than an incidental part of the business. The reciprocity exclusion does apply to all the personal or professional income earned in the business where the sale of goods and the services of the employees are incidental. Where a partner is a member of a partnership where the selling of goods or the services of employees is more than incidental to the partnership business, reciprocity exclusion would apply only to the partner's salary (personal or professional service income) but not to the distributive shares of the partnership business. Salaries would be subject to a reasonableness test and a provision for salaries must be part of the partnership agreement. If there is no written partnership agreement, or if in the written agreement no salary or salary formula is specifically provided, the payment to the partners is a partnership distribution and is not subject to reciprocity exclusion. Partnership draw does not constitute a salary; it is a convenience to the partners in withdrawing a share of their business equity. If all partners are performing personal services and the sale of goods and the services of the employees are incidental, the reciprocity exclusion applies to the partner's salary and to the partner's distributive share. The imputed income of a shareholder of an electing small business corporation (Subchapter S) is not subject to reciprocity exclusion as this income is in the form of a partnership distribution.

2. The word "incidental" means the sale of goods or the services of employees which are only a minor or secondary contribution to the personal service income of the individual or partnership for whom performed. The sale of goods or the services of

employees is incidental if:

a. for the sale of goods the gross profit (gross receipts less cost of goods sold) or

b. for the services of employees the total compensation paid the employees is less than $20,000 or 10% of the gross profit of the business, whichever is greater. The total compensation paid the employees and the gross profit from the sale of goods must be totaled when determining if the goods and employees are incidental.

3. If an individual's total income assignable to Minnesota is subject to reciprocity exclusion, that individual need not file a Minnesota income tax return. However, if that individual has Minnesota income, some of which is subject to reciprocity exclusion and some of which is not subject to reciprocity exclusion and if the income which is not subject to reciprocity exclusion exceeds the filing requirements for filing a Minnesota income tax return, that individual must file a Minnesota income tax return. That individual should use the appropriate federal adjusted gross income for the taxable year. A subtraction would be allowed at a subsequent point on the return to remove income which is subject to reciprocity exclusion.

In order to claim the reciprocity exclusion, individuals should file Form M-115, which is an affidavit claim for exemption of compensation received for services performed under the reciprocity exclusion. Although the exact form may change, the following information will be required:

a. Name, address, and social security number of the individual,

b. year for which the affidavit is being submitted,

c. amount of income received for services performed in Minnesota subject to reciprocity exclusion,

d. a statement whether or not Minnesota income tax was withheld on that income,

e. the name and address of the employer,

f. type of services performed in Minnesota,

g. state in which the individual maintains residence,

h. the year in which the individual became a resident of the state,

i. a statement disclosing whether or not the individual customarily returns to his residence in the other state at least once a month,

j. a statement whether or not the individual filed an income tax return with that state and whether the income subject to reciprocity exclusion was declared on that return and

k. a statement declaring if the individual ever was a resident of Minnesota and, if so, when was the date of last residence.

An individual whose income is subject to reciprocity exclusion may also want to complete a withholding exemption certificate, Form MW-6.

G. The following items of income received by a nonresident are assignable to Minnesota regardless of the time or place received by the taxpayer if the underlying services giving rise to the payment were performed in Minnesota. HE38

1. A bonus.

2. Commissions.

3. Vacation pay.

However, certain qualified pension payments are not assignable to Minnesota if they are received by a nonresident, even though the payments are attributable to services previously performed in Minnesota.

H. The amount of a net operating loss that may be carried back or carried forward shall be the same dollar amount allowed in the determination of federal adjusted gross income. Adjustments must be made in the net operating loss for income and losses which are not assignable to Minnesota and for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code. A taxpayer may make an adjustment to federal adjusted gross income for the modifications that affect shareholders of a small business corporation which has made an election for federal purposes but not for Minnesota purposes as provided in Section 290.01, subd. 20(c). The net operating loss carryback or carryover applied as a deduction in the taxable year to which the net operating loss is carried back or carried over shall be equal to the net operating loss carryback or carryover applied in the taxable year in arriving at federal adjusted gross income subject to the following modifications:

1. Increase the amount of carryback or carryover applied in the taxable year by the amount of losses and expenses not assignable to Minnesota incurred in the taxable year.
2. Decrease the amount of carryback or carryover applied in the taxable year by the amount of income not assignable to Minnesota earned in the taxable year and the amount of federal jobs credit or WIN credit earned in the taxable year.
3. A taxpayer who is not a resident of Minnesota during any part of the taxable year and who has no income assignable to Minnesota

during the taxable year shall apply no net operating loss carryback or carryover in the taxable year.

The net operating loss carryback or carryover to the next consecutive taxable year shall be the net operating loss carryback or carryover as calculated in this Part less the amount applied in the taxable year(s) as above. No additional net operating loss carryback or carryover shall be allowed if the entire amount has been used to offset Minnesota income in a year earlier than was possible on the federal return. A net operating loss carryback or carryover that was allowed to offset federal income in a year earlier than was possible on the Minnesota return shall still be allowed to offset Minnesota income.

13 MCAR Section 1.6020 Energy credit.

A. 2. A taxpayer must actually purchase the equipment or earth sheltered dwelling to qualify for this credit. The expenses connected with the leasing of equipment or the leasing of an earth sheltered dwelling do not qualify for this credit. If the taxpayer received a refund from the seller or the manufacturer of equipment on which the taxpayer claimed this credit, the amount of expenditures that were allowable for this credit must be reduced by the amount of the refund that was received. The taxpayer will need to file an amended income tax return if the refund that was received would require a reduction in the energy credit which had already been claimed. <u>A payment received by the taxpayer from the seller or the manufacturer of equipment is considered as a payment for services rendered when the payment</u>

was for field testing of the system by the taxpayer or for reports on the system that the taxpayer completed. A payment for services rendered must be included in the gross income of the taxpayer and does not reduce the amount of expenditures allowable for this credit. Expenditures will qualify even though they are paid for as the result of a federal ~~or~~, state, or local government grant, but only to the extent that the grant was included in federal adjusted gross income. Each dollar of expenditure which qualifies for this credit may be used only one time for purposes of computing this credit.

A. 7. A shareholder of a family farm corporation is allowed to claim this credit in the same manner as a joint owner of property that otherwise qualified for the credit. All joint owners will be treated as one taxpayer (and so qualify for only one $2,000 energy credit) with the same taxable year. Each joint owner will be allowed, with respect to the expenditures, a credit for that taxable year in an amount, which bears the same ratio to the total amount allowable, as the amount of the expenditures made by the joint owner during the taxable year bears to the aggregate of the expenditures made by all joint owners during the taxable year. However, joint owners who make expenditures with respect to two or more principal residences shall compute the amount of their energy credit separately based on the amount of the expenditure made by each joint owner. If a Subchapter S or a family farm corporation makes the expenditure, the expenditure may be divided among the shareholders based on the percentage of their stock ownership in the corporation.

A. 9. The energy credit, pollution control credit and feedlot pollution control credit shall be applied after all other nonrefundable

credits. If the expenditures otherwise qualify, the taxpayer may elect which credit (including the carryforward) will be used. This election may be amended at any time before the expiration of the statute of limitations. If an expenditure otherwise qualifies the taxpayer may claim both the energy credit and the feedlot pollution control credit or pollution control credit on that property but the energy credit must be used first and the expenditures allowable for the feedlot pollution control credit or pollution control credit must be reduced by the expenditures that have been used for the energy credit. The taxpayer may elect to carryforward the amount of the energy credit, pollution control credit and feedlot pollution credit when the taxpayer's tax liability is computed by using the low income alternative tax.

B. Piggybacked federal renewable energy source credit. Any expenditure that qualifies for the federal renewable energy source credit, including expenditure for labor costs, geothermal energy, wind energy for electricity, renewable energy used to heat water, and any other expenditures which are allowable for the federal credit, would also be allowable for purposes of the state piggybacked credit provided that the building is located in Minnesota and does not contain more than six dwelling units. After December 31, 1980, any active solar collector which qualifies for the federal renewable energy source credit must also be certified by the Minnesota Energy Agency before it will qualify for the state piggybacked federal renewable energy source credit. Expenditures that are allowable are only those that were allowable on the date that the legislature has specified in Minn. Stat. section 290.06, subd. 14 for purposes of adopting the federal

credit provisions. No solar panel installed as a roof (or portion thereof) shall fail to qualify for the piggybacked federal renewable energy source credit solely because it constitutes a structural component of the dwelling on which it is installed. If an expenditure qualifies for both the federal energy conservation credit and for the federal renewable energy source credit and the taxpayer used the expenditure for the federal conservation credit, the taxpayer can use that expenditure for the state piggybacked federal renewable energy source credit provided that the expenditure otherwise qualifies.

C. Earth sheltered dwelling units. Expenditures that qualify for the credit for earth sheltered dwellings include material, labor and other construction costs (except interest) incurred to construct the dwelling. The structure of the earth sheltered dwelling unit must meet the standards of the Minnesota building code even though the code may not be in effect in that area. The earth sheltered dwelling unit's structure must also comply with all three tests which are contained in Minn. Stat. section 290.06, subd. 14(b)(1)-(3) and which are as follows:

"(1) 80 percent or more of the roof* area is covered with a minimum depth of 12 inches of earth; and

(2) 50 percent or more of the wall area is covered with a minimum depth of 12 inches of earth; and

~~*A computer typing error was made here in the final copy of the conference committee report on H.F. 1495 (Laws of 1979, ch. 303). The law contains the word "wall" and not the word "roof." However, it is clear that this was a technical mistake and the Department is proposing a law change to the 1980 legislature.~~

(3) Those portions of the structure not insulated with a minimum of seven feet of earth shall have additional insulation;"

The roof area contained in Minn. Stat. section 290.06, subd. 14(b)(1) that must be covered with earth means that area of the roof that is above the area used for residential living which is heated. The roof area that must be covered with earth does not include the roof area for a garage, unless the garage is heated. For section 290.06, subd. 14(b)(2) the term "wall" means the exterior walls of the residential living area. The walls of a garage are not included in this definition. If a garage is attached to the exterior walls at the residential living area, that area of the exterior wall of the residential living area that is part of the attached garage is not counted in the area of the wall that must be covered with earth. The wall must be covered with a minimum horizontal depth of 12 inches (30 cm) of earth. The term "structure" contained in section 290.06, subd. 14(b)(3) means the exterior walls and roof as defined for section 290.06, subd. 14(b)(1) and (2). In section 290.06, subd. 14(b)(3) the additional insulation that will be required is the amount of insulation that is needed to equal the following requirements:

E. 6. Miscellaneous. The Commissioner of Revenue will require drawings, photographs, or other descriptions of a passive solar energy system from any taxpayer claiming the credit for a passive solar energy system. ~~If the taxpayer consents,~~ The commissioner may consult with the Director of the Minnesota Energy Agency to secure an evaluation of the drawings, photographs, or other

descriptions to determine if the system qualifies for the energy credit.

A taxpayer who has installed or is planning to install a passive solar energy system which he or she feels may achieve passive solar energy performance better than a system designed according to the criteria contained in this rule may request an advisory opinion by submitting an architectural drawing, a detailed operational description of the system and performance calculation to the Director of the Energy Agency. On the basis of this information, the director may decide that the entire system and its integral components or some part thereof qualifies for the credit. The taxpayer shall furnish the Department of Revenue with a copy of the Director's Opinion when claiming this credit.

The original use of the passive solar energy system must begin with the taxpayer who claims the credit. Expenses for normal maintenance on the passive solar energy system do not qualify for the credit. Replacement expenditures of a capital nature to replace all or part of the passive solar energy system do qualify for the energy credit provided that the taxpayer must add these expenditures to the other expenditures that he had already claimed for the energy credit. Those passive solar energy system expenditures which exceed a reasonable cost amount, which serve no additional passive solar function, or which serve a purely aesthetic function, shall not be allowed.

13 MCAR Section 1.6030 Nongame wildlife checkoff.

A. Charitable contribution. A designation by a taxpayer to the Nongame Wildlife Management Fund qualifies as a charitable contribution under the provisions of Minn. Stat. section 290.21, subd. 3 in the year in which the designation was made.

B. Administration.

1. A taxpayer may reverse all or part of the designation that was made to the Nongame Wildlife Management Fund where the designation was originally made in error and the taxpayer had no intention to make a gift when the designation was made. A taxpayer may not reverse the designation to the Nongame Wildlife Management Fund merely because the taxpayer, at a later date, changes the intention to make a gift to the fund. It will be presumed that the taxpayer intended to make a designation when more than 90 days have elapsed since the taxpayer received the refund check or a notice informing the taxpayer that a designation was made to the Nongame Wildlife Management Fund with the following two exceptions:

   a. The taxpayer has a valid explanation showing why no action was taken within the 90 day period. Examples of a valid reason are sickness or being outside of the country.

   b. The taxpayer considered the designation to the Nongame Wildlife Management Fund as a payment of estimated income tax and properly accounted for this amount as an estimated tax payment on the taxpayer's income tax return for the following year.

A taxpayer may designate that all or part of his refund on an amended return go to the Nongame Wildlife Management Fund.

2. An individual, fiduciary, trust or estate may designate all or part of their refund to the Nongame Wildlife Management Fund. A corporation or a partnership may not make this designation. see HE 43 and Supp HE p.8

3. Taxpayers who are allowed to claim the property tax refund as a credit on their income tax return may make a designation to the Nongame Wildlife Management Fund only on their income tax return.

4. The amount of the refund from which a taxpayer may make a designation to the Nongame Wildlife Management Fund is determined after the following deductions have been made:

   a. Unpaid Minnesota tax liabilities owed to the Commissioner of Revenue.

   b. A debt which qualifies for the provisions of the Revenue Recapture Act contained in Minnesota Statutes Chapter 270A.

   c. Amounts credited to the estimated income tax liability for taxable year.

5. Machine audit.

   a. The term "machine audit" means the adjustments made to a taxpayer's return in the original processing of the return from the date the return is filed until the date the refund is granted or the order assessing additional tax is issued.

   b. If, upon machine audit, a taxpayer's overpayment is reduced, the reduction shall be made in the following order:

      (1) The amount of the overpayment that the taxpayer had requested as a refund is reduced.

      (2) The amount of the overpayment that the taxpayer had designated to the Nongame Wildlife Management Fund is reduced.

c. If, upon machine audit, the taxpayer no longer has an overpayment but is assessed a tax balance due, the designation to the Nongame Wildlife Management Fund is cancelled.

6. A taxpayer, who owes a tax balance due (including penalty and interest) on his income tax return, may designate that an amount be paid to the Nongame Wildlife Management Fund by paying the entire balance that is due for both the tax liability and the designation to Nongame Wildlife at the same time that the return is filed. If the amount that is paid with the return does not equal the tax balance due and the amount designated to Nongame Wildlife, the amount of the tax balance due shall be paid first. If the amount that is paid with the return does not fully pay the tax balance due, the designation to the Nongame Wildlife Management Fund shall be cancelled.

13 MCAR Section 1.6225 Targeting.

A. Homestead qualifications. The refund contained in Minn. Stat. section 290A.04, subd. 2c (targeting) provides up to $300 of property tax relief in 1981 to homeowners whose property taxes have increased by more than 10% from 1980 after reduction is made for improvements and other state paid credits. To qualify for targeting the property must qualify as the claimant's homestead for purposes of claiming the property tax refund for property taxes payable in 1980 and 1981. The claimant, therefore, must have owned and occupied the property as the claimant's homestead on January 2, 1980 and on January 2, 1981. When a homestead is owned by two or more persons as joint tenants or tenants in common, the tenants shall determine between them which tenant shall be the claimant for purposes of claiming the property

tax refund and targeting. The joint tenant or tenant in common who claims HE47 the property tax refund in 1981 is the only joint owner who qualifies to claim targeting in 1981. The joint owner who claims the property tax refund and targeting in 1981 need not be the same joint owner who claimed the property tax refund in 1980. In order for a joint owner to claim the property tax refund and targeting in 1981, the property must also have been the joint owner's homestead on January 2, 1980.

B. New construction. The claimant shall reduce the amount of the net property taxes payable in 1981 by the amount which is attributable to improvements. The amount attributable to improvements shall be determined by applying a ratio to the property taxes payable after reduction for the state-paid homestead credit and all other state-paid credits including HE48 the property tax refund. The ratio that shall be used is:

$$\frac{\text{Assessor's estimated market value of improvements}}{\text{Assessor's estimated market value of the entire homestead (including land)}}$$

This ratio shall apply to the estimated market value of all improvements which are included in the estimated market value for the first time for property taxes payable in 1981 regardless of the year the improvement was actually made.

C. Net property taxes payable.

1. A claimant who was required to reduce the property taxes payable for purposes of the property tax refund because

   a. the homestead was used for business purposes and depreciation expenses were claimed or,

   b. part of the homestead was rented to another, must make the similar reduction in the net property taxes payable which

qualify for targeting. The same percentage reduction must be applied to net property taxes payable in 1980 and 1981. The largest percentage reduction must be used whether it be the 1980 percentage reduction or the 1981 percentage reduction.

The taxpayer shall recompute the property tax refund claimed for the year in which the smaller percentage reduction was made. The taxpayer shall use the property taxes for that year reduced by the largest percentage reduction when recomputing the property tax refund. HE 49

2. The net property tax payable is only for that part of the property that qualifies as the claimant's homestead. On a duplex, only the property taxes attributable to the homestead portion qualify for targeting.

3. For purposes of computing the net property taxes payable that qualify for targeting, the property taxes payable must be reduced by the amount of the Class 3CC credit which was received under the provisions of Minnesota Statutes, section 273.13, subdivision 7. see HE 50, Supp HE p.9

4. The net property taxes payable in 1980 shall be reduced only by the amount of the property tax refund attributable to property taxes payable. No reduction shall be allowed for that part of a property tax refund attributable to rent constituting property taxes. If a taxpayer's property tax refund includes property taxes payable and rent constituting property taxes, the property tax refund shall be recomputed using only property taxes payable.

D. The taxpayer who must make a reduction for improvements and a reduction for business or rental use must first make the reduction for improvements and then make the reduction for business or rental use. HE 51

If the improvement that was made is totally used for business or rental use, and this is the only part of the residence that is used for business or rental use, the claimant is required to only make the reduction for the improvement.

APPROVED AS TO FORM AND LEGALITY

6-2 1981

WARREN SPANNAUS, ATTORNEY GENERAL

BY Jerry S. Anderson

SPECIAL ASSISTANT ATTORNEY GENERAL

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUN - 3 1981
Joan Anderson Growe
Secretary of State

3:00 p.m.

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES OF THE DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL TAX AND PROPERTY TAX REFUND (13 MCAR §§ 1.6001 TO 1.6004, 1.6020, 1.6030, AND 1.6225).

ORDER OF THE
CHIEF HEARING EXAMINER

WHEREAS, a hearing was held on October 2, 1980, before Jon L. Lunde, a Hearing Examiner of the State Office of Administrative Hearings, on the above-entitled matter in compliance with Minn. Stat. § 15.0412, subd. 4; and

WHEREAS, the Report of Hearing Examiner made pursuant to Minn. Stat. § 15.052, subd. 3, was issued to the Department of Revenue and;

WHEREAS, the Department of Revenue has now determined to adopt rules pursuant to Minn. Stat. § 15.0412, subd. 4-4f; and

WHEREAS, the Department of Revenue has submitted said rules to the Chief Hearing Examiner for review pursuant to Minn. Stat. §§ 15.0412, subd. 4e and 15.052, subd. 4, and 9 MCAR § 2.111; and

WHEREAS, the Chief Hearing Examiner finds that the final proposed rules are not substantially different from those proposed at the public hearing.

NOW, THEREFORE, upon receipt of this Order, the Department of Revenue has the responsibility of submitting the complete hearing record and the rules as adopted by the Department of Revenue to the Attorney General and to publish in the State Register, all pursuant to Minn. Stat. § 15.0412, subd. 4e and 4f.

Dated: May 14, 1981.

Duane R. Harves

DUANE R. HARVES
Chief Hearing Examiner

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of Amended Rules and New Rules of the Department of Revenue Relating to Individual Income Tax and Property Tax Refund (13 MCAR §§ 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225.

SUPPLEMENTAL ORDER
OF THE
CHIEF HEARING EXAMINER

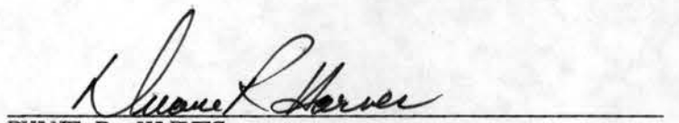
On December 19, 1980, the Minnesota Department of Revenue petitioned the Chief Hearing Examiner to reconsider his Order of November 18, 1980, which had approved the report of Hearing Examiner Jon L. Lunde issued November 14, 1980. The petition also requested Examiner Lunde to reconsider certain of the Findings and Conclusions contained in his November 14 report.

Upon receipt of the Petition for Reconsideration, the Chief Hearing Examiner referred the file to Examiner Lunde who accepted the Petition and advised the Department that they were to give notice of the Petition to the individuals who originally appeared at the hearing; and he then allowed an opportunity for those persons to comment on the Department's Petition. Following his review of the Department's Petition and public comments thereon, Examiner Lunde issued a Supplemental Report on January 20, 1981, and submitted it to the Chief Hearing Examiner on that same date.

Having reviewed the Petition for Reconsideration, public comments received in response to the Petition, the Supplemental Report of Hearing Examiner Jon L. Lunde, and having again reviewed the rest of the files, records and proceedings herein, the Chief Hearing Examiner agrees with the Supplemental Report of the Hearing Examiner and hereby approves that Report as it amends or clarifies the original Report of the Hearing Examiner dated November 14, 1980.

NOW, THEREFORE, IT IS HEREBY ORDERED that the Order of the Chief Hearing Examiner dated November 18, 1980, is hereby amended consistent with the foregoing and the Supplemental Report of the Hearing Examiner attached hereto.

Dated: February 12, 1981.



DUANE R. HARVES
Chief Hearing Examiner

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of Amended Rules and New Rules of the Department of Revenue Relating to Individual Tax and Property Tax Refund (13 MCAR Sections 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225)

ORDER OF THE CHIEF HEARING EXAMINER

The above-entitled matter came on for review by the Chief Hearing Examiner pursuant to the provisions of Minn. Laws 1980, Ch. 615, § 6, subd. 4d (to be codified as Minn. Stat. § 15.0412, subd. 4d) which provides in part:

> If the [hearing examiner's] report contains a finding that the proposed rule is substantially different from that which was proposed at the public hearing, or that the agency has not met the requirements of section 15.0412, subdivisions 4 through 4f, it shall be submitted to the chief hearing examiner for approval. If the chief hearing examiner approves the finding of the hearing examiner, he shall advise the agency of actions which will correct the defects, and the agency shall not adopt the rule until the chief hearing examiner determines that the defects have been corrected. If the chief hearing examiner determines that the need for and reasonableness of the rule has not been established pursuant to subdivision 4, clause (c), and if the agency does not elect to follow the suggested actions of the hearing examiner to correct that defect, then the agency shall submit the proposed rule to the legislative commission to review administrative rules for the commission's advice and comment. The agency shall not proceed to adopt the rule until it has received and considered the advice of the commission; provided, that the agency is not required to delay adoption longer than 30 days after the commission's receipt of the agency's submission.

Based upon a review of the record in this proceeding, the Chief Hearing Examiner hereby approves the Report of the Hearing Examiner in all respects and specifically as to any finding of substantial change or of failure to comply with Minn. Laws 1980, Ch. 615, § 6 (to be codified as Minn. Stat. § 15.0412, subd. 4-4f), or of failure to establish need for and reasonableness of the proposed rule.

In order to correct the defects enumerated by the Hearing Examiner, the agency shall either take the action recommended by the Hearing Examiner or reconvene the rule hearing if appropriate. If the agency chooses to reconvene the rule hearing, it shall do so as if it is initiating a new rule hearing, complying with all substantive and procedural requirements imposed on the agency by law or rule.

If the agency chooses to take the action recommended by the Hearing Examiner, it shall, prior to submitting the rules to the Attorney General for review, submit to the Chief Hearing Exmainer a copy of the rules as initially published in the State Register, a copy of the rules as proposed for final adoption in the form required by the State Register for final publication, and a copy of the agency's Findings of Fact and Order Adopting Rules. The Chief Hearing Examiner will then make a determination as to whether the defect in regard to substantial change and the requirements of Minn. Laws 1980, Ch. 615, § 6 (to be codified as Minn. Stat. § 15.0412, subd. 4-4f) have been corrected.

Should the agency make changes in the rules other than those recommended by the Hearing Examiner, it shall also, prior to submitting the rule to the Attorney General, submit the complete record to the Chief Hearing Examiner for a review in regard to substantial changes.

Dated this 18th day of November, 1980.

DUANE R. HARVES
Chief Hearing Examiner

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES OF THE DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND.	ORDER OF THE CHIEF HEARING EXAMINER

WHEREAS, on August 6, 1980, the Department of Revenue, Income Tax Division, by its attorney, Dale H. Busacker, submitted a request to the Chief Hearing Examiner for approval of the incorporation by reference of certain material in rules to be proposed; and

WHEREAS, pursuant to Minnesota Statutes 1978, Section 15.0412, subd. 4, agencies may incorporate by reference provisions of federal law or rule or other materials from sources which the Chief Hearing Examiner determines are conveniently available for viewing, copying and acquisition by interested persons; and

WHEREAS, the Chief Hearing Examiner has reviewed the Internal Revenue Code of 1954 as amendment through December 31, 1979, and has found it to be in excess of 3,000 words and has determined that it would exceed five pages of publication in the State Register; and

WHEREAS, the Division has indicated, and the Chief Hearing Examiner thus finds, that the material is conveniently available for viewing, copying and acquisition by interested persons.

NOW, THEREFORE, IT IS ORDERED that the Division shall have the approval of the Chief Hearing Examiner to incorporate by reference in their proposed rules the Internal Revenue Code of 1954 as amended through December 31, 1979.

Dated this 15th day of August, 1980.

DUANE R. HARVES
Chief Hearing Examiner

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of Amended Rules and New Rules of the Department of Revenue Relating to Individual Income Tax and Property Tax Refund (13 MCAR §§ 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225.

SUPPLEMENTAL REPORT OF THE HEARING EXAMINER ON PETITION FOR RECONSIDERATION

The above-entitled matter was resubmitted to the Hearing Examiner pursuant to a Petition for Reconsideration filed with the Office of Administrative Hearings on December 19, 1980, addressed jointly to the undersigned Hearing Examiner and to the Chief Hearing Examiner. The procedural history prior to this submission is contained in the initial report of the Hearing Examiner and the Chief Hearing Examiner dated November 14, 1980 and November 18, 1980, respectively. That history will not be reiterated here.

Neither the Minnesota Administrative Procedure Act (Minn. Stat. §§ 15.0411-15.052, nor the procedural rules of the Office of Administrative Hearings relating to rulemaking (9 MCAR §§ 2.101-2.113) specifically provide for reconsideration by the Hearing Examiner nor do they prohibit such reconsideration. However, the Chief Hearing Examiner has previously reconsidered orders issued in rulemaking proceedings as within his discretionary authority. See, OAH Docket No. PCA-79-012-HK, Order of the Chief Hearing Examiner, September 23, 1980. See, also, Anchor Casualty Company v. Bongaard's Co-op. Cream Ass'n., 91 N.W.2d 122 (Minn. 1958). In view of this discretionary authority, the Hearing Examiner accepted the Petition for Reconsideration and advised the Departmental counsel, Dale H. Busacker, to submit copies of the Petition for Reconsideration to all those individuals who originally appeared at the hearing to comment on the proposed rules addressed in the Department's Petition. The affidavit of service of the Department of Revenue on these individuals was submitted to the Hearing Examiner and has been made part of the record herein. The only individuals of record who were concerned with the Department's Petition for Reconsideration were those individuals of record who commented on the Department's proposed rule 13 MCAR § 1.6004 G. pertaining to the taxation of nonresident athletes. No persons appeared at the hearing to comment on the other provisions of the proposed rule addressed in the Petition. Public Comments on the Department's Petition were received from Richard A. Berthelsen, counsel for the National Football League Players Association, 1300 Connecticut Avenue N. W., Washington, D.C., 20036, on January 7, 1981, and from Thomas H. Borman, Esq., Maslon, Edelmon, Borman, Brand & McNulty, 1800 Midwest Plaza, Minneapolis, 55402, counsel for the National Football League and the National Hockey League, on January 16, 1981.

The Petition for Reconsideration requests that the Hearing Examiner reverse his prior determination finding that the Department did not have statutory authority to adopt proposed rule 13 MCAR § 1.6004 G., and to find that the rule as proposed was reasonable and that the Department has statutory authority to adopt proposed rule 13 MCAR § 1.6030, parts B.1. and B.2., and 13 MCAR

deleted

§ 1.6225, B.3. as originally proposed by it. In his original Report which was adopted by the Chief Hearing Examiner, it was found that the Department did not have statutory authority to adopt any of these rules. The sole issues upon reconsideration are whether or not the Hearing Examiner or the Chief Hearing Examiner should alter their original Reports. The four proposed rules involved will be considered separately.

This Supplemental Report has been submitted to the Chief Hearing Examiner for his approval. Such a submission is required because the Chief Hearing Examiner's Order of November 18, 1980 is still in force and effect and by analogy to Minn. Stat. § 15.0412.

If the Chief Hearing Examiner approves this Supplemental Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Hearing Examniner determines that the defects have been corrected. However, in the cases where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner does not elect to adopt the recommendations, he may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Laws 1980, Ch. 615, § 6, subd. 4d.

If the Commissioner elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Commissioner shall submit the rule to the Attorney General for review of form and legality. If the Commissioner makes changes in the rule other than those recommended by the Hearing Examiner, then he shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Laws 1980, Ch. 615, § 6, subd. 4e.

When the Commissioner submits the rule to the Attorney General he shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Taxation of Nonresident Athletes. 13 MCAR § 1.6004 G.

The taxing power of the State is plenary in nature and subject only to constitutional limitations or federal legislation issued under the commerce clause. Thus, if otherwise constitutional and not contrary to superior federal law, the State may generally exercise its taxing power even in an unfair or unreasonable manner. Kaufman v. City of Tucson, 6 Ariz. App. 429, 433 P.2d 282 (1967); Shapiro v. City of New York, 325 N.Y.Supp.2d 787, 67 Misc. 2d 1021, aff'd. 343 N.Y.Supp.2d 323, 32 N.Y.2d 96, 296 N.E.2d 230; Alco Parking Corp. v. City of Pittsburgh, 296 Pa. Cmwlth. 433, 295 A.2d 349 (1972). Furthermore, even the constitutional limitations on the taxing power of the State are strictly construed. Dwyer v. Omaha-Douglas Public Bldg. Comm'n., 180 Neb. 30, 195 N.W.2d 236 (1972).

This broad taxing power is applicable to the taxation of non-residents so that a nonresident's income is taxable by the State so long as there is some "definite link" or some "minimum connection" or nexus justifying imposition of the tax. Northwestern States Portland Cement Co. v. State of Minnesota, and Williams v. Stockman Valves and Fittings, Inc., 79 S.Ct. 357, 358 U.S. 450, 3 L.Ed.2d 421 (1959). The basic rationale for the imposition of an income tax on a nonresident's income is that the State may claim a return if it has provided the nonresident with the opportunities for profit, the benefit of its laws or the protection of person or property; thus, the controlling question is whether the State has given anything for which it can ask return.

In State of Alaska v. Patronia, 69 Wash.2d 460, 418 P.2d 755 (1966), cert. den. 88 S.Ct. 36, 389 U.S.7, 19 L.Ed.2d 6, the Washington Supreme Court held that the State of Alaska could tax 16% of a nonresident seaman's salary where the seaman spent 16% of his time on board a ship while it was in Alaskan waters because the economic activity of Alaska caused the benefits of his employment and constituted the minimum connection necessary for the imposition of the tax. The opportunities, benefits and protections afforded to nonresident athletes who play games in Minnesota is obviously sufficient to impose the tax, and such a tax is authorized by Minn. Stat. § 290.17, subd. 2 (1980), which taxes the income of nonresidents to the extent that labor or services are performed in this state. This statute governs the taxation of nonresident athletes and like other tax statutes, ambiguities, if any, are construed favorably to the taxpayer and against the state. See, Gee v. West, 90 Ida. 173, 409 P.2d 116, 119 (1965) (concurring opinion regarding taxation of nonresidents' income); Dumont v. Commissioner of Taxation, 278 Minn. 312, 154 N.W.2d 196 (1967).

Section 290.17, subd. 2(1) has been construed only once by the Minnesota Supreme Court. In Hughes v. Spaeth, 207 Minn. 577, 292 N.W.2d 194 (1940), the Supreme Court upheld the State's taxation of vacation pay received by a nonresident while outside the State because the vacation pay resulted from work performed within the State. In reaching its opinion, the Court noted that the law seeks to tax on a "realistic" basis and to treat the employment the same as the contracting parties do, but that the "particular convenient periods the parties arrange for payment" was of no concern. This case is of little benefit in determining the statutory bounds of the taxation of a nonresident athlete's wages except insofar as it adopts a realistic approach to the substance of the particular payment. That realistic approach, of course, means that where an athlete performs services in several states, his income must be realistically apportioned to this state for the services performed here.

The Department has requested the Hearing Examiner to reconsider his conclusion that its proposal to tax all nonresident athletes on a games-played basis is unauthorized and unreasonable on the grounds (1) that the decision in the Partee case is erroneous; (2) that no double taxation of athletes' salaries in fact occurs; and (3) that the Spaeth decision supports its proposal to treat the employment as the contracting parties do, and that existing professional athletic contracts support the apportionment formula proposed by the Department to tax athletes on the basis of a games-played formula during the regular season. On reconsideration, the Hearing Examiner reaffirms his former conclusions as to the rule proposed by the Department.

The decision in Partee, while upholding the utilization of a duty-day's formula for taxing football players, and a games-played formula for all other professional athletes, did not hold that football players could not also be taxed using a games-played formula as the Department proposes to do. On the contrary, that issue was not before the Board in that case and was not decided. Normally, where there are several reasonable alternative approaches that may be taken to implement a law, the responsible agency is free to choose among them. However, the approach initially proposed by the Department is not reasonable nor consistent with law.

The proposed rule, adopting a games-played formula for all athletes, ignores the distinction noted in Partee between football and other professional sports, such as hockey, basketball and baseball, which relates to the usual duration of those athletes' presence in a State. The Hearing Examiner reads the Partee decision to mean (and here, hypothetical figures are used) that if a baseball player plays 12 of 180 games on his team's schedule in the taxing state (Minnesota), 12/180's, or 1/15th of his salary is taxable in Minnesota using a games-played formula; and even if a duty-day's formula were to be utilized, the athlete would then be in the State 20 of the 300 days and 20/300s, or 1/15th of his salary would still be taxable. This similarity in the proportions subject to tax was based on the observation in Partee that baseball, basketball and hockey players frequently play a series of games in the taxing state and practice in that state when they play so that a games-played formula and a duty-days formula lead to approximately the same percentages or ratios. In the case of most athletes, therefore, both the numerator and the denominator of the second percentage are increased by those practice days so that the resulting duty-day percentage is substantially equivalent to the games-played percentage. For football players, on the other hand, who do not practice out of state, a games-played formula is not substantially equivalent to a duty-days' formula. Their duty-days' formula would, in fact, be substantially smaller because the second percentage (duty-days' formula) is not affected in its numerator and denominator by practice days but only in its denominator and the resulting percentage, or ratio, is not, therefore, equivalent to the games played ratio. In its Petition, the Department still has misconstrued that distinction.

The games-played formula proposed by the Department ignores pre-season games and practice time and implies that athletes with a greater amount of state contact should, or at least might, pay a smaller percentage of tax than those athletes with more contact. For example, an athlete who plays one pre-season and one regular season game in Minnesota is taxed on the same percentage of salary as is an athlete who plays only one regular season game in the State. The rule also implies that pre-season activities for which athletes might be paid or practice activities for which they might be paid, if performed in the state, do not constitute taxable income. While these factors do not, in themselves, invalidate the rule, they do go to its reasonableness. Thus, while a baseball player who plays five games in Minnesota may pay a tax on a smaller percentage of his total income than a football player who only plays one game in this state, the rule is not invalid on that ground. In Stephan v. State Tax Commissioner, 245 A.2d 552 (Del. 1968), the Court held that it was not unconstitutional to tax residents and non-residents on the same basis even though residents received benefits to which non-residents are not entitled.

The conclusion of the Hearing Examiner, which he reaffirms, is that the proposed games-played formula is inconsistent with Minn. Stat. § 290.17, subd. 2(1) which requires that the tax be imposed upon the income of a nonresident only to the extent that labor or services are performed within the state. The proposed rule is inconsistent with the statute because it taxes income of professional athletes for services which are not performed within the state. In addition, the rule is unreasonable because it treats the services performed by professional athletes only as games played and ignores all the other services those athletes perform in the course of their employment. The Department argues that this result is justified because the playing of games is the essence of their contract. However, there is no law in this state which justifies taxing an individual for all the money he earns because the services he performs in this state are some of the most valuable services to the employer.

The proposed games-played formula's inconsistency with the statute is apparent in several respects. It is most obviously apparent in the case of preseason wages earned by football players. Under the standard NFL contract, 10% of most professional football players' salary is allocated to the pre-season and paid to the athletes during the pre-season. If none of those athletes' services are performed in this state, there is absolutely no law which authorizes the State to tax those pre-season services because the athlete later plays a regular season game here. Yet, the Department includes pre-season salary for professional football players in the gross earnings to which the games-played formula is applied. This taxes services not performed in the State and is prohibited. That income simply is not taxable. The result is no different than taxing a Nebraska carpenter for 10 percent of the services performed in Nebraska if he later performs some services in Minnesota. The results for other teams, such as baseball, basketball, soccer, are unknown because no contracts were presented showing that the Department's formula is justified, even using the Department's approach, on the basis of contractual provisions. But at least, with respect to football players, paid pursuant to the standard contract made part of the record in this proceeding, the apportionment formula is contrary to state law. Furthermore, to the extent that a football player during pre-season plays a game in Minnesota, he should be taxed to the extent that he is paid for that game. This clearly is a service within the meaning of the taxing statute and should be taxed. The proposed rule does not, however, tax such income. The decision in Spaeth, as construed by the Department, to require an examination of the contract, does not support the proposed formula, and as was previously stated, copies of the various athletic contracts involved were, in most cases, not even presented for examination to reveal whether or not, using a contractual approach, the apportionment formula is consistent with those other contracts. Furthermore, while the bulk of the average football player's salary is paid during the regular season, nothing in Spaeth requires that the salary be attributed solely to games played as the Department proposes or that the tax be imposed on the most valuable services rendered by a non-resident. The Department's proposal to ignore all services performed by professional athletes like football players, except for those services rendered during regular season games, is not supported by any law cited by the Department. Preseason training, travel and preseason games are all services rendered

by a professional athlete to a team. Those services cannot be ignored in computing that proper portion of income which is earned in Minnesota and which is taxable by the State. Even if state law could be considered ambiguous, the general rule is that ambiguous statutes are to be construed favorably to the taxpayer and against the government. Dumont v. Commissioner of Taxation, 278 Minn. 312, 154 N.W.2d 196 (1967). While the Department cited some decisions authorizing the use of a games played formula for the taxation of athletes other than football players, none were cited supporting such a formula for the taxation of football players.

Furthermore, the recommendation of the Hearing Examiner for taxing non-football player athletes on a games-played basis resulted solely from the substantial equality of taxation for those athletes using either a games-played or a duty-day's formula. The Department strongly objected to the Hearing Examiner's recommendation that if a game-played formula was adopted, it could not be applied to football players. The Hearing Examiner made that recommendation on the basis of the factors considered by the Board in the Partee case. On reconsideration, however, the Hearing Examiner withdraws that recommendation as an alternative means for curing the defect in the rule. The reason for this is that there are no facts in the record which support that conclusion that all athletes but professional football players, whether taxed on a games-played basis or a duty-day's basis, would have substantially the same percentage of income subject to taxation in this state. Thus, the only way the Hearing Examiner can see for the Department to correct the defect mentioned is to adopt a strict duty-day's formula applicable to all professional athletes.

The Hearing Examiner originally referenced the possible double taxation that could occur if the Department adopted the rule as proposed. The Department vigorously objected to the conclusion that such double taxation would result for athletes in California. Whether or not the Department's position in that respect is accurate, and it may well be, is immaterial for purposes of reconsideration because the double taxation, if any, which might arise by operation of the rule as originally proposed, would not invalidate the rule. While double taxation in the ordinary meaning of that term is often considered undesirable policy, it is not impermissible "double taxation" in the legal sense of that word. Thus, in Milwaukee Motor Transportation Co. v. Commissioner of Taxation, 292 Minn. 66, 193 N.W. 2d 605 (1971), the Supreme Court reiterated the view that double taxation is not objectionable unless the person is taxed twice from the same income by the same taxing authority. By operation of the rule proposed by the Department, double taxation in the legal sense of that term would not occur because different taxing authorities are involved. Whether an athlete is subjected to double taxation (in the ordinary sense of that word) if he is a resident of California, or some other state, is actually immaterial.

Therefore, to reiterate, the Hearing Examiner concludes that the taxation of preseason earnings performed by football players out of state, and perhaps by other athletes out of state, coupled with the failure to recognize any services, other than regular season games, performed by professional athletes as income producing renders the proposed rule unauthorized and unreasonable.

Revocability of Charitable Contributions to the Non-Game Wild Life Management Fund.

The Department has also requested that the Hearing Examiner reconsider his finding that 13 MCAR § 1.6030 B.1. is unauthorized because it permits the revocation of a gift where a taxpayer merely changes his mind. Under common law, gifts are irrevocable and the Department has no authority by interpretative rule to alter or change that law where such change is not supported by statute. The general rule is that adminstrative rulemaking power does not authorize an agency to adopt a rule that is inconsistent with the statutes under which it is promulgated or which change existing common law. Mabley v. City of Evansville, 167 N.E.2d 473, (Ind. 1960); Medical Properties v. North Dakota Board of Pharm., 80 N.W.2d 87 (N.D. 1956). This prohibition is especially appropriate where interpretative rules are involved and is consistent with the general holding that an agency may not enlarge or restrict the statutes under which a rule is promulgated.

Although the Hearing Examiner concluded that the proposed rule could not be adopted as written, perhaps some elaboration on that point is necessary. It is accurate, as the Department argues, that the general refund provisions contained in Minn. Stat. § 290.391 (1978) are applicable to charitable designations to the Non-Game Wildlife Fund. However, they are applicable only to the extent that a taxpayer erroneously designated a gift to this fund where no such gift was intended. The Department's rule, as proposed, does not limit the change of such designations to those circumstances where errors were made because there was no intention to make a gift (or no gift at all) but permits a taxpayer to, in effect, change his intention at a later date, and revoke a gift which was previously intended to be made. In that latter respect, the rule is unauthorized because it changes common law. Where an error in designation is made by a taxpayer and there was no "intention" to make a gift, no "gift" as such is made and the taxpayer can, by amended return, recoup that erroneous designation. However, the rule may not expressly permit the recovery of money initially intended as a gift. If in its administration of this provision, the Department normally accepts an amended return under the rule as sufficient evidence of a mere error (of no intention to make a gift), that, of course, is left to their discretion. However, the rule itself cannot create a substantive right to cancel a valid gift because of a mere change of mind where there was an initial intention to make a gift. In that respect, the section could be rewritten to provide as follows:

> 1. A taxpayer may reverse all or part of the designation that was made to the Non-Game Wildlife Management Fund where such designation was originally made in error and the taxpayer had no intention to make a gift when the designation was made. No reversal of a gift originally intended by the taxpayer can be made merely because the taxpayer changes that intention at a later date.

By so drafting the rule, the Department can provide a mechanism for refunding erroneous designations where no intention to make a gift existed, and at the same time, avoid changing the common law principle that gifts are not revocable. While gifts, if limited to individual persons, might normally be in small sums, the revocability of a gift could be an important matter if a $1,000,000 designation, for instance, was later revoked by a taxpayer or his personal representative.

see p. 33 for amendments

Therefore, the Hearing Examiner reaffirms his prior conclusion that designations to the Non-Game Wildlife Management Fund may not be revoked at any time during which the taxpayer may file an amended return as originally proposed because such a provision authorizes the revocation of an otherwise valid and irrevocable gift under common law. The defect can be cured by amending the Part to read as suggested.

Exclusion of Corporate Contributions to the Non-Game Wildlife Management Fund under 13 MCAR § 1.6030 B.2.

no change see p. 34 and HE 44

The Department has also requested the Hearing Examiner to reconsider his finding that corporations may not be excluded from making a designation to the Non-Game Wildlife Management Fund. Normally, administrative rules must be within the scope of the statute under which they are adopted and may not defeat the spirit and purpose of the statute those rules are designed to implement. 73 C.J.S. Public Administrative Bodies and Procedure, § 103; 2 Am.Jur. 2d, Administrative Law, § 300; Connolly v. O'Malley, 234 N.Y.Supp. 2d 889 (N.Y.A.D. 1962); Morris v. Williams, 63 Cal. Rptr. 689, 67 C.2d 733, 433 P.2d 697 (1967); Farber's Inc. v. Comptroller of Treasury, 266 Md. 44, 291 A.2d 658 (1972). On the other hand, the usual rule is that even a court will not disturb an agency's interpretation of statute under which it operates unless that interpretation is "clearly" contrary to the will of the Legislature or for other "weighty" reasons. 2 Am.Jur.2d Administrative Law, § 297. Furthermore, agency interpretations of the statutes under which they operate, whether long-standing or contemporaneous with the first workings of the statute, are entitled to deference by the courts and the highest respect. 2 Am.Jur.2d Administrative Law, § 241.

The Department concluded that corporations could not make charitable contributions to the Non-Game Wildlife Management Fund because the statute requiring those designations on tax returns does not unequivocally include corporations. While the Hearing Examiner believes that excluding corporations in the proposed rule is at variance with the spirit and purpose of the enactment, the agency's argument that the matter is ambiguous and that its construction is entitled to some deference, is accurate. Since no one challenged the rule as originally proposed by the agency, since the statute under which this rule is proposed is ambiguous, and since the Department's construction is not manifestly contrary to that statute, the Hearing Examiner, on reconsideration, concludes contrary to his prior conclusion, that the rule as proposed is authorized.

Nonetheless, the Hearing Examiner, for the reasons discussed in his initial report, highly recommends that the Department reconsider its decision to exclude corporations from the making of charitable contributions to the fund involved. Including corporations is clearly consistent with the spirit of the provision, beneficial to the state and promotes the preservation of its natural resources. It is unfortunate that the Department would forfeit a mechanism for encouraging contributions to such a cause and bringing that mechanism to public attention merely because it is not clearly required to do so.

Deduction of 3cc Credit under 13 MCAR § 1.6225 C.3.

The Department also requested the Hearing Examiner to reconsider his conclusion that § 1.6225 C.3. requiring a reduction from the property taxes payable by the amount of the 3cc credit received under the provisions of Minn. Laws 1980, Ch. 607, Art. IV, §§ 3, 6 and 7 is unauthorized. The Hearing Examiner's Conclusion requires some clarification as no difference of opinion apparently exists. Minn. Stat. § 273.13, subd. 7 (1980) currently provides a credit for property owned by certain blind and disabled persons. That credit (3cc credit), under the clear and unambiguous provisions of Minn. Laws 1980, Ch. 607, Art. III, § 2, adding a new subdivision 2c to Minn. Stat. § 298.04, must be deducted from gross property taxes payable by a taxpayer to arrive at net property taxes payable, and such a result is implicit in 13 MCAR § 1.6225 A. and B. as originally proposed which respectively provide for reductions for "other state paid credits." This was accurately depicted in the memo from Jo Anne Zoff Sellner of the Senate Counsel in her memorandum to Mr. Busacker dated December 9, 1980. The Hearing Examiner misconstrued the effect and construction of the rule as origially proposed because of the Department's citation to Minn. Laws 1980, Article IV, instead of Minn. Stat. § 273.13, subd. 7 (1980). Clearly a reduction for the latter credit is required and authorized. However, in order to eliminate confusion and to properly implement the law, the rule must be amended to reference the § 273.13, subd. 7, as the 1980 amendment does, and not the statute reimbursing the various taxing authorities for their losses in revenues therefrom. To this end, it is recommended that § 1.6225 C.3. be amended to read as follows:

> For purposes of computing the net property taxes payable to qualify for targeting, the property taxes payable must be reduced by the amount of the class 3cc credit which was received by the homeowner under the provisions of Minn. Stat. § 273.13, subd. 7 (1980).

see HE 50

So amended p. 37

NOW, THEREFORE, BASED ON THE FOREGOING, IT IS HEREBY ORDERED that the prior Report of the Hearing Examiner, dated November 14, 1980, is hereby reaffirmed with the clarifications noted and with the exception that Conclusion No. 3(b) finding that the Department does not have statutory authority to exclude corporations from those persons entitled to make contributions to the Non-Game Wildlife Management Fund is, and should be, deleted. Furthermore, nothing in that Conclusion precludes a reduction in net property taxes payable for the 3cc credit provided by Minn. Stat. § 273.13, subd. 7 (1980). This Report shall be a supplement to that previously issued in this matter with the clarifications and alterations made herein.

Dated this 20th day of January, 1981.

JON L. LUNDE
Hearing Examiner

M E M O R A N D U M

The acceptance of this Petition is not intended by the Hearing Examiner to establish a policy or precedent for future cases. On the contrary, the Hearing Examiner believes that such Petition should be acted upon only in unusual cases which involve substantial questions of statutory authority because, as to such questions, the initial Report is binding if adopted by the Chief Hearing Examiner. Questions as to the meaning or scope of initial Reports should be resolved when rules are resubmitted to the Office of Administrative Hearings to establish that substantive defects have been cured. This case was considered unusual because of the number of statutory authority issues involved and the recent amendments to Ch. 15 making determinations on such issues binding. Initial authority determinations under these recent amendments require especially thorough consideration.

J.L.L.

DR-81-003-JL

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption of Amended Rules and New Rules of the Department of Revenue Relating to Individual Tax and Property Tax Refund (13 MCAR Sections 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225)

REPORT OF THE HEARING EXAMINER

The above-entitled matter came on for hearing before Jon L. Lunde, duly appointed Hearing Examiner, on Thursday, October 2, 1980, at 9:00 a.m. in the State Office Building, Room 83, 435 Park Street, St. Paul, Minnesota, 55155, pursuant to an Order for Hearing dated August 8, 1980. This was a rule-making proceeding conducted pursuant to Minn. Stat. Ch. 15 to determine whether the Department of Revenue has authority to adopt the rules proposed and whether they are necessary and reasonable and may be adopted.

Dale H. Busacker, Division Attorney, Income Tax Division, Minnesota Department of Revenue (hereinafter the "Department"), Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota, 55145, appeared as counsel and chief witness for the Department. In addition, Gerome T. Caulfield, Income Tax Director, and Wesley Skjegstad, Technical Assistant, appeared on behalf of the Department, but offered no testimony. Four other Departmental employees were also present at the hearing in the event their testimony was needed. Testimony from those individuals was not elicited by the Department or the public.

Approximately seven persons appeared at the hearing, and three persons signed the hearing register. The hearing continued throughout the day and until all persons present had had an opportunity to be heard. The record remained open for 20 calendar days following the hearing through October 22, 1980, for the submission of written comments from interested persons. Prior to the hearing, one public comment was received and three public and three Departmental comments were received after the hearing, but before the expiration of the designated comment period. The Department offered 19 exhibits into evidence at the hearing (numbered 1-19), and one exhibit was offered by the public (Pub. Ex. No. 1).

The Commissioner must wait at least five working days before taking any final action on the rules; during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Laws 1980, Ch. 615, § 6, subd. 4d, this Report has been submitted to the Chief Hearing Examiner for his approval. If the Chief Hearing Examiner approves the findings of this Report, he will advise the Commissioner of actions which will correct the defects and the Commissioner may not adopt the rule until the Chief Hearing Examiner determines that the defects have been corrected. However, in the cases where the Chief Hearing Examiner identifies defects which relate to the issues of need or reasonableness, the Commissioner may either adopt the Hearing Examiner's recommendations to cure the defects or, in the alternative, if the Commissioner does not elect

to adopt the recommendations, he may submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment. Provisions relating to this submission to the Commission may be found in Minn. Laws 1980, Ch. 615, § 6, subd. 4d.

If the Commissioner elects to adopt the recommendations of the Hearing Examiner and makes no other changes and the Chief Hearing Examiner determines that the defects have been corrected, then the Commissioner shall submit the rule to the Attorney General for review of form and legality. If the Commissioner makes changes in the rule other than those recommended by the Hearing Examiner, then he shall submit the rule, with the complete record, to the Chief Hearing Examiner for a review of the changes before adopting it and submitting it to the Attorney General. Procedures relating to this subsequent review by the Chief Hearing Examiner are set forth in Minn. Laws 1980, Ch. 615, § 6, subd. 4e.

When the Commissioner submits the rule to the Attorney General, he shall give notice on the day of submission to all persons who requested that they be informed of the submission to the Attorney General.

Based upon all the records and proceedings herein, the Examiner makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On August 7, 1980,, the Department filed the following documents with the Chief Hearing Examiner:

(a) A copy of the proposed rules.
(b) The Order for Hearing proposed to be issued.
(c) The Notice of Hearing proposed to be issued.
(d) A Statement of the number of persons expected to attend the hearing and estimated length of the Agency's presentation.

2. On Monday, August 25, 1980, a Notice of Hearing and a copy of the proposed rules were published at 5 State Register 277-289.

3. On August 26, 1980, more than 30 days prior to hearing, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice.

4. On September 5, 1980, the Department filed the following documents:

(a) The Order for Hearing.
(b) The Notice of Hearing as mailed.
(c) The Affidavit of Mailing the Notice to all persons on the list maintained by the Agency of persons who had registered their names with it for purposes of receiving notice of proposed rules.
(d) All materials received following Notice of Intent to Solicit Outside Opinion regarding the rules pertaining to individual, fiduciary, partnership and corporate income taxes published at 3 S.R. 1526 on Monday, January 29, 1979, and all materials received following Notice of Intent to Solicit Outside Opinion regarding rules pertaining to the energy credit published at 3 S.R. 2276 on Monday, June 25, 1979.
(e) The names of Departmental personnel to represent the Agency at the hearing together with the names of any other witnesses solicited by the Agency to appear on its behalf.
(f) The Statement of Need and Reasonableness.

The documents were available for inspection at the Office of Administrative Hearings from the date of filing to the date of the hearing.

Although rules of the Office of Administrative Hearings in effect on September 5, 1980 required the Agency to submit, at least 25 days prior to hearing, an affidavit of mailing to all persons on the Secretary of State's list and the Secretary of State's certification and list, such documents were not submitted by the Department. The rules involved, 9 MCAR §§ 2.105 C. and D., were based on Minn. Stat. § 15.0412, subd. 4 (1978) which required agencies to send Notices of Hearing to all persons who had registered their names with the Secretary of State for the purpose of receiving such notice. The latter statutory provision was repealed effective August 1, 1980 by Laws 1980, Ch. 615, § 6, which substituted notice to those persons registered with the Agency for those registered with the Secretary of State. That statute effectively repealed the rule of the Office of Administrative Hearings which, incidentally, was amended effective October 6, 1980, to correctly reflect the statutory mandate. The agency's compliance with statutory provisions instead of the rule is therefore appropriate and does not affect the authority of the Department to proceed to adopt the rules as proposed.

5. The record remained open through October 22, 1980, for the receipt of written comments and statements, the period having been extended by order of the Hearing Examiner to 20 calendar days following the hearing.

6. By Order dated August 15, 1980, the Chief Hearing Examiner approved the Department's proposal to incorporate by reference in its proposed rules the Internal Revenue Code of 1954 as amended through December 31, 1979. This approval was issued at the request of the Department which was submitted to the Chief Hearing Examiner on August 6, 1980.

Statutory Authority

7. As authority for its adoption of the general income tax rules proposed, the Department cited Minn. Stat. § 290.52 (1978) which provides in part:

> The commissioner [of revenue] shall administer and enforce the assessment and collection of the taxes imposed by this chapter [290]. He may, from time to time, make, publish and distribute rules and regulations in enforcing its provisions. . . .

The Department also cited, as statutory authority for its adoption of rules pertaining to the energy credit, Minn. Stat. § 290.06, subd. 14, which provides in part:

> The commissioner of revenue in cooperation with the director of the energy agency shall promulate rules establishing additional qualifications and definitions for the [energy] credits provided in clauses (a) to (d).

The Department additionally cited Minn. Stat. § 290A.20 as authority for its adoption of rules pertaining to the property tax refund. It provides in part:

> The commissioner [of revenue] shall promulgate rules and regulations which he deems appropriate for the administration of sections 290A.01 to 290A.21. . . .

These statutory provisions provide adequate authority for the adoption of the rules proposed by the Department. Sections 290.52 and 290A.20 provide authority for the adoption of procedural and interpretative rules[1] which may not, however, be inconsistent with the statutes under which they are adopted or other stated law; and § 290.06, subd. 14, provides authority for the adoption of legislative rules.

Substantive Provisions

8. The rules proposed for adoption consist of amendments to existing rules as well as new rules. They relate to the following subjects:

a. A definition of a "resident" (13 MCAR § 1.6001).
b. Income tax returns for married persons (13 MCAR § 1.6002)
c. Gross income determinations for full-year residents (13 MCAR § 1.6003)
d. Gross income determinations for part-year residents (13 MCAR § 1.6004)
e. Energy credit amendments (13 MCAR § 1.6020)
f. Non-game wildlife check-off (13 MCAR § 1.6030)
g. "Targeting" under the property tax refund law (13 MCAR § 1.6225).

The need for and the reasonableness of each of the seven topics was separately addressed in each of the seven sections of the Department's Statement of Need and Reasonableness (hereinafter the "Statement"). For the most part, each of the rules to be discussed incorporates existing Departmental practice with respect to its administration of the tax laws.

13 MCAR § 1.6001

9. Section 1.6001 pertains to the definition of a resident for purposes of the tax laws, the presumptions applicable to the determination of residence and domicile and the factors to be considered in making the determination. This section was not subject to adverse public comment and is, in its entirety, a necessary and reasonable exercise of the Department's authority. The amendments to this Section which the Department proposed at the hearing merely indicate what language published in the State Register is new language and deletes an obsolete citation. They are, therefore, necessary, reasonable and do not constitute a substantial change.

Part A.1. contains a definition of the term "resident" which deviates somewhat from the statutory definition found in Minn. Stat. § 290.01, subd. 7 (1978) which had been more closely followed in the Department's prior definition. However, some definition in the rules is necessary to understand them and the Department's interpretation of the statutory term in its rules is permissible to clarify ambiguous meanings, modernize language, or otherwise.[2]

13 MCAR § 1.6002

10. Section 1.6002 pertains to income tax returns for husband and wife. This section, in its entirety, including repealed provisions, is a necessary and reasonable implementation of the operative provisions of Chapter 290 and was not subject to adverse comments from the public. The Department proposed several clarifying amendments to the language as originally published in the

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[1] Such authority also exists, at least as to procedural rules, pursuant to Minn. Stat.§ 15.0412, subd. 3 (1980). The conclusion that the Commissioner's rule-making authority is not legislative in nature is consistent with the holding that federal tax regulations are interpretative (see 1 Davis, Administrative Law Treatise, § 503, p. 300 (1958)) and is implied in the Minnesota Supreme Court's holding in Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588, 594 (1971).

[2] While the wholesale use of definitions different from those appearing in statutes is not generally recommended, where the Department's definition clarifies ambiguities in a statute and informs the taxpayer of the Department's interpretation of a term, it is permissible to adopt a different definition. In the event of a conflict, of course, the statutory definition is controlling; however, no such conflict is apparent in this case.

State Register and agreed to two amendments proposed by Gerald Blissenbach, Senior Income Tax Specialist, Minnesota Mining and Manufacturing Company.

11. In Part C., the Department proposed four amendments to the first paragraph in order to clarify the types of returns on which the relevant deductions could be made. The three amendments are necessary, reasonable and insubstantial. As amended, the first paragraph of § 1.6002 C. will read:

> If a husband and wife elect to each file a separate income tax return, or if they elect to file a combined return, each spouse must report that spouse's own federal adjusted gross income. On separate or combined returns, each spouse may claim only those deductions and credits that spouse is separately entitled to claim except that, on separate or combined returns, the married credit, or on a combined return, itemized deductions may be claimed in full by one spouse or may be divided between them in any manner. On separate or combined returns, deductions for which each spouse is equally liable and which are paid from a joint account may be considered as being paid by either spouse [emphasis supplied to indicate new language].

12. Two amendments proposed by Blissenbach and agreed to by the Department would change the last three sentences of Part C. to provide for the similar treatment of dividends, interest and the gain or loss on the sale or exchange of a capital asset. These changes are necessary, reasonable and insubstantial. As amended, the last three sentences of § 1.6002 C. will read:

> Interest income from a joint bank account or jointly held bonds and dividends on jointly held stocks shall be divided equally unless it can be shown that a different allocation is more appropriate. A gain or a loss from the sale or exchange of a capital asset shall be reported by the spouse owning the capital asset. A gain or a loss from the sale or exchange of a capital asset owned jointly by the spouses shall be divided equally unless it can be shown that a different allocation is more appropriate [emphasis added to indicate new language].

13. The Department further proposed an amendment to Part J. by adding at the end a new sentence clarifying the operation of the rule. This is a necessary, reasonable and insubstantial change. The last sentence of § 1.6002 J. will provide:

> As a result a spouse may have a different capital loss carryover for Minnesota than was allowed on the federal return.

13 MCAR § 1.6003

14. Section 1.6003 contains all new material pertaining to the computation of gross income for individuals who are full-year Minnesota residents. The language of this section, as originally published in the State Register, is, in its entirety, a necessary and reasonable implementation of Chapter 290 and was not the subject of adverse public comment. However, several amendments to the rules as originally published in the State Register were proposed by the Department. Some of these amendments were based on the comments of Mr. Blissenbach.

15. Based on Blissenbach's comments, the Department proposes to put a parenthetical explanation at the end of Part A. clarifying the effective date of conformity to the Internal Revenue Code. The clarification proposed is necessary, reasonable and insubstantial. The parenthetical at the end of § 1.6003 A. will read as follows:

> (i.e., the federal change is effective for years beginning after December 31, 1980 but is enacted as an amendment to the Internal Revenue Code during 1979. Present conformity to the Code in-

cludes amendments through December 31, 1979. The change is effective for Minnesota for taxable years beginning after December 31, 1980;)

16. The Hearing Examiner does not disapprove of the parenthetical amendment clarifying the year "set" by the legislature which was thoroughly described in the Statement but does feel that it could be phrased in a clearer manner and would propose the following:

> (If the federal change in the Internal Revenue Code is effective for years beginning after December 31, 1980, but is enacted as an amendment in 1979, the change is effective for Minnesota for taxable years beginning after December 31, 1980, also, since present conformity to the Internal Revenue Code includes federal amendments through December 31, 1979.)

✓ p. 12

17. The Department also proposed at the hearing to add two new sentences at the very end of § 1.6003 B. to read as follows:

> Income and gains from the sale or other disposition of property which is reported on the installment method and is included in federal adjusted gross income is included in Minnesota gross income even though the property was located outside of Minnesota and the sale occurred prior to 1978. For purposes of computing the amount of the gain that would be included in Minnesota income, the basis will be determined under the provisions of Part D.2. of this rule.

✓ p. 13.

This amendment is consistent with existing law and is a necessary, reasonable and insubstantial change.

18. Based on Blissenbach's suggestion, the Department also proposed at the hearing to amend the first sentence of the second paragraph of Part D.2. to read as follows:

> The basis of tangible property acquired while a Minnesota resident utilized any trade or business outside of Minnesota ~~by a Minnesota resident~~ shall be cost less depreciation allowable for Minnesota income tax purposes [underlineation designates amended language and strike marks indicates deleted language].

✓ p. 15

This is a necessary, reasonable and insubstantial amendment which more clearly reflects existing law.

19. A second amendment to this same paragraph was proposed by Blissenbach but is opposed by the Department. The last sentence of that section, as published, provides:

> When property is utilized in a trade or business outside of Minnesota and is held by a Minnesota resident who acquired the property prior to the date of becoming a Minnesota resident, the federal adjusted basis of that property shall be the Minnesota basis [emphasis added].

If amended as Blissenbach proposes, the sentence would read as follows:

> When property is utilized in a trade or business outside of Minnesota and is held by a Minnesota resident who acquired the property when the person was not subject to the Minnesota income tax, the federal adjusted basis of that property shall be the Minnesota basis [Emphasis added].

The Department contends that Minn. Stat. § 290.12, subd. 2, while alluding to "a person or organization not subject to income taxation under this act." should properly be construed as covering all non-residents, even those who might have been subject to some tax under the act, because the State has no authority to tax a non-resident for out of state property. The Department

also feels that it is proper to avoid classifying non-residents into two categories. The Department's construction of the Act is not without support in the law and is precisely the type of interpretation properly left to its informed discretion. Its insistence on the published language is, therefore, necessary and reasonable.

20. The Department also proposes to amend the third sentence of § 1.6003 D.5. by adding the words "or losses" after the word "income" to clarify the intent of the rule. This amendment is also necessary, reasonable and insubstantial. As amended, that sentence will provide in part:

> The following is a listing of some intangible assets and includes the income or losses from these assets: [emphasis added]

* * *

21. The final amendments to § 1.6003 proposed by the Department at the hearing and subsequently modify Part E. The Department proposes to amend the first paragraph by changing the language of the first sentence and adding new language at the very end. As amended, the first paragraph of Part E. will read:

> The amount of a new operating loss ~~carryforward or carryback~~ that may be carried back or carried forward shall be the same dollar amount allowed in the determination of federal adjusted gross income. However, as provided in Part C., no deduction is allowed for or with respect to that portion of losses which constitute tax preference items. An adjustment must also be made for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code. A net operating loss shall be allowed to be carried back or carried forward only to the extent that loss was assignable to Minnesota in the year the loss occurred or in the year to which the loss was carried, whichever would allow more of the loss to be allowed for Minnesota purposes. An individual who is a nonresident in the loss year and a resident in the carryover year or an individual who was a resident in the loss year and a nonresident in the carryover year should use this part to determine the amount of their net operating loss. [Underlineation designates new material, strike marks designate deleted material].

The amendments to the first paragraph of Part E. more properly states the intent of the provision and more clearly reflects when a loss can be claimed on the Minnesota return by a full-year resident. The amendments to the first paragraph are necessary, reasonable and insubstantial and were not the subject of any adverse public comment.

22. The Department also proposed to amend the second paragraph of Part E. by adding one sentence to read as follows:

> "A taxpayer may make an adjustment to federal adjusted gross income for the modifications that affect shareholders of a small business corporation which has made an election for federal purposes but not for Minnesota purposes as provided in Section 290.01, subd. 20(c)."

The addition of this language, which merely restates current administrative practice is necessary, reasonable and insubstantial. It is repeated at 13 MCAR § 1.6004 I. at the end of the first paragraph.

23. The last amendment to Part E. adds clarifying language and conditions concerning the deductability of the net operating loss carryback and carryover to the very end of part E. The added paragraphs, consisting of all new material, will provide as follows:

"The net operating loss carryback or carryover applied as a deduction in the taxable year to which the net operating loss is carried back or carried over shall be equal to the net operating loss carryback or carryover applied in the taxable year in arriving at federal adjusted gross income subject to the following modifications:

1. Increase the amount of carryback or carryover applied in the taxable year by the amount of losses and expenses not assignable to Minnesota incurred in the taxable year.
2. Decrease the amount of carryback or carryover applied in the taxable year by the amount of income not assignable to Minnesota earned in the taxable year and the amount of federal jobs credit or WIN credit earned in the taxable year.
3. A taxpayear who is not a resident of Minnesota during any part of the taxable year and who has no income assignable to Minnesota during the taxable year shall apply no net operating loss carryback or carryover in the taxable year.

The net operating loss carryback or carryover to the next consecutive taxable year shall be the net operating loss carryback or carryover as calculated in this Part less the amount applied in the taxable year(s) as above. No additional net operating loss carryback or carryover shall be allowed if the entire amount has been used to offset Minnesota income in a year earlier than was possible on the federal return. A net operating loss carryback or carryover that was allowed to offset federal income in a year earlier than was possible on the Minnesota return shall still be allowed to offset Minnesota income but only if the loss was assignable to Minnesota in the year the loss occurred."

✓ P. 17, 18

This amendment, which also appears as an amendment to § 1.6004, pertaining to part-year residents, was not the subject of adverse public comment and is necessary, reasonable and insubstantial. Although the amendment is lengthy, it is not substantial under the guidelines established in 9 MCAR § 2.111 A.-D. because it does not affect classes of persons not represented at the hearing, does not deal with a new subject matter of significant effect, and does not result in a rule fundamentally different from that originally proposed. On the contrary, the subject of the deductability of net operating loss carrybacks and carryovers was the subject of the rule as originally proposed and all residents and non-residents alike were notified that that subject would be dealt with at the rule-making hearing. In addition, the Notice of Hearing, itself, informs interested persons that the rules are subject to change or amendment as a result of the hearing process. For all those reasons, the amendment, even though lengthy, is not deemed to be substantial in nature. Tax rules, by their very nature, are complex and replete with possible issues and have wide-ranging effect. It is not reasonable to suppose that an agency is tied to the language used in its rules as originally proposed and published. Given the complexity of the subject-matter, the agency must be permitted to make amendments, clarifications and additions to its rules during the hearing process so long as no fundamental changes result and no lack of notice problems arise. In this case, the rules, themselves, aroused little public interest, and those persons who were interested had no objection to this amendment.

24. The last amendment to § 1.6003 consists of the addition of a new Part F. which will read as follows:

F. To the extent a capital loss carryover is allowed in determining federal adjusted gross income, the capital loss carryover will be allowed in Minnesota even though the capital loss was incurred on the sale of out-of-state property prior to 1978. However, see the special rules for husband and wife returns contained in Part J. of § 1.6002.

✓ P. 18

This amendment is consistent with Minn. Stats. § 290.01, subd. 20, which requires that federal adjusted gross income must be used by Minnesota residents to compute their tax liability. The addition of this Part F. is necessary, reasonable and insubstantial.

13 MCAR § 1.6004

25. Section 1.6004 contains all new material pertaining to the computation of gross income for part-year residents and non-residents. Except as discussed below, this section, in its entirety, is a necessary and reasonable implementation of Chapter 290 and was not subject to adverse public comment. Further, the rule is consistent with the provisions of the income tax reciprocity agreements between Minnesota and Wisconsin and Minnesota and North Dakota governing personal or professional service income personally rendered by a taxpayer. The Department did propose and concur in several amendments to the rules at the hearing.

26. Two amendments to Part A.2. were proposed by the Department at the hearing. The first would alter the language of Part A.2.c. to read as follows:

> c. income and losses from tangible property located outside of Minnesota, which income or loss was received or earned while that person was a non-resident of Minnesota. After removing capital gains and losses not assignable to Minnesota, the taxpayer shall recompute the amount of capital gains that are included in Minnesota gross income. The taxpayer shall also recompute any capital loss limitation and capital loss carryover to remove those amounts that are not assignable to Minnesota. (Emphasis added)

✓ p.19

The Department also proposed a new paragraph at the very end of Part A.2. to read as follows:

> "A part-year resident would apply these modifications and this rule to the income and losses received during that part of the year the individual was a non-resident of Minnesota. Income and losses received during that part of the year the individual was a resident of Minnesota would be governed by the rule concerning full-year residents."

✓ p.19

These two amendments to the rules as originally published, are necessary reasonable and insubstantial. The first is consistent with the income assignability provisions set out in Minn. Stat. § 290.17, subd. 2, and other provisions of Chapter 290, and the second clarifies the procedure to be followed by part-year residents. The two amendments were not subject to adverse public comment.

27. The Department also proposed one amendment to Part A.3. and concurred in three amendments to that Part which were proposed by Blissenbach. The first amendment is a mere technical one changing the heading of Part A.3.d. to read as follows:

> "d. Business income or losses."

✓ p.20

This more properly reflects the substance of the Part and is necessary, reasonable and insubstantial.

28. The Department also concurred in three language changes to Part A.3.d.(2) proposed by Blissenbach. As amended, that Part will read:

> (2) Business conducted within Minnesota and which has a nexus within Minnesota so that the business is subject to Minnesota income tax would include income or losses from the sales within Minnesota and a business dealing in personal and professional services where such services were performed in the state. Trade or business income or loss assignable to Minnesota and earned by a nonresident individual as a proprietorship or partnership which

✓ p.21

was carried partly within and partly without Minnesota is subject to the three-factor apportionment formula contained in section 290.19 or apportionment under section 290.20 except for construction business on which the three-factor formula is not permitted. A non-resident individual who has farm income from within Minnesota and from outside of Minnesota may also use the ~~three-factor apportionment formula~~ apportionment formulas contained in sections 290.19 and 290.20. [Underlineation designates new material, and strike marks designates deleted material.]

The changes in this subpart more accurately reflect existing state law and are necessary, reasonable and insubstantial.

29. Part F. deals with the exclusion of personal or professional service income earned in Minnesota by a Wisconsin or North Dakota resident under agreements between the relevant states. Blissenbach proposed two language changes to this Part at the hearing. Based on his suggestion, the Department proposes to amend the first sentence of Part F.1. to read as follows:

"The reciprocity exclusion does not appy where the personal or professional service income is earned as part of a business operated by the taxpayer which has employees that do more than incidental duties for the business or where there is the sale or delivery of goods which are more than an incidental part of the business." [underlined wording is new]

p. 22

This clarification to the rule as originally published is necessary, reasonable and insubstantial.

The Department refused to amend this sentence, as Blissenbach proposed, to add the words "and is included in and not separately accounted for" after the words "is earned". The Department concluded that such an amendment would permit taxpayers without the benefit of a written agreement to specify what portion of their incomes was from personal services within this state. Since such a provision could be abused, the Department's refusal to adopt it was reasonable. This is especially true because a taxpayer who keeps proper records of his personal services would be allowed a commensurate exclusion.

30. Section 1.6004 G., which was the only provision of the rule subject to adverse public comment, pertains to the taxation of non-resident athletes for their performances in Minnesota. As originally proposed, it provides:

G. The amount of federal adjusted gross income to be assigned to Minnesota for nonresident athletes for that person's (sic) athletic performance in Minnesota shall be determined by using the "games played" formula. The fraction used to determine the amount of income assignable to Minnesota under the "games played" formula shall use the total number of games in the season as the denominator and the total number of games played in Minnesota as the numerator. In using the "games played" formula, pre-season games do not constitute games played during a season. Each level of post-season "playoff" games constitutes a season. The use of any method other than "games played" to determine assignability of income to Minnesota will place the burden on the nonresident athlete to demonstrate that his or her income is actually the product of other substantial services in addition to performing as an athlete in an athletic contest. An athlete who meets this requirement would be allowed to use the "duty days" formula. The fraction used to apportion income by using the "duty days" formula is where the denominator contains the total number of days which the individual is under a duty to perform for the employer and the numerator is the total number of those days spent in Minnesota. An example of these types of athletes would be those that are hired for specific duties after the end of a normal season, or other athletes such as managers, coaches or trainers who are hired for duty on an annual basis.

this entire section deleted

see p. 25

skip to HE 38 for consideration of other sections

At the hearing, the Department proposed to add one new sentence immediately after the first sentence of the rule as originally proposed to read as follows:

> The term "athletic performance" means that a person is being paid to perform in a game or to be available to perform.

This amendment is insubstantial and necessarily clarifies the Department's position that the games played formula does apply to nonresident athletes who don't actually play in a game. It applies whether or not the individual makes an appearance in the game.

31. The basis for the Department's use of the games played formula is contained in its Statement (pp. 75-84). It provides in pertinent part as follows:

> . . . The controversy is over how to determine the amount of income that must be assigned to Minnesota. This rule states that the income for an athlete will be assigned using the games played formula. This formula counts the number of games that are played in Minnesota as the numerator, and the total number of games in the season as the denominator and applies that fraction to the amount of the federal adjusted gross income of the nonresident athlete that is attributable to payment for athletic performance. It should be remembered that for a resident athlete, all income, of course, would be assignable to Minnesota. Now in using the games played formula, pre-season games do not constitute games played during a season because that is not the reason why the athlete and the athletic club have contracted together. The reason they have contracted together is for the purposes of providing athletic performance in regular season games. Now, each level of post-season playoff games would constitute a season; therefore, if a playoff consists of only one game the income that is directly earned by the player for that one game would be assigned to where the game was played. However, if there were two games or five games or seven games involved before one team can move on to a new level of playoffs, then that level would constitute the number of games. If there were seven games in the playoff series, and all seven games were played, and four of those were played in Minnesota, then 4/7th of the income from those games would be assignable to Minnesota.
>
> * * *
>
> In this way, the rule recognizes that a professional athlete is actually and primarily paid for his or her services in regular season games. This is the purpose of the existence of the athletic leagues and teams, and this is how they sell their tickets and their television and radio rights. This is their reason for existence. The very essence of the team is that they will play games of athletic competition against other teams. The real worth of the team is in the playing of the games. The practice and the pre-season games are incidental to their regular season performance. The games that are played is the point of all the publicity and the training. Without those regular season games, there would be no need for either practice or publicity. It is perfectly reasonable to conclude that professional sports teams do not pay large amounts of money to athletes simply for their services during practice sessions, pre-season games, publicity events or otherwise. The athlete's only real worth to his team is in terms of his ability to play in the regular season's schedule of games. This will be the presumption as contained in the rule; however, again, it must be remembered that for those players who can show that the club has contacted with them for other substantial services beyond playing in the games, that the duty days formula may be used by them. . . .

32. The American League of Professional Baseball Clubs (AL), the National Football League (NFL), the National Hockey League (NHL), and the National Football League Players Association (NFLPA), through their respective counsel, submitted written comments opposing the proposed games played formula. They all

felt that the games played formula was inconsistent with state law as well as the laws, decisions and opinions of other taxing authorities and that a duty-day's formula was more appropriate. Furthermore, they all argued that only a duty-day's or work-day's formula was consistent with state law and the substance of the agreements existing between professional athletes and the various teams.

33. At the present time, California and Michigan tax nonresident baseball players on the basis of a duty-day's formula where the days spent in the state is the numerator of the faction, and the total duty days is the denominator. Duty days begin when a player must first report for practice and end on the day of the final game of the season, including play-off games. Apparently, this was not always the case in California which, at one time, taxed nonresident baseball, basketball and hockey players on the basis of a games-played formula but which taxed nonresident football players on the basis of a duty-day's formula. California refused to tax nonresident football players on a games-played basis because it was found that to do so would produce substantially different results than the duty-day method.

34. The duty-days' formula has been held to be roughly equivalent to a games played formula in baseball, hockey, basketball and other sports involving a large number of games but has been held to be inapplicable to football because of the relatively small number of games played. Thus, the California State Board of Equalization, in a rejecting a football player's argument that his salary should be allocated to California in accordance with a games-played formula, like other sports, held as follows:

> Baseball, basketball and hockey teams play relatively large numbers of games during their respective playing seasons, and the number of working days approximates the number of games played. Moreover, baseball, basketball and hockey teams often play series of games without returning to their home states. Any discrepancies between the number of games and working days therefore appear in both the numerator and denominator of the apportionment formula and cancel each other out. [The Board] therefore concludes that the working day and games played methods are equivalent when applied, to baseball, basketball and hockey players. In essence, the [Board's] position is that the working day method is preferable for all non-resident athletes, but that the games played method is appropriate in some cases because it is more convenient and produces approximately the same result.[3]

The Board noted that the State could reasonably find that the games played method should not be applied to professional football players stating:

> It is sufficient to note that the principal reason for using the games played method in those cases does not apply here. Unlike baseball, basketball or hockey teams, football teams play only one game per week during the regular season, and they typically return to their home state after each game to practice for the next. Therefore, the games-played method, if applied to football players would produce substantially different results than the working-day method. Accordingly, it is not unreasonable ... to use the one method for some athletes, while using the other method for football players.[4]

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[3] Appeal of Dennis F. and Nancy Partee, Cal.St. Bd. of Equalization, October 6, 1976, ¶ 205-538 CCH California Tax Reports at ¶¶ 205-539, 540, p. 14, and 893-46, 47.

[4] Id. ¶ 205-540, p. 14, 893-47.

California apparently reverted to a duty-days' or work-days' formula after this decision was issued in 1976. In the instant case, the Department presented no evidence showing the effects of its proposed rule on the various types of professional athletes who might make appearances in Minnesota.

35. The non-game activities required of professional athletes, including professional football players, are a substantial part of their employment and an integral part of their job duties. Thus, in the Partee matter, California found that necessary practice sessions and travel was not an insignificant or incidental part of a football player's duties and that, in spite of contractual provisions to the contrary that then existed, it was reasonable to assume that a portion of the player's salary represented compensation for such activities.[5]

> Thus, the NFL player contract in ¶¶ 1 and 2 provides as follows:
>
> 1. TERM. This contract covers one football season, and will begin on the date of execution or April 1, 19__, whichever is later, and end on April 1, 19__, unless extended, terminated, or renewed as specified elsewhere in this contract.
>
> 2. SERVICES. Club employs player as a skilled football player. Player accepts such employment. He agrees to give his best efforts and loyalties to the Club, and to conduct himself on and off the field with appropriate recognition of the fact that the success of professional football depends largely on public respect for and approval of those associated with the game. Player will report promptly for and participate fully in Club's official pre-season training camp, all Club meetings and practice sessions, and all pre-season, regular-season and post-season football games scheduled for or by Club. If invited, Player will practice for and play in any all-star football games sponsored by the League. Player will not participate in any football game not sponsored by the League unless the game is first approved by the League.

Fines may be imposed on football players as well as hockey players and others for being late to team practices or meetings, for missing team meetings or practices, or for reporting late or being absent from pre-season training camp. It is clear that travel and practice are, in fact, an integral part of a professional athlete's employment and indispensable for the successful operation of the purposes for which he is hired. A team simply cannot function as a practical matter if the players do not practice on their game plans, refine their abilities, or travel to the games scheduled. Thus, Edward R. Garvey, Executive Director of the NFLPA, stated (in his letter dated October 21, 1980):

> The thought that a single game is equivalent to 1/16th of the effort required to draw his full salary is specious. Therefore, the National Football League Players Association urges the non-resident professional athlete obligation to be apportioned on the traditional "duty days" concept rather than on this ill-founded notion of "games played" within the borders of this state.

36. If Minnesota were to adopt a games-played formula, it would result in the double taxation of the same income for many professional athletes, especi-

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[5] Partee, supra, ¶¶ 205-539, p. 14, 893-46.

ally those residing in California, because California grants a credit to athletes who reside there against taxes paid to other states based only on a duty-days' formula.

37. The taxation of the gross income of nonresident individuals by Minnesota is authorized by Minn. Stat. § 290.17, subd. 2(1) (1978) which provides in part:

> . . . the income of nonresident taxpayers from such sources shall be assigned to this state if, and to the extent that, labor or services are performed within it. . . .

In Hughes v. Spaeth, 207 Minn. 577, 292 N.W. 194 (1940), the Court held that in determining the proper allocation of a nonresident's income to the state, the Department must look to the substance of the employment relationship to ascertain what services actually have produced the income. Based on the evidence that was presented regarding the pre-season and seasonal activities of professional football players with respect to training camps, preseason games, practice and travel, the Hearing Examiner concludes that these are substantial and integral parts of a professional player's employment and not merely incidental thereto and that it is inconsistent with the statute and the decision of the Court in Hughes v. Spaeth, supra, to tax professional football players on the basis of the games-played formula, and that such a formula is also unreasonable and unauthorized and should not be adopted. To correct this defect, Minnesota should follow the other states known to have considered the matter and adopt a duty-days' formula where the numerator of the fraction is the number of duty-days in the state of Minnesota and the denominator is the total number of duty-days for that athlete computed from the opening of spring training or the pre-season training of the respective team to the final game of the season or regular post-season game. Alternatively, the Department could use a games-played formula for all professional athletes but use a duty-days' formula for football players. While this might substantially or totally eliminate any tax revenues from games played by professional football players in the state, it is nonetheless consistent with state law and the substance of those athletes' employment. In addition, it avoids the double taxation problems raised by Thomas H. Borman in his letter of October 1, 1980 and is consistent with known state regulations and revenue rulings of the Internal Revenue Service pertaining to non-citizen athletes who participate in athletic contests in the United States. See, e. g., Rev. Rul. 76-66, 1976-1 C.B. 189.

38. The Department also proposed at the hearing to amend § 1.6004 H. by substituting the word "payment" for the word "distribution" in the second line. Because the word "payment" was a more proper term to describe the bonuses, commissions and vacation pay referred to in the rule, the word "distribution" generally being applied to corporate payments to shareholders. This a necessary, reasonable and insubstantial amendment. As amended, the first sentence of Part H. will read:

> The following items of income receieved by a nonresident are assignable to Minnesota regardless of the time or place received by the taxpayer if the underlying services giving rise to the payment were performed in Minnesota.

39. The Department further proposes to amend Part I. to read as follows:

> I. The amount of a net operating loss ~~carryforward or carryback~~ that may be carried back or carried forward shall be the same dollar amount allowed in the determination of fed-

eral adjusted gross income. Adjustments must be made in the net operating loss for income and losses which are not assignable to Minnesota and for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code. A taxpayer may make an adjustment to federal adjusted gross income for the modifications that affect shareholders of a small business corporation which has made an election for federal purposes but not for Minnesota purposes as provided in Section 290.01, subd. 20(c). [Emphasis added for new language]

✓ P.26

The net operating loss carryback or carryover applied as a deduction in the taxable year to which the net operating loss is carried back or carried over shall be equal to the net operating loss carryback or carryover applied in the taxable year in arriving at federal adjusted gross income subject to the following modifications:

1. Increase the amount of carryback or carryover applied in the taxable year by the amount of losses and expenses not assignable to Minnesota incurred in the taxable year.
2. Decrease the amount of carryback or carryover applied in the taxable year by the amount of income not assignable to Minnesota earned in the taxable year and the amount of federal jobs credit or WIN credit earned in the taxable year.
3. A taxpayer who is not a resident of Minnesota during any part of the taxable year and who has no income assignable to Minnesota during the taxable year shall apply no net operating loss carryback or carryover in the taxable year.

The net operating loss carryback or carryover to the next consecutive taxable year shall be the net operating loss carryback or carryover as calculated in this Part less the amount applied in the taxable year(s) as above. No additional net operating loss carryback or carryover shall be allowed if the entire amount has been used to offset Minnesota income in a year earlier than was possible on the federal return. A net operating loss carryback or carryover that was allowed to offset federal income in a year earlier than was possible on the Minnesota return shall still be allowed to offset Minnesota income.

These are the same amendments which were made to § 1.6003 E. and are a necessary, reasonable and insubstantial change in the rule as originally published for the reasons previously set forth. This amendment also was not subject to any adverse public comment or criticism at the hearing or thereafter.

13 MCAR § 1.6225 (should read "6020")

40. The Department has proposed several amendments to the energy credit provisions contained in § 1.6225. The statement clearly discloses the need for and the reasonablness of each of these amendments and none of them were the subject of adverse public comment. These amendments are found in their entirety to be necessary and reasonable.

13 MCAR § 1.6030

41. § 1.6030 contains all new provisions for a charitable contribution to the non-game wildlife management fund of the Department of Natural Resources which was authorized by Laws 1980, Ch. 607, Art. I, § 24, adding a new section 290.431 to Chapter 290 (1978) which provides as follows:

> . . . Effective with returns filed for taxable years beginning after December 31, 1979, every person who files an income tax return or property tax refund claim form may designate that $1 or more shall be deducted from the refund that would otherwise be payable to that person and paid into a fund to be established

for the management of non-game wildlife. The commissioner of revenue shall, on the first page of the income tax return and the property tax refund claim form, notify filers of their right to designate that a portion of their refund shall be paid into the non-game wildflife management fund. The sum of the amounts so designated to be paid shall be annually appropriated from the general fund to the commissioner of natural resources and credited to the non-game wildlife management fund for use by the non-game section of the division of wildlife in the department of natural resources.

The proposed rules were not the subject of any adverse public comments and, except as discussed below, they are necessary and reasonable provisions designed to administer and enforce Laws 1980, Ch. 607, Art. I, § 24 (hereinafter the 1980 amendment).

42. Part B.1. provides that a taxpayer may reverse all or part of the designation made to the fund at any time the taxpayer can file an amended return. Such a provision, while not unreasonable, is not authorized under existing law, by statute or otherwise The statute, itself, does not provide for such a revocation and the whole concept of a revocable gift is inconsistent with existing law.

The 1980 amendment provides that the amounts designated to the fund "shall be annually appropriated from the general fund to the commissioner of natural resources." Nothing in the statutory language permits the Department to later reduce the amount of the money so appropriated or determine when gifts to the Department of Natural Resources should be refunded. Those monies do not belong to the Department of Revenue but to the Department of Natural Resources. Furthermore, inter vivos gifts are not subject to revocation under common law. See, 8A Dun. Minn. Dig. 2d, § 4.00 (3rd Ed. 1979).

Where charitable contributions to the Department of Natural Resources fund have been made and appropriated and belong to the Department of Natural Resources, there simply is no authority for a taxpayer's revocation of that decision. The characterization of a charitable contribution as an "election" which can, like other elections, be reversed at any time the statute of limitations is open ignores the substance of the designation as a gift. Furthermore, while amended returns can be filed for errors (Minn. Stat. § 290.391), a mere change of mind regarding a gift is not, in any sense of the word, an "error" and does not affect one's tax liability as such, which that section was designed to do. This section should, therefore, be amended to provide that designations are irrevocable.

see p.33 for amendment and also Supp. HE p.7

43. Part B.2. provides that corporations may not, on their returns, make a designation to the fund. This provision is also at variance with the plain language of the 1980 amendment which permits "every person" filing a return to designate monies to the fund and requires the Commissioner of Revenue to inform filers of their "right" to make that designation.

Under § 290.02, subd. 2, a person is defined as:

"Individuals, fiduciaries, estates, trusts, and partnerships not included in the definition of corporations may, when its context requires, include corporations as herein defined."

As the basis for excluding corporations, the Department's Statement (pp. 97-98), states:

A corporation is not allowed to make this designation because it does not appear that the context would require or include corporations. The context of the law is that a person may make this

designation on an income tax return or on a property tax return. The corporation cannot make a property tax refund return. Also, it does not seem consistent really that a corporation would be making this designation. It would appear that there would be a different corporate structure between the tax department that completed the corporate tax return and the department that decides whether or not to make a certain charitable contribution to a worthy cause.

44. The Hearing Examiner disagrees with this rationale. There is no evidence in the record supporting the Department's speculation about corporate structure, and such speculation is, in any event, immaterial as is the fact that corporations cannot make property tax refund returns. They can, after all, make income tax returns which are specifically mentioned in the statute.

The manifest intent of the 1980 amendment is to provide a procedure whereby persons may make charitable contributions to the non-game wildlife management fund and to encourage such contributions. It is in the obvious interest of the State to facilitate such gifts for all applicable taxpayers and it is not in the interests of the State to make such procedures unavailable to corporations who have the resources and perhaps the desire to make substantial contributions. The Department's construction unnecessarily restricts those purposes. The Hearing Examiner therefore concludes that the obvious purpose of the Legislature requires that corporations be included within the definition of a "person" under Chapter 290 and be permitted to make the designations authorized under the statute to the fund and that there is no statutory authority to adopt the rule as proposed.

45. To correct these defects, the Department should amend § 1.6030 B.1. by deleting the first two sentences and § 1.6030 B.2. by including corporations in the first sentence and deleting them from the second sentence. In addition, § 1.6030 B.4.b. could be clarified further by adding to the end thereof the words "codified as Minn. Stat. § 270A.01 et seq."

13 MCAR § 1.6225

46. Section 1.6225 is proposed to implement the property tax refund provisions contained in Laws 1980, Ch. 607, Art. 3, § 2, (codified as Minn. Stat. § 290A.04, subd. 2c, commonly referred to as "targeting"). It provides an additional property tax refund of up to $300 based on increases in property taxes payable. The refund is limited to property tax increases in excess of ten percent. Except as discussed below, the proposed rule, which was not subject to public comment, is an authorized, necessary and reasonable application of state law.

47. Part A. generally defines the nature and extent of the refund and those persons entitled to claim it. This is a necessary and reasonable provision but contains one ambiguity in the sentence which reads: "The joint tenant or tenant in common who claimed the property tax refund in 1981 is the only joint owner who qualifies to claim targeting in 1981." The word "claimed" should be changed to "claims" to be consistent in tense with the following sentence and to avoid any doubt as to its meaning. Part B. provides the method whereby the value of improvements are computed for reduction of property taxes payable. The Department reduces the amount of property taxes payable by a fraction which consists of the assessor's estimated market value of improvements divided by the assessor's estimated market value of the entire homestead, including land. This ratio, when applied against the property taxes payable,

yields the amount of the net property taxes payable which will qualify for targeting. As the Department admitted in its Statement (p. 108), the ratio is not precise, but it is one that can simply be applied and the error that occurs is always to the taxpayer's advantage. It is, therefore, a necessary and reasonable implementation of the 1980 amendment.

48. At the hearing, the Department proposed to amend the second sentence of § 1.6225 A. should read "B" by deleting the words "but before the reduction for" and substituting for them the word "including." The wording of the rule as originally proposed and published in the State Register was improper because the taxpayer could be penalized twice and to avoid that problem, it was necessary to clearly specify that the property tax refund must be credited before the targeting calculation is made. This amendment is necessary, reasonable and insubstantial for that reason. ✓ P. 36

49. The Department also proposed at the hearing to amend Part C.1.b. by adding a new sentence at the very end to read as follows:

> The taxpayer shall recompute the property tax refund claimed for the year in which the smaller percentage reduction was made. The taxpayer shall use the property taxes for that year reduced by the largest percentage reduction when recomputing the property tax refund.

✓ P. 37

This section clearly states the intent of the law that a recomputation is required when a taxpayer uses a different amount of their home for a business or rental use in one year than in another. The amendment would make sure that the refund is attributable to property taxes and is necessary, reasonable and insubstantial.

50. Section 1.6225 C.3. states that the property taxes payable for purposes of computing the refund must be reduced by the amount of Class 3cc credit which was received under the provisions of Laws 1980, Ch. 607, Art. IV, §§ 3, 6 and 7. This provision is unauthorized and should not be adopted. The Department, in its Statement (p. 112), in explaining the provision stated as follows:

> The law also provides that the property tax refund credit that the taxpayer qualified for also be removed. However, the law does not specifically contain a provision for the 3cc credit that was provided under Laws 1980, Ch. 607, Art. IV, §§ 3, 6 and 7. It is, of course, entirely possible that because this credit was also contained in the omnibus tax bill, along with the targeting provision, that it was a legislative oversight. This rule clarifies the fact that this credit also is to be deducted. The essence of the law is that targeting is to be used only after all other state credits have been deducted. Then, the property taxes payable are to be compared. If the property taxes payable in 1981 increases by more than 10% over that in 1980, then targeting would apply. Based on these provisions, it is reasonable to assume that the legislature did intend that this state paid credit also be removed.

The Commissioner simply cannot, based on assumption, or based on his determination of what the law should be, change the clear meaning of Chapter 607 or to require deductions not specifically required by that enactment. Minn. Stat. § 290A.04, subd. 2c, as amended in 1980, provides in the second paragraph as follows:

> For purposes of this subdivision, "net property taxes payable" means property taxes payable after reductions made pursuant to sections 273.13, subdvisions 6, 7 and 14a; and 273.115, subdivision 1; and Laws 1980, Chapter 432, Section 7; and after the deduction of tax refund amounts for which the claimant qualifies pursuant to subdivisions 2, 2a and 2b.

The law includes those deductions which were to be made and, as a general rule of statutory construction, those items that waere not specifically included must be excluded. Thus, in Wallace v. Commissioner of Taxation, 289 Minn. 220, 184 N.W.2d 588 (1971), the Supreme Court of Minnesota, in addressing a similar issue, stated, in response to the Department's argument that the omission of certain crucial language was a mere legislative oversight that could be corrected by its own construction, stated (p. 594): "We must reject this argument on the well-established ground that courts cannot supply that which the legislature purposely omits or inadvertently overlooks." Since the Legislature failed to require the property tax reduction by the amount of Class 3cc credits, while including others, the Commissioner cannot do so. The Department may not adopt interpretative rules which expand or reduce the scope of deductions established by the Legislature and rules which do so are unauthorized. Therefore, § 1.6225 C.3. should be deleted from the rule.

but see Supp. HE p. 9 not deleted p. 37

51. At the hearing, the Department also proposed to add a new Part D. to § 1.6225 to read as follows:

> The taxpayer who must make a reduction for improvements and a reduction for business or rental use must first make the reduction for improvements and then make the reduction for business or rental use.
>
> If the improvement that was made is totally used for business or rental use, and this is the only part of the residence that is used for business or rental use, the claimant is required to only make the reduction for the improvement.

This amended language clarifies which reduction must be made first. Property taxes attributable to improvements are removed first because this valuation was the first added for property taxes payable in 1981. After the value of such improvements are removed, property taxes for the two years can be compared to make a proper reduction for business or rental use which affects both years. It further specifies that a taxpayer need only make one reduction in property taxes where the business or rental use existed in 1980 but not in 1979. This is a necessary and reasonable and insubstantial amendment to the rules and may be adopted.

Based upon the foregoing Findings of Fact, the Hearing Examiner hereby makes the following:

CONCLUSIONS

1. That due, timely and adequate notice of the hearing in this matter was properly served and published by the Department.

2. That the Department has met the procedural requirements of Laws 1980, Ch. 615, § 6, subds. 4-4f (codified as Minn. Stat. § 15.0412, subds. 4-4f) and all other procedural requirements of law or rule.

3. That the Department has demonstrated the authority of the Commissioner of Revenue to adopt the proposed rules and has fulfilled all other relevant, substantive requirements of law or rule within the meaning of Laws 1980, Ch. 615, § 6, subd. 4c (codified as Minn. Stat. § 15.0412, subd. 4c), and Minn. Stat. § 15.0412, subd. 1 (1978), with the following exceptions:

> (a) That 13 MCAR § 1.6004 G., as proposed, providing for a games-played formula for the taxation of non-resident football players, is not authorized by Minn. Stat. § 290.17, subd. 2 (1978) as construed in Hughes v. Spaeth, 207 Minn. 577, 292 N.W. 194 (1940);

(b) That 13 MCAR §§ 1.6030 B.1. and B.2., as proposed, providing for the revocation of charitable contributions and the exclusion of corporations from those persons entitled to make such contributions on their tax forms, is not authorized by Laws 1980, ch. 607, Art I, 324, codified as Minn. Stat. § 390.431; and

(c) That 13 MCAR § 1.6225 C.3., as proposed, providing for the deduction of the 3cc credit in computing the property tax refund credit, is not authorized by Laws 1980, Ch. 607, Art. 3, § 2, codified as Minn. Stat. § 290A.04, subd. 2c.

4. That the Department has demonstrated the need for and the reasonableness of the proposed rules, as amended by it at the hearing or within the allotted comment period, within the meaning of Laws 1980, Ch. 615, § 6, subd. 4c, and Minn. Stat. § 15.0412, subd. 1 (1978), except as noted in Finding 37.

5. That the changes and additions to the rules as originally published, proposed after publication but before the expiration of the designated comment period, do not constitute substantial changes within the meaning of Laws 1980, Ch. 615, § 6, subd. 4d (codified as Minn. Stat. § 15.0412, subd. 4d) or 9 MCAR § 2.111.

6. That suggested action to correct the defects mentioned in Conclusions 3 and 4 has been made at Findings 37, 45 and 50.

7. That due to Conclusions 3 and 4, this Report shall be submitted to the Chief Hearing Examiner for his approval pursuant to Laws 1980, Ch. 615, § 6, subd. 4d, codified as Minn. Stat. § 15.0412, subd. 4d.

R E C O M M E N D A T I O N

IT IS RECOMMENDED, THEREFORE, That the proposed rules be adopted consistent with these Findings and Conclusions, except where the proposed rules exceed the statutory authority of the Commissioner of Revenue as noted in Conclusion 3, and that with respect to Conclusion 3, the defects in the rules be cured as suggested in the Report.

Dated this 14th day of November, 1980.

JON L. LUNDE
Hearing Examiner

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Rules as Adopted

Amendments as Proposed

13 MCAR Section 1.6001 ~~2001(7)~~ Resident defined.

A. General statements. HE 9

1. The term "resident" means ~~any individual domiciled in Minnesota, and~~ any ~~other~~ individual person maintaining ~~an abode therein~~ a home in Minnesota during any ~~portion~~ part of a tax year who ~~shall~~ is, during ~~any portion~~ that part of such year, ~~have been~~ domiciled in Minnesota ~~within the state~~. The term "domicile" means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home.

2. ~~Residence, as defined in the Act, is practically synonymous with domicile.~~ The ~~residence~~ domicile of any person shall ~~is held to~~ be ~~in~~ that place in which ~~his~~ that person's habitation is fixed, without any present intentions of ~~removing~~ removal therefrom, and to which, whenever ~~he is~~ absent, ~~he~~ that person intends to return.

A person who leaves ~~his~~ home to go into another ~~state~~ jurisdiction for temporary purposes only is not considered to have lost ~~his~~ that person's ~~residence~~ domicile. But if a person ~~removes~~ moves to another ~~state~~ jurisdiction with the intention of remaining there permanently or for an indefinite time as a ~~place of permanent residence~~ home, ~~he~~ that person shall ~~be considered to~~ have lost ~~his~~ that person's ~~residence~~ domicile in this state. The presumption is that a person who leaves this state to accept a job assignment in a foreign nation has not lost that person's domicile in this state.

~~Every person married and living with his spouse at the close of the taxable year must file a return if either of the following conditions exist.~~

~~(1) The tax on his own taxable net income or the tax on the combined taxable net income of himself and his spouse exceeds the allowable specific credits as provided in M.S.A. 290.06; or~~

~~(2) His gross income or the combined income of himself and his spouse exceeds $2,000.~~

~~See Reg. 2037(1).~~

~~If a husband and wife living together at the close of the taxable year each had separate income during the taxable year, they may either file a joint return or separate returns. Regardless of whether a joint return or separate returns are filed, the total income of both spouses must be reported. Example: Gross income of the husband $5000, gross income of the wife $125. The income of both the husband and wife must be reported either in a joint return or in separate returns.~~

B. A husband and wife may elect to file (1) a single return jointly (joint return), (2) separate returns, or (3) separately on one return ("combined" return).

C. If a husband and wife elect to each file a separate income tax return, or if they elect to file a combined return, each spouse must report that spouse's own federal adjusted gross income. On separate or combined returns, each spouse may claim only those deductions and credits that spouse is separately entitled to claim except that on separate or combined returns the married credit; or on a combined return,

itemized deductions; may be claimed in full by one spouse or may be divided between them in any manner. On separate or combined returns, HE 11 deductions for which each spouse is equally liable and which are paid from a joint account may be considered as being paid by either spouse.

Income and losses from jointly held property must be divided based on percentage of ownership in the property. Income and losses from a partnership which operates a business must be reported on the basis of the partnership agreement. Income and losses from a business that is not governed by a partnership agreement must be reported on the basis of participation in and contributions to the partnership or joint business venture and this is determined according to the (1) percentage of contribution to the capital assets, (2) percentage of labor performed, and (3) percentage of participation in management decisions. Interest income from a joint bank account or jointly held bonds and dividends on jointly held stocks shall be divided equally unless it can be shown that a different allocation is more appropriate. HE 12 A gain or a loss from the sale or exchange of a capital asset shall be reported by the spouse owning the capital asset. A gain or a loss from the sale or exchange of a capital asset owned jointly by the spouses shall be divided equally unless it can be shown that a different allocation is more appropriate. HE 12

D. If both husband and wife are residents of a community property state or nation, it is permissible for them to split their income and losses based on the law of their residence. Otherwise, it is not permissible for a husband and wife to split their income and losses or to assign it to the other spouse unless there is a business relationship or unless it is required under the provisions of the Internal Revenue Code.

Rules as Proposed (all new material)

13 MCAR Section 1.6003 Minnesota gross income for individuals who are full-year Minnesota residents (Federal Adjusted Gross Income)

A. The beginning point in the determination of Minnesota gross income is federal adjusted gross income. Federal adjusted gross income for Minnesota residents should be the same as the federal adjusted gross income that is used for federal purposes. If no federal tax return was filed for that year, federal adjusted gross income for Minnesota must be calculated using the appropriate Internal Revenue Code as if a federal tax return had been filed. Federal adjusted gross income for Minnesota is defined in Minn. Stat. Section 290.01, subd. 20 as being the federal adjusted gross income as defined in the Internal Revenue Code on a certain date. Unless the legislature specifies otherwise, provisions that affect federal adjusted gross income for future years and which have been enacted by Congress as of December 31 of the year set by the legislature, become effective for Minnesota income tax purposes at the same time they become effective for federal income tax purposes. (If the federal change in the Internal Revenue Code is effective for years beginning after December 31, 1980, but is enacted as an amendment in 1979, the change is effective for Minnesota for taxable years beginning after December 31, 1980, also, since present conformity to the Internal Revenue Code includes federal amendments through December 31, 1979.) Provisions that affect federal adjusted gross income and which have been enacted by Congress after December 31 of the year set by the legislature do not become effective until the legislature passes a law to adopt the provisions or to update the reference to December 31, of a certain year.

HE 16

a. Income from personal and professional services performed outside of Minnesota.

b. other income from intangible assets, and

c. income and losses from tangible property located outside of Minnesota, which income or loss was received or earned while that person was a nonresident of Minnesota. After removing capital gains and losses not assignable to Minnesota, the taxpayer shall recompute the amount of capital gains that are included in Minnesota gross income. The taxpayer shall also recompute any capital loss limitation and capital loss carryover to remove those amounts that are not assignable to Minnesota.

A modification should also be made to remove the amount of certain qualified pension payments which are received while a nonresident of Minnesota.

A part year resident would apply these modifications and this rule to the income and losses received during that part of the year the individual was a nonresident of Minnesota. Income and losses received during that part of the year the individual was a resident of Minnesota would be governed by the rule concerning full year residents.

3. The following types of income received by a nonresident in Minnesota are to be included in that individual's Minnesota gross income and are assignable to Minnesota:

a. Wages, salaries, tips, fees, commissions, bonuses, or similar earnings for personal or professional service performed with-

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during the taxable year shall apply no net operating loss carryback or carryover in the taxable year.

The net operating loss carryback or carryover to the next consecutive taxable year shall be the net operating loss carryback or carryover as calculated in this Part less the amount applied in the taxable year(s) as above. No additional net operating loss carryback or carryover shall be allowed if the entire amount has been used to offset Minnesota income in a year earlier than was possible on the federal return. A net operating loss carryback or carryover that was allowed to offset federal income in a year earlier than was possible on the Minnesota return shall still be allowed to offset Minnesota income.

Amendments as Proposed

13 MCAR Section 1.6020 Energy credit.

A. 2. A taxpayer must actually purchase the equipment or earth sheltered dwelling to qualify for this credit. The expenses connected with the leasing of equipment or the leasing of an earth sheltered dwelling do not qualify for this credit. If the taxpayer received a refund from the seller or the manufacturer of equipment on which the taxpayer claimed this credit, the amount of expenditures that were allowable for this credit must be reduced by the amount of the refund that was received. The taxpayer will need to file an amended income tax return if the refund that was received would require a reduction in the energy credit which had already been claimed. A payment received by the taxpayer from the seller or the manufacturer of equipment is considered as a payment for services rendered when the payment

.6030

Rules as Proposed (all new material)

13 MCAR Section 1.6030 Nongame wildlife checkoff.

A. Charitable contribution. A designation by a taxpayer to the Nongame Wildlife Management Fund qualifies as a charitable contribution under the provisions of Minn. Stat. section 290.21, subd. 3 in the year in which the designation was made.

B. Administration.

1. A taxpayer may reverse all or part of the designation that was made to the Nongame Wildlife Management Fund where the designation was originally made in error and the taxpayer had no intention to make a gift when the designation was made. A taxpayer may not reverse the designation to the Nongame Wildlife Management Fund merely because the taxpayer, at a later date, changes the intention to make a gift to the fund. It will be presumed that the taxpayer intended to make a designation when more than 90 days have elapsed since the taxpayer received the refund check or a notice informing the taxpayer that a designation was made to the Nongame Wildlife Management Fund with the following two exceptions:

See HE 42 Supp HE p.7

a. The taxpayer has a valid explanation showing why no action was taken within the 90 day period. Examples of a valid reason are sickness or being outside of the country.

b. The taxpayer considered the designation to the Nongame Wildlife Management Fund as a payment of estimated income tax and properly accounted for this amount as an estimated tax payment on the taxpayer's income tax return for the following year.

A taxpayer may designate that all or part of his refund on an amended return go to the Nongame Wildlife Management Fund.

RECEIVED
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OFFICE OF HEARING EXAMINERS

Department of Labor and Industry
Prevailing Wage Division

Notice of Prevailing Wage Rates for Highway Construction

Minn. Stat. § 177.44 requires the Commissioner of Labor and Industry to certify at least once a year, the prevailing wage rates for highway construction under contracts based on bids as provided for in Minn. Stat. § 161.32. Title 8, Minnesota Code of Agency Rules, Section 1.8010 (8 MCAR § 1.8010) requires notice of those certifications to be published in the *State Register*.

On January 22, 1979, the Commissioner certified wage rates for highway construction for 12 counties in Minnesota. Those counties are: Lac Qui Parle, Chippewa, Kandiyohi, Meeker, Yellow Medicine, Renville, McLeod, Lincoln, Lyon, Redwood, Pipestone and Murray.

A copy of the determined wage rates may be obtained by writing to the Department of Labor and Industry, Prevailing Wage Division, 444 Lafayette Road, St. Paul, Minnesota 55101.

A check or money order for $5.00, payable to the Department of Labor and Industry, must accompany each request to cover the cost of copying and mailing.

R. Bruce Swanson
Deputy Commissioner

Department of Natural Resources

Notice of Change of Hearing Date for the Proposed Rules Concerning Dam Safety

Notice is hereby given of a change of date for the public hearing on proposed rules concerning dam safety, pursuant to Laws of 1978, ch. 779, published at *State Register*, Volume 3, Number 28, p. 1397, January 15, 1979. The hearing originally was scheduled for February 12, 1979, at 10:00 a.m. in the Weyerhaeuser Room of the Minnesota Historical Society, 690 Cedar St., St. Paul, MN. It has been rescheduled for March 1, 1979 at 10:00 a.m. in the same location.

Department of Revenue
Income Tax Division

Notice of Intent to Solicit Outside Opinions Regarding Rules of the Income Tax Division

The Income Tax Division of the Department of Revenue is beginning to examine its current rules governing individual, fiduciary, partnership, and corporate income taxes along with small business corporations and withholding with the intention of:

1. Identifying those existing rules which are no longer valid because of law changes and court decisions.

2. Establishing areas of priority for drafting new rules in the areas listed above along with property tax refunds.

3. Actual drafting of new rules.

The Department invites interested persons or groups to provide information, comments, and advice on the subject in writing or orally to Dale Busacker, Attorney, Income Tax Division, Department of Revenue, Centennial Office Building, St. Paul, Minnesota 55145 or (612) 296-3436.

It is anticipated that the income tax rules will be categorized and amended section by section.

Written statements will be made part of the public hearing record.

Office of the Secretary of State
Administration Division

Open Appointment Process: Notice of Openings on State Agencies — Application Procedures

Pursuant to Laws of 1978, ch. 592, the legislature has implemented an Open Appointment process by which the public is informed of openings on state multi-member agen-

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

RECEIVED
SEP 5 1980
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES OF THE DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001 TO 1.6004, 1.6020, 1.6030, AND 1.6225)

ORDER FOR HEARING

It is hereby ordered that a public hearing on the above captioned rules be held in Room 83, State Office Building, 435 Park Street, St. Paul, Minnesota 55155, on October 2, 1980, commencing at 9:00 a.m. and continuing until all persons have had an opportunity to be heard.

It is further ordered that a Notice of Hearing be mailed to all persons or representatives of associations or other interested groups who have registered their names with the Department of Revenue for that purpose.

It is further ordered that the Notice of Hearing be published in the State Register.

Clyde E Allen Jr

August 8, 1980

Clyde E. Allen, Jr.
Commissioner of Revenue

Agency Exh. No. 1
File No. DR-81-003-JL
Date 10-2-80

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

RECEIVED
SEP 5 1980
OFFICE OF HEARING EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES OF THE DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001 TO 1.6004, 1.6020, 1.6030, AND 1.6225)

NOTICE OF HEARING

A public hearing concerning the proposed rule amendments and adoption of new rules will be held in Room 83, State Office Building, 435 Park Street, St. Paul, Minnesota 55155, on Thursday, October 2, 1980, commencing at 9:00 a.m. The proposed rule amendments and new rules may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments and new rules, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested (or affected) persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or materials may be submitted to Jon L. Lunde, Office of Administrative Hearings, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, 612-296-5938, either before the hearing or within five working days after the close of the hearing. The Hearing Examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is covered by Minn. Stat. Sections 15.0411 to 15.0417 and 15.052 and by 9 MCAR Sections 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the Hearing Examiner.

AGENCY Exh. No. 2
File No. DR-81-003-JL
Date 10-2-80

Twenty-five days prior to the hearing a statement of need and reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This statement of need and reasonableness will include a summary of all the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule amendments. Copies of this statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The proposed rule amendment to the definition of "resident" (Income Tax Rule 2001(7)) lists several items which will be considered in determining whether or not a person is domiciled in this state. The amendments also clarify the application of other provisions of the existing rule.

The proposed rule amendments to the existing rule governing joint returns (Income Tax Rule 2038(1)) is amended to provide several guidelines in the area of income tax returns for husband and wife. A definition is provided to define the term "married." The proposed rule specifies some restrictions on the splitting of income and losses between a husband and wife. The proposed rule amendments also provide how a husband and wife who are no longer married can file an amended return for a year in which they had filed a joint or combined return. The proposed rule also specifies how a husband and wife are to determine their federal adjusted gross income when they file a joint federal return and a separate or combined Minnesota income tax return.

A new proposed rule deals with the topic of Minnesota gross income for individuals who are full year Minnesota residents. The new proposed rule specifies the restrictions on the deduction of out of state losses and gives guidelines on the deduction of a net operating loss. The proposed rule also defines income and losses that are assignable to Minnesota.

Another new proposed rule deals with the topic of Minnesota gross income for individuals who are part year residents or nonresidents of Minnesota. This proposed rule defines what income is assignable to Minnesota and gives guidelines on the application of the reciprocity exclusion agreements with Wisconsin and North Dakota. Guidelines are provided in this rule for the allowance of a net operating loss. The proposed rule specifies that nonresident athletes are to assign their income to Minnesota based on a "games played" formula. Nonresident athletes whose income is a product of other substantial services in addition to performing as an athlete in an athletic contest are to use the "duty days" formula.

Amendments are proposed to the existing income tax energy credit rule (13 MCAR Section 1.6020). These amendments incorporate some qualification changes that result from 1980 legislation passed by the Minnesota legislature and some changes passed by the U. S. Congress in the Windfall Profits Tax Act. Unnecessary provisions in this rule are now deleted and the proposed amendments clarify that if a person provides services in connection with the purchase of renewable energy source equipment, the payments for that person's services are income.

A new rule is proposed concerning the Nongame Wildlife Checkoff. This proposed rule provides for the administration of this designation when changes are made in the amount of the overpayment as reflected on the individual's return.

A new rule is proposed in the property tax refund area concerning the adoption by the 1980 legislature of an additional refund called targeting. This proposed rule specifies homestead qualifications, how a new construction is to be treated, and the calculation of net property taxes payable.

The agency's authority to adopt the proposed rule amendments is contained in Minn. Stat. Sections 290.06, subd. 14, 290.52, and 290A.20.

The agency estimates that there will be no cost to local public bodies in the state to implement the amendments for the next two years immediately following its adoption within the meaning of Minn. Stat. Section 15.0412, subd. 7.

Copies of the proposed rules are now available and one free copy may be obtained by writing to Gerome Caulfield, Director, Income Tax Division, Second Floor Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota 55145, 612-296-3436. Additional copies will be available at the door on the date of the hearing.

Any person may request notification of the date on which the Hearing Examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing you may request notification by sending a written request to the Hearing Examiner in the case of the Hearing Examiner's report or to the agency in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. Chapter 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. Section 10A.01, subd. 11 (1979 Supplement) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel

expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone 612-296-5615.

Clyde E Allen Jr

August 8, 1980

Clyde E. Allen, Jr.
Commissioner of Revenue

RECEIVED
SEP 5 1980
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

IN THE MATTER OF the proposed adoption of amended rules and new rules of the Department of Revenue relating to Individual Income Tax and Property Tax Refund (13 MCAR Sections 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225)

AFFIDAVIT

Mary Lacho, being first duly sworn, deposes and says:

That on the 26th day of August, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the Notice of Hearing in the matter of the proposed adoption of rules of the Department of Revenue relating to individual income tax and property tax refund by depositing in inter-office mail, where appropriate, or by depositing in the United States mail at the City of St. Paul, a true and correct copy of the Notice, properly enveloped, with postage prepaid, to all persons and associations at the address listed on the attached list received from the Department of Revenue and also to other interested parties who are listed on the attached list.

Mary Lacho

Subscribed and sworn to before me this 26th day of August, 1980.

Kathleen D. Franssen

KATHLEEN D. FRANSSEN
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 9, 1984.

AGENCY Exh. No. 5
File No. DR-81-003-JL
Date 10-2-80

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

RECEIVED
SEP 5 1980
OFFICE OF HEARING
EXAMINERS

IN THE MATTER OF THE PROPOSED ADOPTION
OF AMENDED RULES AND NEW RULES OF THE
DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL
INCOME TAX AND PROPERTY TAX REFUND
(13 MCAR SECTIONS 1.6001 to 1.6004,
1.6020, 1,6030, AND 1.6225)

AFFIDAVIT

Dale H. Busacker, being first duly sworn, deposes and says:

That on the 25th day of August, 1980 at the City of St. Paul, County of Ramsey, State of Minnesota, he personally received the list of persons, associations and other interested groups who had registered with the Department of Revenue for the purpose of receiving notice of public hearing on proposed rules. A copy of this list is attached.

Dale B. Busacker

Subscribed and sworn to before me
this 25th day of August, 1980.

Julie K. Harris

JULIE K. HARRIS
NOTARY PUBLIC - MINNESOTA
HENNEPIN COUNTY
My Commission Expires June 10, 1985

RECEIVED
SEP 5 1980
OFFICE OF HEARING
EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

In the Matter of the Proposed Adoption
of Amended Rules and New Rules of the
Income Tax Division Relating to Individual
Income Tax and Property Tax Refund

CERTIFICATE OF
COMPLETENESS AND ACCURACY

I hereby certify that the attached three sheets constitute the complete list of persons, associations and other interested groups who, as of 8:00 o'clock A.M., this 25th day of August, 1980, have requested, pursuant to Minn. Stat. § 15.0412, subd. 4, that their names be placed on file with the Department of Revenue for the purpose of receiving notice of public hearing on proposed rules on the subject captioned above.

STATE OF MINNESOTA
CLYDE E. ALLEN, JR.
COMMISSIONER OF REVENUE

By Katherine H. Karsh
KATHERINE H. KARSH, Attorney
Commissioner's Staff

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Minneapolis, MN 55402

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Personnel Administrator
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Hopkins, MN 55343

Advocate for the Blind
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and Flynn,
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Minneapolis, MN 55426

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St. Paul, Minnesota 55101
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St. Paul, Minnesota 55165
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718 NW Financial Center
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White Bear Lake, Minnesota 55110
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CCH Computax Systems, Inc.
7471 University Avenue
La Mesa, California 92041
Attn: William J. Henry

Southwest Business Forms
125 North Emporia Avenue
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TLS Company
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RECEIVED
SEP 5 1980
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EXAMINERS

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

IN THE MATTER OF the proposed adoption of amended rules and new rules of the Department of Revenue relating to Individual Income Tax and Property Tax Refund (13 MCAR Sections 1.6001 to 1.6004, 1.6020, 1.6030, and 1.6225)

AFFIDAVIT

Mary Lacho, being first duly sworn, deposes and says:

That on the 28th day of August, 1980, at the City of St. Paul, County of Ramsey, State of Minnesota, she served the Notice of Hearing in the matter of the proposed adoption of rules of the Department of Revenue relating to individual income tax and property tax refund by depositing in the United States mail at the City of St. Paul, a true and correct copy of the Notice, properly enveloped, with postage prepaid, to all persons and associations at the address listed on the attached list.

Mary Lacho

Subscribed and sworn to before me this 28th day of August, 1980.

Kathleen D. Franssen

KATHLEEN D. FRANSSEN
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 9, 1984.

Mr. Thomas Borman
Maslon Kaplan Edelman Borman Brand
& McNulty Law Office
1800 Midwest Plaza
Minneapolis, Minnesota 55402

J. R. Wise, Chief
Office Audit Section
Revenue Audit Bureau
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P. 277-289

STATE REGISTER

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STATE OF MINNESOTA



VOLUME 5, NUMBER 8

August 25, 1980

Pages 263-302

Agency Exh. No. 3
File No. DR-81-003-JL
Date 10-2-80

STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 5		
9	Monday Aug 18	Monday Aug 25	Monday Sept 1
10	Monday Aug 25	Friday Aug 29	Monday Sept 8
11	Friday Aug 29	Monday Sept 8	Monday Sept 15
12	Monday Sept 8	Monday Sept 15	Monday Sept 22

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of Public Hearings on proposed rules are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, Suite 415, Hamm Building, 408 St. Peter Street, St. Paul, Minnesota 55102.

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The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

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NOTICE

How to Follow State Agency Rulemaking Action in the *State Register*

State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a **NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION.** Such notices are published in the **OFFICIAL NOTICES** section. Proposed rules and adopted rules are published in separate sections of the magazine.

The PROPOSED RULES section contains:

- Proposed new rules (including Notice of Hearing).
- Proposed amendments to rules already in existence in the Minnesota Code of Agency Rules (MCAR).
- Proposed temporary rules.

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments (those which were adopted without change from the proposed version previously published).
- Adopted amendments to new rules or rule amendments (changes made since the proposed version was published).
- Notice of adoption of temporary rules.
- Adopted amendments to temporary rules (changes made since the proposed version was published).

All ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* will be published in the Minnesota Code of Agency Rules (MCAR). Proposed and adopted TEMPORARY RULES appear in the *State Register* but are not published in the MCAR due to the short-term nature of their legal effectiveness.

The *State Register* publishes partial and cumulative listings of rule action in the MCAR AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
Issue 27-38, inclusive
Issue 39, cumulative for 1-39
Issues 40-51, inclusive
Issue 52, cumulative for 1-52

The listings are arranged in the same order as the table of contents of the MCAR.

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PROPOSED RULES

Pursuant to Minn. Stat. § 15.0412, subd. 4, agencies must hold public hearings on proposed new rules and/or proposed amendment of existing rules. Notice of intent to hold a hearing must be published in the *State Register* at least 30 days prior to the date set for the hearing, along with the full text of the proposed new rule or amendment. The agency shall make at least one free copy of a proposed rule available to any person requesting it.

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 20 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Public Hearings on Agency Rules
September 1-6, 1980

Date	Agency and Rule Matter	Time & Place
Sept. 4	Housing Finance Agency Income Limits for the Home Improvement Program Hearing Examiner: Richard Luis	9:00 a.m., Conference Rm., Capitol Square Bldg., 550 Cedar St., St. Paul, MN 55101

Department of Health
Environmental Health Division

Proposed New Rules Relating to Mineral Explorers and Exploratory Borings, and Proposed Amendments to Rules Relating to Water Well Construction and the Use of Plastic Casing

Notice of Hearing

Notice is hereby given that a public hearing concerning the proposed rules captioned above will be held pursuant to Minn. Stat. § 15.0412, subd. 4 (Supp. 1978) in Room 105, Minnesota Department of Health Building, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440, on Tuesday, September 30, 1980, commencing at 9:30 a.m. The proposed rules may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed rules you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Richard Luis, Hearing Examiner, Office of Administrative Hearings, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, telephone: (612) 296-8114, either before the hearing or within five (5) working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. All such statements will be entered into and become part of the record. For those wishing to submit written statements or exhibits, it is requested that at least three (3) copies be furnished. In addition, it is suggested, to save time and avoid duplication, that those persons, organizations, or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write to the hearing examiner.

Notice is hereby given that twenty-five (25) days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include all of the evidence which the agency intends to present at the hearing to justify both the need for and the reasonableness of the proposed rules. However, additional evidence may be submitted in response to questions raised by interested persons. You are therefore urged to both review the Statement of Need and Reasonableness before the hearing and to attend the hearing. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

If adopted, the proposals would have the following effects:

1. The proposed new rules would effectuate the statutory requirement that mineral explorers be licensed according to the procedures prescribed in 7 MCAR § 1.211 for water well contractors and to follow certain procedures for the construction and abandonment of exploratory borings; and

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION** — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

2. The proposed revision to existing rules governing the use of plastic well casing would prescribe procedures for its use where certain geological conditions are encountered and would allow for the use of plastic casing under conditions which permit its safe use throughout the state.

Statutory authority of the Commissioner of Health to promulgate the new rules on mineral exploration is contained in Minn. Laws of 1980, ch. 535, §§ 5 and 8. Statutory authority of the Commissioner of Health to promulgate revisions to rules regarding plastic well casing is contained in Minn. Stat. § 156A.031 (Supp. 1979).

Copies of the proposed amendments are now available and at least one free copy may be obtained by writing to the Minnesota Department of Health, Division of Environmental Health, 717 Delaware Street Southeast, Minneapolis, Minnesota 55440. Additional copies will be available at the door on the date of the hearing.

Notice: Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five (5) working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the Hearing Examiner's Report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

In addition, please be advised that Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (Supp. 1979) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone: (612) 296-5615.

Promulgation of these proposed new rules and amendments will not result in the expenditure of public monies by local government units.

August 8, 1980

George R. Pettersen, MD
Commissioner of Health

Amendments as Proposed

7 MCAR § 1.210 Definitions and policies.

B.2. "Council" means the Water Well Contractors' and Exploratory Borers' Advisory Council created pursuant to the provisions of Minn. Stat. § 156A.06.

B.6. "Applicant" means any person who applies for a water well contractor's or explorer's license pursuant to the Act.

B.9. "Year of experience" for a water well contractor means a year during which the applicant personally drilled five (5) water wells and was actively working in the trade for a period of 1,000 hours under the supervision of a licensed water well contractor. An applicant drilling 1,000 hours per year and completing fewer than five wells per year may qualify, if the experience is gained in constructing one or more large diameter wells (casing outer diameter is ten inches or more) which are more than 500 feet deep. An applicant who seeks to qualify under this provision shall have his license limited to construction of such deep and large diameter wells. A year of experience for an explorer means a year during which the applicant supervised or personally drilled five exploration borings.

B.10. "Licensee" means a person who is licensed as a water well contractor or explorer pursuant to the provisions of the Act and these rules.

Rule as Proposed

7 MCAR § 1.225 Rule relating to mineral exploration. This rule applies to all explorers who engage in exploratory boring in accordance with the provisions of Minn. Stat. § ch. 156A (as amended by Laws of 1980, ch. 535).

A. Unless otherwise specified in this rule, the definitions given in 7 MCAR § 1.210 B. and C. shall apply to the terms used in this rule, as appropriate.

B. Licensing. The procedures and conditions for licensing of water well contractors which are contained in 7 MCAR § 1.211 A. through G. shall apply to the licensing of explorers, except that experience in supervising the construction of borings need not have been gained in Minnesota.

C. Explorer responsibilities.

1. No person shall construct or cause to be constructed any exploratory boring within this state unless he possesses a valid explorer's license issued by the commissioner.

2. The explorer shall be responsible for the construction and abandonment of all exploratory borings completed under his license.

D. Procedures for location, construction and abandonment of exploratory borings.

1. Location and construction.

a. An exploratory boring shall be located in accordance with the isolation distances from sources of contamination which are specified in 7 MCAR § 1.217 C.1.a. through e.

b. An exploratory boring shall be constructed in a location and maintained in such a manner as to prevent all known sources of contamination from entering the boring at any time.

c. Any boring which encounters a cavernous limestone formation shall be cased and grouted to prevent the introduction of surface water into the groundwater and to prevent the passage of water from one aquifer to another. The casing and grouting procedures are prescribed in 7 MCAR § 1.220 A., C. and H.

d. No boring shall be open except during the time when it is actually being drilled or logged.

2. Abandonment.

a. Abandonment of all exploratory borings shall be carried out in accordance with the provisions of ch. 156 A and these rules (7 MCAR §§ 1.210-1.225) as appropriate.

b. Abandonment, whether temporary or permanent, shall be undertaken immediately upon completion of drilling activities.

c. Temporary abandonment.

(1) A boring which is temporarily abandoned shall be cased from bedrock or the bottom of the boring, to one foot above the ground surface, or if in a flood plain, at least two feet above the level of the highest flood of record, and protected with a water-tight cap which will prevent any surface contamination from entering the boring.

(2) Any boring which is temporarily abandoned shall be marked and protected with four steel posts as prescribed in 7 MCAR § 1.217 C.4.b.

(3) A boring shall not be temporarily abandoned for more than five years.

d. Permanent abandonment.

(1) Whenever the explorer determines that a boring need not remain open any longer, or whenever he is about to lose the right to explore, the explorer shall permanently abandon the boring in the manner prescribed in these rules.

(2) A boring which is permanently abandoned shall be completely filled in the manner and with the materials prescribed in 7 MCAR § 1.218 C.2.a. through e.

e. Abandonment report. The abandonment report required by Minn. Stat. § 156A.017, subd. 8 shall specify whether the boring is being temporarily or permanently abandoned. A separate abandonment report shall be filed when a temporarily abandoned boring is permanently abandoned.

E. Any request for modification of the provisions of rules applicable to exploratory borings shall be submitted according to the procedure prescribed in 7 MCAR § 1.210 D.3.a. and b.

Amendments as Proposed

7 MCAR § 1.224 Plastic well casing. In addition to complying with 7 MCAR §§ 1.210-1.223, an installer who uses plastic well casing* must comply with the provisions of this rule with regard to construction and installation.

*~~Laws of 1977, ch. 398, and Laws of 1979, ch. 312 permit the use of plastic well casing in certain Minnesota counties. A list of these counties is appended at the end of this rule.~~

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION —** Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

B.2. Any plastic pipe, couplings, components, solvents, cements, or primers used in water well casing construction shall have the approval of a testing laboratory which has demonstrated the use of unbiased, reliable and appropriate testing methods, as determined by the Commissioner of Health. Such laboratory must approve the material as being intended for use in the transport of potable water. This approval shall be stamped on the pipe as prescribed below.

~~C. Plastic well casing pipe size: Where a submersible pump is to be installed inside a plastic casing, the casing diameter shall be no less than five inch nominal pipe size, as specified in ASTM F 480.~~

Reletter D. as C.

D. ~~E.~~ Technique for joining plastic well casing.

1. Cutting. The installer shall use fine tooth blades with little or no set for cutting the pipe. Pipe ends shall be cut square ~~using a miter box~~. A plastic pipe cutter equipped with extra wide rollers and thin cutting wheels may be used. Standard steel pipe or tubing cutters shall not be used for cutting plastic pipe.

5. ~~(1). allow sufficient time for the joint to cure before the joined pipe can be dropped into the drilled hole. This additional cure time is specified in Table 3.~~

~~Table 3~~
~~Joint Cure Schedule~~

~~Ambient Temperature, °C~~	~~2 to 3 in. SDR 26 and above~~	~~SDR 21 17, 13.5~~	~~3½ to 12 in. SDR 26 and above~~	~~SDR 21 17, 13.5~~
~~15 to 40~~	~~2 h*~~	~~12 h~~	~~6 h~~	~~24 h~~
~~5 to 15~~	~~4 h~~	~~24 h~~	~~12 h~~	~~48 h~~
~~20 to +5~~	~~16 h~~	~~96 h~~	~~48 h~~	~~8 days~~

~~*When the relative humidity is above 60%, increase all of the above times by 50%.~~

E. ~~F.~~ Installation of plastic well casing.

1. The installer shall drill an open hole which is 4 inches larger than nominal casing size where:

a. rock (consolidated as opposed to unconsolidated geological material) is encountered within 25 feet of the surface. The annular space shall be grouted with neat cement or concrete grout as prescribed in 7 MCAR § 1.220 C.

b. rock is encountered at a depth greater than 25 feet from the surface. The casing shall extend at least 5 feet into the stable rock formation. The casing shall be sealed into the rock using neat cement grout. The remaining annular space shall be grouted as prescribed in 7 MCAR § 1.220 C. or F.

c. boulders or unstable geologic conditions require that an oversized hole be drilled in order to install and protect the well casing. The annular space shall be grouted as prescribed in 7 MCAR § 1.220 C. or F.

d. the well screen is to be gravel packed. The gravel pack shall not extend more than 10 feet above the static water level nor within 50 feet of the land surface. The remaining annular space shall be grouted as prescribed in 7 MCAR § 1.220 C. or F.

3. Grouting.

a. The installer shall fill the annular space between the drill hole wall and the casing pipe with grout ~~(defined in 7 MCAR § 1.210)~~ as prescribed in 7 MCAR § 1.220 C. or F. to assure equal loading around the casing in order to prevent collapse or deformation of the casing and to prevent any contamination from entering the well. ~~Native sand may be used in non-artesian wells drilled in outwash material having no clay lense or lenses (a geological stratum composed of clay). The upper 30 feet in any type of well shall be grouted with neat cement grout (defined in 7 MCAR § 1.220 C.3.) using a tremie pipe. A tremie pipe is one which is small enough to fit in the annular space and which carries the grout to the bottom of a hole. The grout shall be fed under pressure from the bottom to the top in one continuous operation.~~

~~b. When drilling a rock well, the installer shall seal the casing pipe into the bedrock using neat cement grout (defined in 7 MCAR § 1.220 C.3.).~~

b. ~~c.~~ Because of its high heat of hydration, grout made of rapid-setting cement is not permitted for use in wells which are cased with PVC pipe.[3]

6. Plastic water well casing shall not be used in wells cased and cement grouted through cavernous rock formations. However, in such formations, plastic casing may be used as an inner casing if surrounded by an outer casing which meets the requirements of 7 MCAR § 1.220A.7.

7. Screws shall not be used to join solvent weld joints.

Department of Natural Resources

Proposed Amendments to Boat and Water Safety Rules

Notice of Hearing

A public hearing concerning the proposed rule amendments will be held in St. Paul on September 25, 1980 at the Minnesota Historical Society Building, 640 Cedar Street, in the Weyerhaeuser Room. The hearing will begin at 7:00 p.m.

The proposed rules may be modified as a result of the hearing process. Therefore, if you are concerned about the content of the rules, you are urged to participate.

Following the agency's presentation at the hearing, all interested or affected persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or material may be submitted to Phyllis Reha, Hearing Examiner, room 300, 1745 University Avenue, St. Paul, MN 55104, telephone (612) 296-6910 either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.1417 and 15.052, and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the Office of Hearing Examiners. This Statement of Need and Reasonableness will include a summary of all of the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule amendments. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Hearing Examiners at a minimal charge.

Because of legislative changes during the 1975 and 80 sessions, as well as changes in federal regulations and those additions or deletions necessitated by experience, amendments to the current boat and water safety rules have been found to be necessary. Current rules were promulgated in 1972.

The following amendments are proposed:

—the addition of the term "sailboard" as well as several technical corrections in the rules on licensing and marking of watercraft.

—providing that all required safety equipment be provided by the owner of rental watercraft.

—changing technical terms regarding alcohol and controlled substances to conform to statute changes.

—shortening and clarifying the rules of the road for non-motorized watercraft and the use of emergency lights on patrol craft.

—rewriting the required safety equipment rules to conform to new statutes. This includes requirements for lifesaving devices, sound producing devices, fire extinguishers and navigation lights. No substantial change is proposed from existing rules, however.

—changing the technical requirements for certain waterway markers to more closely conform to what is practical and available commercially.

—removing language on skin and SCUBA diving which was preempted by a 1975 statute.

—clarifying permit requirements for temporary structures, buoys and signs.

—deleting reference to an obsolete address in the Department of Natural Resources.

The authority for and subject-matter of the rules are found in Minn. Stat. ch. 361.

The agency estimates that there will be no cost to local public bodies in the state to implement the amendments for the two years immediately following its adoption, within the meaning of Minn. Stat. § 15.0412, subd. 7 (1978).

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Copies of the proposed rule amendments are now available and at least one free copy may be obtained by writing to Boat and Water Safety Section, Minnesota Department of Natural Resources, Box 46 Centennial Bldg., Saint Paul, Minnesota 55155, telephone (612) 296-3336. Additional copies will be available at the hearing. If you have any questions on the content of the proposed rule amendments, contact the boat and water safety section at the address or phone listed above.

Any person may request notification of the date on which the hearing examiner's report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the hearing examiner, in the case of the hearing examiner's report, or to the agency, in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone (612) 296-5615.

August 8, 1980.

Joseph N. Alexander, Commissioner
Department of Natural Resources

Rules as Proposed

NR 200 Licensing of watercraft.

(b) Display of license certificate. No person shall operate or use a watercraft, except a non-motorized canoe, kayak, ~~or~~ sailboat, sailboard or rowing shell required to be licensed unless the license certificate for such watercraft is on board and available for inspection by authorized enforcement officers. Owners of non-motorized canoes, kayaks, sailboats, sailboards, or rowing shells shall produce the license certificate for such watercraft within a reasonable time upon request of authorized enforcement officers. The owner of rental watercraft may keep the license certificate available for inspection on the premises from which the watercraft is rented, provided that the owner's business is legibly printed on the rear half and on both sides of the watercraft in the same size and manner as required for the license number in NR 200, Section (c).

(c) Display of license number & validation decal on motorized watercraft. The license number, on all watercraft, except non-motorized canoes, kayaks, sailboats, sailboards and rowing shells shall be securely affixed on each side of the forward half of the watercraft for which it was issued in such a position as to provide clear and legible identification. The letters and numerals must be of a color that contrasts with the background and may be reflectorized decals or metal or may be painted. The letters and numerals shall read from left to right and shall not be less than 3 inches in height, of block type, of a stroke not less than ½ inch or more than ¾ inch in width, not including a border. The license number shall be maintained so that it is clearly visible and legible, and the letter groups must be separated from the numeral groups by a space of not less than 3 inches nor more than 4 inches. Adjacent letters and numerals within each group must be spaced not less than ½ inch nor more than ¾ inch apart. A state validation decal for the current license period must be affixed toward the stern of the boat and not more than 4 inches from the first or last letter of the license number on each side of the boat.

(e) Marking of non-motorized sailboats and sailboards. All non-motorized sailboats and sailboards shall display the decals furnished by the Department of Natural Resources for such watercraft. These decals shall be securely affixed on each side of the forward half of the watercraft for which it was issued, in such a position as to provide clear and legible identification. If it is impossible to display such decals on the forward half of such watercraft so as to provide clear and legible identification both decals must then be affixed to the stern of such watercraft.

(g) Other insignia. No person shall operate any watercraft, except a non-motorized canoe, kayak, rowing shell, sailboard or sailboat, which has any number, letter, design or insignia displayed on either side thereof which is closer than 24 inches to any part of the watercraft license number of validation decal.

(j) Enforcement pennant. ~~All watercraft used in the enforcement of these rules and regulations and the laws under which they are promulgated shall be marked by the flying of a pennant.~~ The pennant required under Minn. Stat. § 361.215 shall be triangular in shape

and of the following dimensions: Four (4) inches in depth at the staff and one foot in length. The pennant shall be of a blue background and bear a three (3) inch replica of the Minnesota State Seal.

~~(k) Determining length of watercraft. For the purpose of determining the license fee, the overall length of the watercraft shall be measured from transom top to point of the bow.~~

NR 201 Rental of watercraft.

(a) Condition and equipment of rented watercraft.

(8) The owner of a business which rents, leases, or hires out watercraft shall provide for each person on board the watercraft a lifesaving device required by law or these rules, as well as all other required safety equipment for each watercraft.

(b) Persons to whom watercraft may be rented. No watercraft shall be knowingly rented or offered for rent to any person who is under the influence of ~~an alcoholic beverage, narcotic or habit forming drug~~ alcohol or a controlled substance.

NR 202 Navigation of watercraft on the waters of the state; safety equipment.

(a) General rules of the road.

(4) A ~~sailboat~~ non-motorized watercraft has right-of-way over a motor-powered watercraft except when it is the overtaking watercraft. ~~Small sailboats~~ Non-motorized watercraft should not insist on this right-of-way when approaching large commercial vessels.

~~Watercraft propelled by oars or paddles shall also be given right-of-way by motor-powered watercraft.~~ Motor-powered watercraft should always keep clear and pass astern of such watercraft.

(5) All watercraft shall yield the right-of-way to enforcement or other authorized emergency watercraft displaying a red or blue flashing light.

(b) General mode of operation of watercraft.

(3) No person shall operate a watercraft within 150 feet of a diver's warning flag (described in ~~NR 206 (a)(6).~~ Minn. Stat. § 361.085).

(4) The operator of any watercraft, when signaled to do so by a conservation officer, sheriff or sheriff's deputy shall bring the watercraft to a stop or maneuver it in a manner which will allow the officer to come alongside.

~~(c) Safety Equipment.~~

~~(1) Every person on board a non-motorized canoe or kayak shall wear or have readily accessible to him on board the non-motorized canoe or kayak for his personal use a U.S. Coast Guard approved lifesaving device. A lifesaving device of the vest type with no less than 150 permanently inflated air sacs of 12 mil vinyl construction and capable of supporting a minimum weight of 13 pounds may be substituted for a U.S. Coast Guard approved lifesaving device.~~

~~(2) All motor-powered watercraft 26 feet or more in overall length shall be equipped with one hand- or power-operated horn or whistle audible at least one mile.~~

~~(3) All motor-powered watercraft less than 26 feet in length with construction permitting the entrapment of explosive or flammable gases or vapors must have at least one B-I type hand portable U.S. Coast Guard approved fire extinguisher fully charged and in good operating condition on board and readily accessible.~~

~~(4) All motor-powered watercraft 26 feet or less than 40 feet in length must have at least two B-I U.S. Coast Guard approved hand portable fire extinguishers, or at least one B-II type U.S. Coast Guard approved hand portable fire extinguisher on board in good condition, fully charged and readily accessible.~~

~~(5) All motor-powered watercraft 40 feet to not more than 65 feet in length must have at least three B91 type U.S. Coast Guard approved fire extinguishers; or at least one B-I type plus one B-II type approved hand portable fire extinguisher on board. These fire extinguishers must be fully charged, in good working condition and readily accessible.~~

~~(6) All motor-powered watercraft over 65 feet in length must have at least three B-II type U.S. Coast Guard approved fire extinguishers on board. These fire extinguishers must be fully charged, in good working condition and readily accessible.~~

(c) Personal flotation (lifesaving) devices

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(1) Every person on board a watercraft shall wear or have readily accessible a U.S. Coast Guard approved Type I, II, III or IV personal flotation device.

(2) A Coast Guard approved Type V personal flotation device may be carried in lieu of the Type I, II, III or IV personal flotation device required in this regulation, if the Type V personal flotation device is approved for the activity in which the watercraft is being used.

(3) Persons being towed by a watercraft on water skis, or other devices shall be considered to be on board the towing watercraft, for the purpose of personal flotation device requirements. A U.S. Coast Guard approved personal flotation device must be either carried in the towing watercraft or worn by the person being towed.

(4) All personal flotation devices required by these rules shall be:

(aa) Approved by the United States Coast Guard.

(bb) Legibly marked with the approval number issued by the United States Coast Guard.

(cc) In serviceable condition.

(dd) Either readily accessible or worn.

(ee) Of the appropriate size for the intended wearer, if the device is designed to be worn.

(d) Sound producing devices

(1) All motorboats 16 feet or more in overall length shall carry a power, hand or mouth-operated horn or whistle capable of producing a sound for at least two seconds which is audible for at least one-half mile.

(2) All motorboats 26 feet but less than 40 feet in overall length shall be equipped with a hand or power-operated horn or whistle capable of producing a sound for at least two seconds which is audible for at least one mile.

(3) All motorboats 40 feet or more in length shall be equipped with a power-operated horn or whistle capable of producing a sound for at least two seconds which is audible for at least one mile.

(e) Fire extinguishers

(1) All motorboats less than 26 feet in length with construction permitting the entrapment of explosive or flammable gases or vapors must have at least one B-I type hand portable U.S. Coast Guard approved fire extinguisher fully-charged and in serviceable condition on board and readily accessible.

(2) All motorboats 26 feet to less than 40 feet in length must have at least two B-I U.S. Coast Guard approved hand portable fire extinguishers, or at least one B-II type U.S. Coast Guard approved hand portable fire extinguisher on board in serviceable condition, fully-charged and readily accessible.

(3) All motorboats 40 feet to not more than 65 feet in length must have at least three B-I type U.S. Coast Guard approved fire extinguishers; or at least one B-I type plus one B-II type approved hand portable fire extinguisher on board. These fire extinguishers must be fully-charged, in serviceable condition and readily accessible.

(4) All motorboats over 65 feet in length must have at least three B-II type U.S. Coast Guard approved fire extinguishers on board. These fire extinguishers must be fully-charged, in serviceable condition and readily accessible.

(5) When a motorboat is equipped with a U.S. Coast Guard approved fixed fire extinguishing system installed in the engine compartment, one less B-I extinguisher is required. The fixed system must be in serviceable condition and fully-charged.

(f) ~~(d)~~ Ventilation equipment

(g) ~~(e)~~ Lighting equipment

(7) All watercraft over 65 feet in length must display the lights required by ~~the Inland Rules Light Requirements found in~~ NR 202 ~~(e)~~(g)~~(5)~~(4).

(8) All non-motorized ~~canoes, kayaks, sailboats and rowboats~~ watercraft when under way or anchored, between sunset and sunrise, shall carry aboard but not necessarily fixed to any part of the watercraft a minimum of one ~~a~~ lantern or flashlight capable of showing a white light visible all around the horizon at a distance of two miles or more. ~~in sufficient time to avoid collision with another watercraft.~~ Such light or lantern shall be displayed~~.~~ in sufficient time to avoid collision with another watercraft.

(9) When a watercraft is moored to a buoy authorized by a permit issued under NR 207 it shall not be required to display the 32-point anchor light required in NR 202 (g)(4) through (8).

NR 203 Capacity plate information requirements.

(a) For watercraft constructed from January 1, 1972 through July 31, 1980:

(1)~~(a)~~ Information required. The manufacturer's capacity plate required by law shall contain the following information:

(aa)~~(1)~~ Safe maximum horsepower;

(bb)~~(2)~~ Maximum number of persons at 150 pounds per person;

(cc)~~(3)~~ Properly located maximum weight in pounds of persons, motor and gear.

(2)~~(b)~~ Formula for determining maximum weight. The formula for determining the maximum weight for watercraft manufac-tured for sale in Minnesota, 19 feet and under, except canoes, kayaks, and sailboats, shall be the recommended practices for watercraft load capacity Project H-5 (adopted) or Project H-5a (proposed) contained in the American Boat and Yacht Council Incorporated publication "Safety Standards for Small Craft 1971-72."

(3)~~(c)~~ Formula for determining maximum horsepower. The formula for determining the maximum horsepower for watercraft manufactured for sale in Minnesota, 19 feet and under, shall be the "recommended Practices and Standards Covering Safe Powering of Small Craft" Project P-11 (proposed) contained in the American Boat and Yacht Council, Incorporated publication "Safety Standards for Small Craft 1971-72."

(b) For watercraft constructed on or after August 1, 1980:

(1) Information required. The manufacturer's capacity plate required by law shall contain the following information:

(aa) For outboard boats

Maximum persons capacity in pounds or persons
Maximum weight capacity (persons, motor and gear) in pounds
Maximum motor horsepower or maximum horsepower with and without remote steering

(bb) For inboard, inboard/outdrive and boats without mechanical propulsion

Maximum persons capacity in pounds or persons
Maximum weight capacity (persons and gear) in pounds

(2) The method used for determining capacity information shall comply with the U.S. Coast Guard Safe Loading and Powering Standards as set forth in 33 CFR Part 183.

(c) The terms "safe power capacity" and "safe carrying capacity" used in Minn. Stat. § 361.05 (4) shall be that capacity displayed on the manufacturer's capacity plate. If no such plate exists, the method referred to in either NR 203 (a)(2) & (3) or NR 203 (b)(2) shall be used to determine the capacity.

NR 204 Waterway markers.

(b) Channel marker buoys

(1) Every channel marker buoy shall have the external form of a ~~flat topped~~ cylinder having a circular transverse cross-section not less than 9 inches ~~and not more than 15 inches~~ in diameter. All such markers must extend at least 36 inches above the water.

(3) To indicate a watercraft should pass to south or west, where there is no well-defined channel, a buoy shall have the top surface and upper 5 inches colored red and the remainder colored white. If the buoy is reflectorized, it shall be done with a white strip, no less than 4 inches in width, that completely encircles the buoy and it shall be placed directly under the ~~black~~ red top. A white quick-flashing light shall be used if the buoy is lighted.

(c) Other navigational buoys. A buoy indicating that a watercraft should not pass between it and the nearest shore shall have ~~a flat top and shall have a square~~ a circular transverse cross-section measuring not less than 9 inches in diameter ~~nor more than 15 inches across on a side~~ and shall extend at least 36 inches above the surface of the water. ~~Each such buoy shall have a white top surface and a white vertical stripe on each side extending medially from top to bottom of a width equal to one-half the width of each side. The remainder shall be colored red.~~ Each such buoy shall be marked with alternating vertical red and white stripes. White reflectorization may be used on a minimum of the upper four inches of the white vertical stripe. Red reflectorization may be used on a minimum of the upper four inches of the red vertical stripes. A white quick-flashing light shall be used if the buoy is lighted.

(d) Mooring buoys. Every buoy placed in the waters of the state for use in anchoring or mooring watercraft may be of any practicable size or shape, but must have at least 8 inches extending above the waterline. No anchoring buoy may have a diameter of over ~~20~~ 24 inches if circular or a width of more than ~~20~~ 24 inches if some other shape. No mooring or anchor buoy may be placed in any public water if it obstructs access to any public or private property or creates a navigational hazard. No mooring or anchor buoy may be placed

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in or upon the water of the State except by public authority or under a permit issued by the sheriff of the county. Every such buoy shall be colored white and shall be encircled by a visible blue band at least ~~three~~ one inches wide. Mooring buoys must have a minimum total of 16 square inches of white reflectorization, part of which must be visible from any direction. Mooring buoys, if lighted, shall show a flashing white light.

(e) Regulatory and information signs and buoys

(1) No regulatory or informational signs or buoys may be placed in or upon the waters of this state, except by public authority or under a permit issued by the sheriff of the county. All such signs and buoys shall be colored white except as hereinafter provided.

When a buoy is used as a regulatory or informational marker (except in private swimming areas), it shall have two orange-colored horizontal bands completely around the buoy's circumference, one such band at the top, and the other just above the waterline. The appropriate geometric shape(s) indicating the buoy's purpose and any lettering or numerals shall be placed between these horizontal bands. The buoy itself shall have a circular transverse cross-section of at least 9 inches and shall extend at least 36 inches above the surface of the water.

(2) Every sign or buoy giving information for the convenience of watercraft operators shall bear a two-inch wide orange-colored band forming an upright rectangle measuring at least 14 inches in height ~~and width,~~ outside dimensions.

(3) Signs or buoys indicating danger to watercraft shall bear an orange-colored band of two-inch width forming an upright diamond at least 14 inches in outside ~~width~~ height, and such signs shall bear a printed statement of the source of danger.

(4) Signs or buoys indicating controlled water areas in which boating, fishing, waterskiing, skin diving, or other water activities are restricted, limited or otherwise subjected to special rules or regulations shall bear a two-inch wide band forming a circle at least ~~24~~ 12 inches in outside diameter. The limitation, restriction, prohibition or regulation effective within a controlled area shall be printed inside of the orange-colored circle when possible.

Signs or buoys designating State Game Refuges, Wildlife Management Areas or spawning areas shall not be subject to the provisions of this order.

(5) Signs or buoys directing all watercraft to keep out of a specific water area shall bear a two-inch orange-colored band forming an upright diamond at least 14 inches in outside ~~width~~ height, dissected vertically and horizontally by an orange-colored strip two inches wide.

Signs or buoys designating State Game Refuges, Wildlife Management Areas or spawning areas shall not be subject to the provisions of this order.

(6) Signs indicating winter ice dangers to persons, motor vehicles, snowmobiles, all-terrain vehicles, ice boats, or any other conveyance used to transport persons over the ice on public waters of the state shall bear a two-inch wide orange-colored band forming an upright diamond at least 14 inches in outside width and such signs shall bear a printed statement of the source of danger.

Where used, except for the marking of aeration systems operating under a permit from the Commissioner of Natural Resources, these signs shall completely line the perimeter of the ice hazard at intervals not exceeding 75 feet and shall be at least 48 inches above the ice. When a permit is issued for an aeration system, the commissioner shall specify the marking requirements for each system as a part of the permit.

~~Such signs must be removed from the ice, by whomever placed, not later than April 1.~~

(7) No person shall operate any motor vehicle, snowmobile, all-terrain vehicle, ice boat, or any other conveyance used to transport persons over the ice on public waters of the state within 150 feet of a diver's warning flag described in ~~NR 206 (a)(6)~~ Minn. Stat. § 361.085.

(8) Written material on any waterway marker sign or buoy shall be printed with black letters at least 2 inches in height, on a white background. ~~All lettering shall be placed inside the area enclosed by the orange band, except that explanatory material appearing on signs indicating an area prohibited to watercraft shall be placed outside of the orange band.~~

NR 205 Marking of legally designated swimming areas.

(b) Other areas

(1) The entire perimeter of the water area shall be marked with white marking buoys no less than 9 inches in diameter and extending no less than 36 inches above the surface of the water. Each marking buoy must contain two horizontal bands of ~~reflectorized international~~ orange, one such band at the top, and the other just above the waterline. Each marking buoy must also contain two diamond shapes with crosses which means "boats keep out." These diamond shapes must have a vertical diagonal of not less than 14 inches. ~~and a horizontal diagonal of not less than 14 inches.~~ The borders of the diamond and cross outline shall not be less than ~~1~~ 2 inches in width. The color of these borders shall be ~~reflectorized international~~ orange. The diamonds shall be placed midway between the horizontal bands. The words "swim area" should also appear on each marker in no less than two-inch letters.

NR 206 Scuba Divers and Water skiers.

~~(a) Diver's Flags~~

~~(1) Every person who shall swim in any waters of the state, except in legally designated swimming areas, while wearing or carrying any apparatus including a snorkel permitting him to breathe while under water, shall tow a diver's flag, displayed above the surface of the water, which shall be attached to a device capable of supporting such swimmer and his equipment upon the surface of the water.~~

~~(2) Every person who causes a diver's flag to be displayed shall remain within 50 feet thereof, measured on the surface of the water.~~

~~(3) A diver's flag shall not be towed by more than one person, except as provided in (5) below.~~

~~(4) No person shall display a diver's flag so as to cause unlawful obstruction to navigation.~~

~~(5) If a group of divers is operating in an area, the outside of the perimeter shall be marked and shall be outside of the normal area of navigation. These markings shall consist of the official diver's flag and shall be placed around the perimeter of the diving area at intervals not exceeding 150 feet.~~

~~(6) A diver's flag displayed to indicate the presence of persons engaged in underwater activities shall measure at least 15 inches horizontally and 12 inches vertically, and both sides thereof shall have a red-colored background bisected diagonally by a three-inch wide white stripe having its upper end adjacent to the flagstaff.~~

~~(7) A diver's flag shall be displayed in a vertical plane extended from a rigid flagstaff equipped to maintain the upper edge of the flag at least three feet above the water surface.~~

~~(8) Any diver's flag may be reflectorized or fluorescent provided that the entire displayed surface thereof is uniformly reflectorized or fluorescent.~~

~~(b)~~ Length of ski tow ropes. No person being towed on water skis, aquaplane, saucer or other device shall be towed with a rope, wire, cable or other towing device extending more than 150 feet from the towing watercraft without obtaining a permit from the local sheriff.

NR 207 Placement of temporary structures and buoys in the waters of the state.

(a) Generally. No person shall leave any temporary structure not extending from shore, or any ~~navigational~~ buoy or ~~regulatory or information~~ sign in the waters of this state between the hours of sunset and sunrise without first obtaining a permit in writing therefor from the sheriff of the county. Mooring buoys must be placed as provided in NR 204(d). Swimming area markers must be placed as provided in NR 205.

NR 210 Reimbursement of county sheriffs for search and rescue operations.

(b) Reimbursement by state. A sheriff claiming reimbursement shall submit in duplicate an itemized invoice, verified by the county auditor, together with a statement showing that the operation qualified for reimbursement to the ~~administrator of the Bureau of Business Management, the~~ Department of Natural Resources~~, Centennial Building, Saint Paul, Minnesota 55155~~. All claims will be subject to audit by the state.

Department of Revenue

Proposed Amendments and New Rules Relating to Individual Income Tax and Property Tax Refund (13 MCAR §§ 1.6001-1.6004, 1.6020, 1.6030 and 1.6225)

Notice of Hearing

A public hearing concerning the proposed rule amendments and adoption of new rules will be held in Room 83, State Office Building, 435 Park Street, St. Paul, Minnesota 55155, on Thursday, October 2, 1980, commencing at 9:00 a.m. The proposed rule amendments and new rules may be modified as a result of the hearing process. Therefore, if you are affected in any manner by the proposed amendments and new rules, you are urged to participate in the rule hearing process.

Following the agency's presentation at the hearing, all interested (or affected) persons will have an opportunity to ask questions and make comments. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearing, written statements or materials may be submitted to Jon L. Lunde, Office of Administrative Hearings, Room 300,

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1745 University Avenue, St. Paul, Minnesota 55104, 612-296-5938, either before the hearing or within five working days after the close of the hearing. The hearing examiner may, at the hearing, order that the record be kept open for a longer period not to exceed 20 calendar days. The rule hearing procedure is covered by Minn. Stat. §§ 15.0411-15.0417 and 15.052 and by 9 MCAR §§ 2.101-2.112 (Minnesota Code of Agency Rules). If you have any questions about the procedure, call or write the hearing examiner.

Twenty-five days prior to the hearing a statement of need and reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This statement of need and reasonableness will include a summary of all the evidence which will be presented by the agency at the hearing justifying both the need for and the reasonableness of the proposed rule amendments. Copies of this statement of need and reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The proposed rule amendment to the definition of "resident" (Income Tax Rule 2001(7)) lists several items which will be considered in determining whether or not a person is domiciled in this state. The amendments also clarify the application of other provisions of the existing rule.

The proposed rule amendments to the existing rule governing joint returns (Income Tax Rule 2038(1)) is amended to provide several guidelines in the area of income tax returns for husband and wife. A definition is provided to define the term "married." The proposed rule specifies some restrictions on the splitting of income and losses between a husband and wife. The proposed rule amendments also provide how a husband and wife who are no longer married can file an amended return for a year in which they had filed a joint or combined return. The proposed rule also specifies how a husband and wife are to determine their federal adjusted gross income when they file a joint federal return and a separate or combined Minnesota income tax return.

A new proposed rule deals with the topic of Minnesota gross income for individuals who are full year Minnesota residents. The new proposed rule specifies the restrictions on the deduction of out of state losses and gives guidelines on the deduction of a net operating loss. The proposed rule also defines income and losses that are assignable to Minnesota.

Another new proposed rule deals with the topic of Minnesota gross income for individuals who are part year residents or nonresidents of Minnesota. This proposed rule defines what income is assignable to Minnesota and gives guidelines on the application of the reciprocity exclusion agreements with Wisconsin and North Dakota. Guidelines are provided in this rule for the allowance of a net operating loss. The proposed rule specifies that nonresident athletes are to assign their income to Minnesota based on a "games played" formula. Nonresident athletes whose income is a product of other substantial services in addition to performing as an athlete in an athletic contest are to use the "duty days" formula.

Amendments are proposed to the existing income tax energy credit rule (13 MCAR § 1.6020). These amendments incorporate some qualification changes that result from 1980 legislation passed by the Minnesota legislature and some changes passed by the U.S. Congress in the Windfall Profits Tax Act. Unnecessary provisions in this rule are now deleted and the proposed amendments clarify that if a person provides services in connection with the purchase of renewable energy source equipment, the payments for that person's services are income.

A new rule is proposed concerning the Nongame Wildlife Checkoff. This proposed rule provides for the administration of this designation when changes are made in the amount of the overpayment as reflected on the individual's return.

A new rule is proposed in the property tax refund area concerning the adoption by the 1980 legislature of an additional refund called targeting. This proposed rule specifies homestead qualifications, how a new construction is to be treated, and the calculation of net property taxes payable.

The agency's authority to adopt the proposed rule amendments is contained in Minn. Stat. §§ 290.06, subd. 14; 290.52; and 290A.20.

The agency estimates that there will be no cost to local public bodies in the state to implement the amendments for the next two years immediately following its adoption within the meaning of Minn. Stat. § 15.0412, subd. 7.

Copies of the proposed rules are now available and one free copy may be obtained by writing to Gerome Caulfield, Director, Income Tax Division, Second Floor Centennial Office Building, 658 Cedar Street, St. Paul, Minnesota 55145, 612-296-3436. Additional copies will be available at the door on the date of the hearing.

Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted or resubmitted to the Attorney General by the agency. If you desire to be so notified, you may so indicate at the hearing. After the hearing you may request notification by sending a written request to the Hearing Examiner in the case of the Hearing Examiner's report or to the agency in the case of the agency's submission or resubmission to the Attorney General.

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including *his own* travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including *his own* traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone 612-296-5615.

August 8, 1980

Clyde E. Allen, Jr.
Commissioner of Revenue

Amendments as Proposed

13 MCAR § 1.6001 2001 (7) Resident defined.

A. General statements.

1. The term "resident" means ~~any individual domiciled in Minnesota, and~~ any ~~other~~ individual person maintaining ~~an abode therein~~ a home in Minnesota during any ~~portion~~ part of a tax year who ~~shall~~ is, during ~~any portion~~ that part of such year, ~~have been~~ domiciled in Minnesota ~~within the state~~. The term "domicile" means the bodily presence of an individual person in a place coupled with an intent to make such a place one's home.

2. ~~Residence, as defined in the Act, is practically synonymous with domicile.~~ The ~~residence~~ domicile of any person shall ~~is held to~~ be ~~in~~ that place in which ~~his~~ that person's habitation is fixed, without any present intentions of ~~removing~~ removal therefrom, and to which, whenever ~~he is~~ absent, ~~he~~ that person intends to return.

A person who leaves ~~his~~ home to go into another ~~state~~ jurisdiction for temporary purposes only is not considered to have lost ~~his~~ that person's ~~residence~~ domicile. But if a person ~~removes~~ moves to another ~~state~~ jurisdiction with the intention of remaining there permanently or for an indefinite time as a ~~place of permanent residence~~ home, ~~he~~ that person shall ~~be considered to~~ have lost ~~his~~ that person's ~~residence~~ domicile in this state. The presumption is that a person who leaves this state to accept a job assignment in a foreign nation has not lost that person's domicile in this state.

The presumption is that the place where a ~~man's~~ person's family ~~resides~~ is domiciled ~~shall be considered his residence~~ is that person's domicile.~~, and~~ The ~~residence~~ domicile of a ~~wife~~ spouse ~~is usually that of her husband~~ shall be the same as the other spouse, unless there is affirmative evidence to the contrary or unless the husband and wife are ~~permanently~~ legally separated or the marriage has been dissolved. When a ~~man~~ person has ~~taken up his~~ made a ~~abode~~ home at any place with the intention of remaining there and ~~his~~ the person's family neither ~~resides~~ lives there ~~with him~~ nor intends to do so, then ~~he~~ that person shall ~~be considered to~~ have established a ~~residence~~ domicile separate from that person's ~~of his~~ family.

The ~~residence~~ domicile of a single ~~man~~ person is ~~his~~ that person's usual ~~place of abode~~ home. In case of a minor child who is not emancipated, the ~~residence~~ domicile of the child's ~~father, or of the mother if the father is deceased~~ parents is the domicile of the child. The domicile of the parent who has legal custody of the child is the domicile of the child. A person who is a permanent resident alien in the United States may have a domicile in this state. The domicile of a member of the armed forces will be governed by the facts just prior to becoming a member of the armed forces unless the person takes the necessary steps to establish a new domicile.

3. The mere intention to acquire a new ~~residence~~ domicile, without the fact of physical removal, does not change the status of the taxpayer, nor does the fact of physical removal, without the intention to remain, change ~~his~~ the person's status. The presumption is that one's domicile is the place where ~~he~~ one lives. An individual can have only one domicile at any particular time. A domicile once shown to exist is presumed to continue until the contrary is shown. An absence of intention to abandon a ~~residence~~ domicile is equivalent to an intention to retain the existing one. No positive rule can be adopted with respect to the evidence necessary to prove an intention to change a domicile but such intention may be proved by acts and declarations, and of the two forms of evidence, acts ~~are generally conceded~~ shall be given more weight than declarations. A person who is temporarily employed within ~~the~~ this state does not acquire a ~~residence~~ domicile in ~~the~~ this state, if during such period ~~he~~ the person is domiciled without ~~the~~ this state.

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B. The following items listed will be considered in determining whether or not a person is domiciled in this state:

1. Location of domicile for prior years.

2. Where the person votes or is registered to vote. ~~While the exercise of one's voting franchise is presumptive evidence of residence, such evidence may be overcome by a showing of the facts involved in the determination of residence.~~ Casting an illegal vote does not ~~of itself~~ establish ~~residence~~ domicile for income tax purposes.

3. Status as a student.

4. Classification of employment as temporary or permanent.

5. Location of employment.

6. Location of newly acquired living quarters whether owned or rented.

7. The present status of the former living quarters, i.e., was it sold, offered for sale, rented or available for rent to another.

8. Homestead status has been requested and/or obtained for property tax purposes on newly purchased living quarters and the homestead status of the former living quarters has not been renewed.

9. Ownership of other real property.

10. Jurisdiction in which a valid driver's license was issued.

11. Jurisdiction from which any professional licenses were issued.

12. Location of the person's union membership.

13. Jurisdiction from which any motor vehicle license was issued and the actual physical location of the vehicles.

14. Purchased resident or nonresident fishing or hunting licenses.

15. Whether an income tax return has been filed as a resident or nonresident.

16. Whether the person has fulfilled the tax obligations required of a resident.

17. Location of any bank accounts, especially the location of the most active checking account.

18. Location of other transactions with financial institutions.

19. Location of the place of worship at which the person is a member.

20. Location of business relationships and the place where business is transacted.

21. Location of social, fraternal, or athletic organizations or clubs or in a lodge or country club, in which the person is a member.

22. Address where mail is received.

23. Percentage of time (not counting hours of employment) that the person is physically present in Minnesota and the percentage of time (not counting hours of employment) that the person is physically present in each jurisdiction other than Minnesota.

24. Location of jurisdiction from which unemployment compensation benefits are received.

25. Location of schools at which the person, the person's spouse or children attend, and whether resident or nonresident tuition was charged.

26. Statements made to an insurance company, concerning the person's residence, and on which the insurance is based.

Any one of the items listed above will not, by itself, determine domicile.

13 MCAR § 1.6002 ~~2038 (1) JOINT RETURNS.~~ Income tax returns for husband and wife.

A. The determination of whether an individual is married shall be made as of the close of the taxable year; except that if a surviving spouse does not remarry during the taxable year such determination shall be made as of the date of death. An individual shall not be considered to be married if the marriage has been dissolved or if they are legally separated or if they do not live together, unless the spouse is only temporarily away from home. No joint or combined return can be made if the husband and wife have different taxable years. In the case where one spouse dies, a joint or combined return may be filed if the surviving spouse has not remarried before the close of their taxable year.

~~Every person married and living with his spouse at the close of the taxable year must file a return if either of the following conditions exist.~~

~~(1) The tax on his own taxable net income or the tax on the combined taxable net income of himself and his spouse exceeds the allowable specific credits as provided in M.S.A. 290.06; or~~

~~(2) His gross income or the combined gross income of himself and his spouse exceeds $2,000.~~

~~See Reg. 2037(1).~~

~~If a husband and wife living together at the close of the taxable year each had separate income during the taxable year, they may either file a joint return or separate returns. Regardless of whether a joint return or separate returns are filed, the total income of both spouses must be reported. Example: Gross income of the husband $5000, gross income of the wife $125. The income of both the husband and wife must be reported either in a joint return or in separate returns.~~

B. A husband and wife may elect to file (1) a single return jointly (joint return), (2) separate returns, or (3) separately on one return (''combined'' return).

C. If a husband and wife elect to each file a separate income tax return, or if they elect to file a combined return, each spouse must report that spouse's own federal adjusted gross income. On separate returns, each spouse may claim only those deductions and credits that spouse is separately entitled to claim except that the married credit may be claimed in full by one spouse or may be divided between them in any manner. Deductions for which each spouse is equally liable and which are paid from a joint account may be considered as being paid by either spouse.

Income and losses from jointly held property must be divided based on percentage of ownership in the property. Income and losses from a partnership which operates a business must be reported on the basis of the partnership agreement. Income and losses from a business that is not governed by a partnership agreement must be reported on the basis of participation in and contribution to the partnership or joint business venture and this is determined according to the (1) percentage of contribution to the capital assets, (2) percentage of labor performed, and (3) percentage of participation in management decisions. Interest income from a joint bank account or jointly held bonds and dividends on jointly held stocks shall be divided equally. A gain or a loss from the sale or exchange of a capital asset shall be reported by the spouse owning the capital asset. A gain or a loss from the sale or exchange of a capital asset owned jointly by the spouses must be reported by each spouse based on the percentage of ownership of the capital asset.

D. If both husband and wife are residents of a community property state or nation, it is permissible for them to split their income and losses based on the law of their residence. Otherwise, it is not permissible for a husband and wife to split their income and losses or to assign it to the other spouse unless there is a business relationship or unless it is required under the provisions of the Internal Revenue Code.

E. The liability of each spouse on a separate return is limited to the tax liability on that return. If a combined return is filed and if later an adjustment is made to an item of income, or modification to income, which is attributable solely to one spouse, only that spouse is liable for any additional tax.

F. Where a husband and wife filed joint or combined returns and subsequently are no longer married within the definition of Part A., an amended return, claim for refund, or net operating loss or farm loss carryback claim filed by one of the former spouses shall be allowed if the item is attributable to that spouse to the extent of that spouse's tax liability. Where a joint return was filed, the spouse's tax liability shall be determined according to the following formula:

$$\frac{\text{Spouse's recomputed separate tax liability}}{\text{Both spouse's recomputed separate tax liability.}} \times \text{Recomputed joint tax liability} = \text{Spouse's share of joint tax liability}$$

The spouse's share of the joint liability is then subtracted from the spouse's contributions through withholding or estimated tax or other payments which were made to pay that joint liability. The amount of the refund to be made to the spouse cannot exceed the amount of the joint overpayment shown on the amended return or claim for refund. Where a combined return was filed, the spouse's tax liability shall be determined as if an amended combined return was filed.

When an amended joint or combined return is filed, items paid out of joint funds of the husband and wife shall be divided between the spouses to provide the greatest tax benefit to both spouses unless both spouses had previously elected another method. Joint estimated tax declarations shall be divided according to the provisions of Income Tax Rule 2093(2). Where credits are not paid out of joint funds, the credit shall belong to the spouse who made the payment on which the credit is based. The homemaker credit and the married credit

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may be divided equally between the spouses. The homemaker credit and the dependent care credit are not allowed to be claimed on separate returns filed by a married couple.

When an amended joint or combined return or a claim for refund is filed under this part, no refund will be given to a spouse unless an amended return or claim for refund is filed by that spouse. No additional tax liability may be created and assessed against a spouse unless an amended return is filed by that spouse or there is an audit done by the department.

~~If one spouse did not have separate income of his own, the spouse who did not have separate income cannot file a separate return. However, a husband and wife living together at the close of the taxable year may make a joint return even though one of the spouses had neither gross income nor deductions.~~

~~If the income of a husband and wife is included in a joint return, the tax is computed on the aggregate income and all deductions and credits shall be taken from such aggregate income. However, if separate returns are filed, each spouse must include only his separate income in his return.~~

~~In determining whether persons are married or single, the determination is made as of the last day of the taxable year.~~

~~No joint return can be made if the husband and wife have different taxable years. However, an exception to this rule is made in the case where one spouse died during the taxable year (see Reg. 2038(2).~~

~~In the case of a joint return, the liability with respect to the tax is both joint and several.~~

G. Persons who become married during the taxable year may file a joint, combined, or a separate return if they are married and living together at the close of the taxable year. Married persons who were legally separated or living apart during any part of the taxable year may file a joint, combined, or a separate return if they were ~~married and~~ living together at the close of the taxable year. ~~In either case, a joint return must include all of the income each spouse received during the taxable year, and the credit allowed for married persons must be prorated so that such credit is claimed only for the part of the taxable year the persons were married and living together. For proration of credits, see Reg. 2006(3)(d).~~

H. Except as provided by law in the case of a death of a spouse, a joint or a combined return must be signed by both husband and wife unless (a) the return is made by an agent of both the husband and wife, or (b) one spouse signs as the agent of the other. Any spouse who makes a joint or a combined return through an agent ~~assume~~ assumes the responsibility for making the return and ~~incur~~ incurs liability for the penalty provided for erroneous, false, or fraudulent returns. One spouse cannot sign as the agent of the other unless the return is accompanied by a power of attorney authorizing such action by the spouse not signing the return. Other agents must also submit their power of attorney with the return.

I. The election of a husband and wife to file ~~a~~ joint ~~return~~, combined, or separate returns may be changed by ~~said~~ the husband and wife if (1) they both sign and file an amended return reflecting the change of election to file a joint or combined return or (2) each spouse signs and files an amended return reflecting the change of election to file a separate return. The change in the election may be made at any time within the period provided ~~by the statute~~ for the assessment of additional taxes~~, that is, three and one-half years from the time of the filing of the return in question.~~

J. When a husband and wife file a joint federal income tax return and file a separate or combined Minnesota income tax return, they shall determine their Minnesota gross income separately as if their federal adjusted gross income had been determined separately. Any income exclusion or adjustment to income (such as the disability income exclusion), allowed in arriving at federal adjusted gross income which requires them to file a joint federal return will be allowed in determining Minnesota gross income even though they elect to file separate or combined returns for Minnesota. However, if a deduction allowed or a loss limitation provided in computing federal adjusted gross income (such as the capital loss limitation) is reduced by one half if separate federal returns had been filed, the Minnesota gross income of each spouse reflected on a separate or combined Minnesota return will be computed as though separate federal returns had been filed including the reduced deduction or loss limitation.

Rules as Proposed (all new material)

13 MCAR § 1.6003 Minnesota gross income for individuals who are full-year Minnesota residents (Federal Adjusted Gross Income)

A. The beginning point in the determination of Minnesota gross income is federal adjusted gross income. Federal adjusted gross income for Minnesota residents should be the same as the federal adjusted gross income that is used for federal purposes. If no federal tax return was filed for that year, federal adjusted gross income for Minnesota must be calculated using the appropriate Internal Revenue Code as if a federal tax return had been filed. Federal adjusted gross income for Minnesota is defined in Minn. Stat. § 290.01, subd. 20 as being the federal adjusted gross income as defined in the Internal Revenue Code on a certain date. Unless the legislature specifies otherwise, provisions that affect federal adjusted gross income for future years and which have been enacted by Congress as of December 31 of the year set by the legislature, become effective for Minnesota income tax purposes at the same time they become effective for federal income tax purposes. Provisions that affect federal adjusted gross income and which have been enacted by

Congress after December 31 of the year set by the legislature do not become effective until the legislature passes a law to adopt the provisions or to update the reference to December 31, of a certain year.

B. All income and losses, regardless of the source, are assignable to Minnesota. Pay received by a member of the military who is a Minnesota resident and who is outside of the state of Minnesota while receiving the pay is includible for Minnesota purposes, as is income received by any other resident.

C. Losses.

1. Losses included in federal adjusted gross income which were incurred in connection with out of state income are allowable in full with the following exception. Out of state losses are reduced by the taxpayer's tax preference items which are attributable to those losses but only to the extent of those losses. The preference items of depletion and capital gains deduction shall not be used to reduce a taxpayer's out of state loss.

The preference item, intangible drilling costs, is defined as being the amount of the excess intangible drilling costs arising in the taxable year which exceed the amount of the net income from productive wells of the taxpayer from oil, gas, and geothermal properties for the taxable year.

2. Each loss will be considered separately for the purpose of making this computation. A separate loss would consist of:

a. Each separate operation within an individual proprietorship.

b. Each separate operation within a partnership, limited partnership, joint venture, or small business corporation.

c. Each transaction regarding the sale of a capital asset or an asset utilized in a trade or business provided that the sale of such asset is not part of an ongoing operation.

3. When an out of state loss is reduced by a tax preference item which is reflected in the computation of the adjusted basis of property, the reduction in basis which was made for federal purposes would not be made for Minnesota purposes to the extent of the amount of the loss which was reduced by that specific preference item. The taxpayer may elect to not reduce the basis of a depletable asset or the taxpayer may reduce the amount of otherwise taxable income subsequently produced by that asset in subsequent taxable years by the amount of the reduction that was required to be made to the out of state loss because of these tax preference items.

4. A net operating loss carryback or carryforward which has been used in the calculation of federal adjusted gross income must be reduced by the amount of tax preference items attributable to the out of state loss.

5. A modification increasing federal adjusted gross income in the amount of the losses that are disallowed must be made.

D. As provided in B., all income and losses are assignable to Minnesota. The following are types of income or losses from sources outside of Minnesota:

1. Farm income or loss from a farm located outside of Minnesota.

2. Income, gains, or losses from tangible property, such as real estate, which is located outside of Minnesota. Oil, gas, coal and mineral leases are interests in real property. The following would also be out of state income or losses if incurred in connection with real estate located outside of Minnesota: option income or expenses, exploring, securing, and developing the real estate, and equipment used on the real estate.

The basis of tangible property utilized in a trade or business outside of Minnesota by a Minnesota resident shall be cost less depreciation allowable for Minnesota income tax purposes. However, prior to 1978, a Minnesota resident need not reduce the basis of out of state property which was held while a Minnesota resident. The amount of depreciation allowable in any year is the amount claimed in arriving at federal adjusted gross income and would not be modified because of a higher Minnesota basis. When property is utilized in a trade or business outside of Minnesota and is held by a Minnesota resident who acquired the property prior to the date of becoming a Minnesota resident, the federal adjusted basis of that property shall be the Minnesota basis.

3. The income or losses from a business located outside of Minnesota.

4. Income or losses from trusts, estates, partnerships, joint ventures, or Minnesota electing small business corporations to the extent that the income results from business conducted or tangible property located outside of Minnesota.

5. Income or losses from intangible assets owned by a Minnesota resident is not out of state income. Generally an intangible asset is a legal relationship between persons (which in fact has no geographic location) and is so associated with the owner that it is

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taxable at the place of the owner's domicile. The following is a listing of some intangible assets and includes the income from these assets:

a. Stocks, notes and bonds even if secured by liens on property.

b. The right to receive payments under a contract for deed or mortgage.

c. The right to withdraw contributions to a retirement fund.

d. Dividends received.

e. Gains or losses from the sale or exchange of stocks, bonds or notes.

f. Interest received on a savings account.

g. Distributions received from a corporation which has made a federal election to be treated as a small business corporation but which has not made a similar election for Minnesota.

E. The amount of a net operating loss carryforward or carryback shall be the same dollar amount allowed in the determination of federal adjusted gross income. However, as provided in Part C., no deduction is allowed for or with respect to that portion of losses which constitute tax preference items. An adjustment must also be made for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code.

The taxpayer may also make an adjustment for gains or losses which result from the sale or other disposition of property having a higher adjusted basis for Minnesota income tax purposes than for federal income tax purposes subject to the limitations contained in § 290.01, subd. 20(b)(2) and (4).

13 MCAR § 1.6004 Minnesota gross income for individuals who are part year residents or nonresidents of Minnesota (Federal Adjusted Gross Income)

A. Gross income.

1. An individual who was a part year resident or a nonresident of Minnesota should use the appropriate federal adjusted gross income that was computed for federal income tax purposes as the beginning point in the determination of Minnesota gross income.

2. Modifications should be made to remove:

a. Income from personal and professional services performed outside of Minnesota,

b. other income from intangible assets, and

c. income and losses from tangible property located outside of Minnesota, which income or loss was received or earned while that person was a nonresident of Minnesota.

A modification should also be made to remove the amount of certain qualified pension payments which are received while a nonresident of Minnesota.

3. The following types of income received by a nonresident in Minnesota are to be included in that individual's Minnesota gross income and are assignable to Minnesota:

a. Wages, salaries, tips, fees, commissions, bonuses, or similar earnings for personal or professional service performed within Minnesota. Two conditions must be met before a taxpayer's income can be deemed personal or professional service income. First, the income producing activity itself must be the rendition of personal or professional services; and, second, the taxpayer must personally render such services; it is not enough to employ others to render them. The following are some examples of taxpayers who may be deriving income or earnings from the performance of personal or professional services: carpenter, plumber, bricklayer, repairman, barber, beautician, accountant, attorney, doctor, dentist, architect, engineer, or an insurance agent. While the ownership and management of a shopping center or hotel which furnishes business space is business income, it is not a personal service business.

b. Rents, royalties and any other income received from land, buildings, machinery, or other tangible property located in Minnesota.

c. Gains or losses from the sale or other disposition of land, buildings, machinery, or other tangible property located in Minnesota.

d. Business losses.

(1) Income or losses from

(a) a business,

(b) a farm,

(c) that portion of the distributive share of income or losses of a partnership which are attributed to Minnesota, and

(d) that portion of the distributed and undistributed net income or loss, which is attributed to Minnesota, of a small business corporation which has elected to be taxed as a partnership for Minnesota purposes, which income or loss is derived from the operation of a business in Minnesota or which is income or loss from tangible property located within Minnesota is assignable to Minnesota.

(2) Business conducted within Minnesota would include income or losses from sales within Minnesota and a business dealing in personal and professional services where such services were performed in this state. Trade or business income or loss assignable to Minnesota and earned by a nonresident individual as a proprietorship or partnership which was carried on partly within and partly without Minnesota is subject to the three factor apportionment formula contained in section 290.19 except for construction business on which the three factor formula is not permitted. A nonresident individual who has farm income from within Minnesota and from outside of Minnesota may also use the three factor apportionment formula.

B. The definition of federal adjusted gross income is the same definition as is used for Minnesota residents and which is determined by the legislature by adopting the reference to the Internal Revenue Code for use in or application to that particular taxable year.

C. Income received by a nonresident, which is the distributive share of partnership income from personal or professional services which are performed in Minnesota, is assignable to Minnesota in the same proportion as the partnership income is assignable to Minnesota even though the nonresident partner performed no personal or professional services in Minnesota during that year.

D. Minnesota gross income for a nonresident of Minnesota does not include income that is received as compensation for military or naval services performed within Minnesota.

E. The United States Government has entered into numerous tax treaties with different nations which provide that when a nonresident alien is employed in the United States the gross income which they earn is not subject to taxation in the United States as long as that nonresident alien is employed only temporarily in the United States. Since that income is not taxable for federal purposes, it would not be taxable for Minnesota purposes. Each tax treaty has somewhat different terms and each case must be examined on its own.

F. Minnesota gross income does not include personal or professional service income earned in Minnesota by a resident of Wisconsin or North Dakota who customarily returns at least once a month to their residence in that state. Wisconsin and North Dakota are the only two states that have reciprocity exclusion agreements with the state of Minnesota. The income subject to reciprocity exclusion is compensation for the performance of personal or professional services which the taxpayer personally renders. It is not enough to employ others to render these services.

1. The reciprocity exclusion does not apply where the personal or professional income is earned as part of a business which has employees that do more than incidental duties for the business or where there is the sale or delivery of goods which are more than an incidental part of the business. The reciprocity exclusion does apply to all the personal or professional income earned in the business where the sale of goods and the services of the employees are incidental. Where a partner is a member of a partnership where the selling of goods or the services of employees is more than incidental to the partnership business, reciprocity exclusion would apply only to the partner's salary (personal or professional service income) but not to the distributive shares of the partnership business. Salaries would be subject to a reasonableness test and a provision for salaries must be part of the partnership agreement. If there is no written partnership agreement, or if in the written agreement no salary or salary formula is specifically provided, the payment to the partners is a partnership distribution and is not subject to reciprocity exclusion. Partnership draw does not constitute a salary; it is a convenience to the partners in withdrawing a share of their business equity. If all partners are performing personal services and the sale of goods and the services of the employees are incidental, the reciprocity exclusion applies to the partner's salary and to the partner's distributive share. The imputed income of a shareholder of an electing small business corporation (Subchapter S) is not subject to reciprocity exclusion as this income is in the form of a partnership distribution.

2. The word "incidental" means the sale of goods or the services of employees which are only a minor or secondary contribution to the personal service income of the individual or partnership for whom performed. The sale of goods or the services of employees is incidental if:

a. for the sale of goods the gross profit (gross receipts less cost of goods sold) or

b. for the services of employees the total compensation paid the employees is less than $20,000 or 10% of the gross profit of the business, whichever is greater. The total compensation paid the employees and the gross profit from the sale of goods must be totaled when determining if the goods and employees are incidental.

3. If an individual's total income assignable to Minnesota is subject to reciprocity exclusion, that individual need not file a Minnesota income tax return. However, if that individual has Minnesota income, some of which is subject to reciprocity exclusion and

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some of which is not subject to reciprocity exclusion and if the income which is not subject to reciprocity exclusion exceeds the filing requirements for filing a Minnesota income tax return, that individual must file a Minnesota income tax return. That individual should use the appropriate federal adjusted gross income for the taxable year. A subtraction would be allowed at a subsequent point on the return to remove income which is subject to reciprocity exclusion.

In order to claim the reciprocity exclusion, individuals should file Form M-115, which is an affidavit claim for exemption of compensation received for services performed under the reciprocity exclusion. Although the exact form may change, the following information will be required:

a. Name, address, and social security number of the individual,

b. year for which the affidavit is being submitted,

c. amount of income received for services performed in Minnesota subject to reciprocity exclusion,

d. a statement whether or not Minnesota income tax was withheld on that income,

e. the name and address of the employer,

f. type of services performed in Minnesota,

g. state in which the individual maintains residence,

h. the year in which the individual became a resident of the state,

i. a statement disclosing whether or not the individual customarily returns to his residence in the other state at least once a month,

j. a statement whether or not the individual filed an income tax return with that state and whether the income subject to reciprocity exclusion was declared on that return and

k. a statement declaring if the individual ever was a resident of Minnesota and, if so, when was the date of last residence.

An individual whose income is subject to reciprocity exclusion may also want to complete a withholding exemption certificate, Form MW-6.

G. The amount of federal adjusted gross income to be assigned to Minnesota for nonresident athletes for that person's athletic performance in Minnesota shall be determined by using the ''games played'' formula. The fraction used to determine the amount of income assignable to Minnesota under the ''games played'' formula shall use the total number of games in the season as the denominator and the total number of games played in Minnesota as the numerator. In using the ''games played'' formula, pre-season games do not constitute games played during a season. Each level of post-season ''playoff'' games constitutes a season. The use of any method other than ''games played'' to determine assignability of income to Minnesota will place the burden on the nonresident athlete to demonstrate that his or her income is actually the product of other substantial services in addition to performing as an athlete in an athletic contest. An athlete who meets this requirement would be allowed to use the ''duty days'' formula. The fraction used to apportion income by using the ''duty days'' formula is where the denominator contains the total number of days which the individual is under a duty to perform for the employer, and the numerator is the total number of those days spent in Minnesota. An example of these types of athletes would be those that are hired for specific duties after the end of a normal season, or other athletes such as managers, coaches or trainers who are hired for duty on an annual basis.

H. The following items of income received by a nonresident are assignable to Minnesota regardless of the time or place received by the taxpayer if the underlying services giving rise to the distribution were performed in Minnesota.

1. A bonus.

2. Commissions.

3. Vacation pay.

However, certain qualified pension payments are not assignable to Minnesota if they are received by a nonresident, even though the payments are attributable to services previously performed in Minnesota.

I. The amount of a net operating loss carryforward or carryback shall be the same dollar amount allowed in the determination of federal adjusted gross income. Adjustments must be made in the net operating loss for income and losses which are not assignable to Minnesota and for any changes in the computation of federal adjusted gross income which have not been adopted by the Minnesota legislature in a law updating the reference to the Internal Revenue Code.

Amendments as Proposed

13 MCAR § 1.6020 Energy credit.

A.2. A taxpayer must actually purchase the equipment or earth sheltered dwelling to qualify for this credit. The expenses connected with the leasing of equipment or the leasing of an earth sheltered dwelling do not qualify for this credit. If the taxpayer received a refund from the seller or the manufacturer of equipment on which the taxpayer claimed this credit, the amount of expenditures that were

allowable for this credit must be reduced by the amount of the refund that was received. The taxpayer will need to file an amended income tax return if the refund that was received would require a reduction in the energy credit which had already been claimed. A payment received by the taxpayer from the seller or the manufacturer of equipment is considered as a payment for services rendered when the payment was for field testing of the system by the taxpayer or for reports on the system that the taxpayer completed. A payment for services rendered must be included in the gross income of the taxpayer and does not reduce the amount of expenditures allowable for this credit. Expenditures will qualify even though they are paid for as the result of a federal ~~or~~, state, or local government grant, but only to the extent that the grant was included in federal adjusted gross income. Each dollar of expenditure which qualifies for this credit may be used only one time for purposes of computing this credit.

A.7. A shareholder of a family farm corporation is allowed to claim this credit in the same manner as a joint owner of property that otherwise qualified for the credit. All joint owners will be treated as one taxpayer (and so qualify for only one $2,000 energy credit) with the same taxable year. Each joint owner will be allowed, with respect to the expenditures, a credit for that taxable year in an amount, which bears the same ratio to the total amount allowable, as the amount of the expenditures made by the joint owner during the taxable year bears to the aggregate of the expenditures made by all joint owners during the taxable year. However, joint owners who make expenditures with respect to two or more principal residences shall compute the amount of their energy credit separately based on the amount of the expenditure made by each joint owner. If a Subchapter S or a family farm corporation makes the expenditure, the expenditure may be divided among the shareholders based on the percentage of their stock ownership in the corporation.

A.9. The energy credit, pollution control credit and feedlot pollution control credit shall be applied after all other nonrefundable credits. If the expenditures otherwise qualify, the taxpayer may elect which credit (including the carryforward) will be used. This election may be amended at any time before the expiration of the statute of limitations. If an expenditure otherwise qualifies the taxpayer may claim both the energy credit and the feedlot pollution control credit or pollution control credit on that property but the energy credit must be used first and the expenditures allowable for the feedlot pollution control credit or pollution control credit must be reduced by the expenditures that have been used for the energy credit. The taxpayer may elect to carryforward the amount of the energy credit, pollution control credit and feedlot pollution credit when the taxpayer's tax liability is computed by using the low income alternative tax.

B. Piggybacked federal renewable energy source credit. Any expenditure that qualifies for the federal renewable energy source credit, including expenditure for labor costs, geothermal energy, wind energy for electricity, renewable energy used to heat water, and any other expenditures which are allowable for the federal credit, would also be allowable for purposes of the state piggy-backed credit provided that the building is located in Minnesota and does not contain more than six dwelling units. After December 31, 1980, any active solar collector which qualifies for the federal renewable energy source credit must also be certified by the Minnesota Energy Agency before it will qualify for the state piggybacked federal renewable energy source credit. Expenditures that are allowable are only those that were allowable on the date that the legislature has specified in Minn. Stat. section 290.06, subd. 14 for purposes of adopting the federal credit provisions. No solar panel installed as a roof (or portion thereof) shall fail to qualify for the piggybacked federal renewable energy source credit solely because it constitutes a structural component of the dwelling on which it is installed. If an expenditure qualifies for both the federal energy conservation credit and for the federal renewable energy source credit and the taxpayer used the expenditure for the federal conservation credit, the taxpayer can use that expenditure for the state piggybacked federal renewable energy source credit provided that the expenditure otherwise qualifies.

C. Earth sheltered dwelling units. Expenditures that qualify for the credit for earth sheltered dwellings include material, labor and other construction costs (except interest) incurred to construct the dwelling. The structure of the earth sheltered dwelling unit must meet the standards of the Minnesota building code even though the code may not be in effect in that area. The earth sheltered dwelling unit's structure must also comply with all three tests which are contained in Minn. Stat. § 290.06, subd. 14(b)(1)-(3) and which are as follows:

"(1) 80 percent or more of the roof* area is covered with a minimum depth of 12 inches of earth; and

(2) 50 percent or more of the wall area is covered with a minimum depth of 12 inches of earth; and

(3) Those portions of the structure not insulated with a minimum of seven feet of earth shall have additional insulation;"

*~~A computer typing error was made here in the final copy of the conference committee report on H.F. 1495 (Laws of 1979, ch. 303). The law contains the word "wall" and not the word "roof." However, it is clear that this was a technical mistake and the Department is proposing a law change to the 1980 legislature.~~ The roof area contained in Minn. Stat. § 290.06, subd. 14(b)(1) that must be covered with earth means that area of the roof that is above the area used for residential living which is heated. The roof area that must be covered with earth does not include the roof area for a garage, unless the garage is heated. For § 290.06, subd. 14(b)(2) the term "wall" means the exterior walls of the residential living area. The walls of a garage are not included in this definition. If a garage is attached to the

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exterior walls at the residential living area, that area of the exterior wall of the residential living area that is part of the attached garage is not counted in the area of the wall that must be covered with earth. The wall must be covered with a minimum horizontal depth of 12 inches (30 cm) of earth. The term "structure" contained in § 290.06, subd. 14(b)(3) means the exterior walls and roof as defined for § 290.06, subd. 14(b)(1) and (2). In section 290.06, subd. 14(b)(3) the additional insulation that will be required is the amount of insulation that is needed to equal the following requirements:

E.6. Miscellaneous. The Commissioner of Revenue will require drawings, photographs, or other descriptions of a passive solar energy system from any taxpayer claiming the credit for a passive solar energy system. ~~If the taxpayer consents,~~ The commissioner may consult with the Director of the Minnesota Energy Agency to secure an evaluation of the drawings, photographs, or other descriptions to determine if the system qualifies for the energy credit.

A taxpayer who has installed or is planning to install a passive solar energy system which he or she feels may achieve passive solar energy performance better than a system designed according to the criteria contained in this rule may request an advisory opinion by submitting an architectural drawing, a detailed operational description of the system and performance calculation to the Director of the Energy Agency. On the basis of this information, the director may decide that the entire system and its integral components or some part thereof qualifies for the credit. The taxpayer shall furnish the Department of Revenue with a copy of the Director's Opinion when claiming this credit.

The original use of the passive solar energy system must begin with the taxpayer who claims the credit. Expenses for normal maintenance on the passive solar energy system do not qualify for the credit. Replacement expenditures of a capital nature to replace all or part of the passive solar energy system do qualify for the energy credit provided that the taxpayer must add these expenditures to the other expenditures that he had already claimed for the energy credit. Those passive solar energy system expenditures which exceed a reasonable cost amount, which serve no additional passive solar function, or which serve a purely aesthetic function, shall not be allowed.

Rules as Proposed (all new material)

13 MCAR § 1.6030 Nongame wildlife checkoff.

A. Charitable contribution. A designation by a taxpayer to the Nongame Wildlife Management Fund qualifies as a charitable contribution under the provisions of Minn. Stat. section 290.21, subd. 3 in the year in which the designation was made.

B. Administration.

1. A taxpayer may reverse all or part of the designation that was made to the Nongame Wildlife Management Fund from the taxpayer's refund. A taxpayer may reverse the designation to the Nongame Wildlife Management Fund at any time during which the taxpayer may file an amended return. A taxpayer may designate that all or part of his refund on an amended return go to the Nongame Wildlife Management Fund.

2. An individual, fiduciary, trust or estate may designate all or part of their refund to the Nongame Wildlife Management Fund. A corporation or a partnership may not make this designation.

3. Taxpayers who are allowed to claim the property tax refund as a credit on their income tax return may make a designation to the Nongame Wildlife Management Fund only on their income tax return.

4. The amount of the refund from which a taxpayer may make a designation to the Nongame Wildlife Management Fund is determined after the following deductions have been made:

a. Unpaid Minnesota tax liabilities owed to the Commissioner of Revenue.

b. A debt which qualifies for the provisions of the Revenue Recapture Act contained in Laws of 1980, Chapter 607, Article XII.

c. Amounts credited to the estimated income tax liability for taxable year.

5. Machine audit.

a. The term "machine audit" means the adjustments made to a taxpayer's return in the original processing of the return from the date the return is filed until the date the refund is granted or the order assessing additional tax is issued.

b. If, upon machine audit, a taxpayer's overpayment is reduced, the reduction shall be made in the following order:

(1) The amount of the overpayment that the taxpayer had requested as a refund is reduced.

(2) The amount of the overpayment that the taxpayer had designated to the Nongame Wildlife Management Fund is reduced.

c. If, upon machine audit, the taxpayer no longer has an overpayment but is assessed a tax balance due, the designation to the Nongame Wildlife Management Fund is cancelled.

6. A taxpayer, who owes a tax balance due (including penalty and interest) on his income tax return, may designate that an amount be paid to the Nongame Wildlife Management Fund by paying the entire balance that is due for both the tax liability and the designation to Nongame Wildlife at the same time that the return is filed. If the amount that is paid with the return does not equal the tax balance due and the amount designated to Nongame Wildlife, the amount of the tax balance due shall be paid first. If the amount that is paid with the return does not fully pay the tax balance due, the designation to the Nongame Wildlife Management Fund shall be cancelled.

13 MCAR § 1.6225 Targeting.

A. Homestead qualifications. The refund contained in Minn. Stat. § 290A.04, subd. 2c (targeting) provides up to $300 of property tax relief in 1981 to homeowners whose property taxes have increased by more than 10% from 1980 after reduction is made for improvements and other state paid credits. To qualify for targeting the property must qualify as the claimant's homestead for purposes of claiming the property tax refund for property taxes payable in 1980 and 1981. The claimant, therefore, must have owned and occupied the property as the claimant's homestead on January 2, 1980 and on January 2, 1981. When a homestead is owned by two or more persons as joint tenants or tenants in common, the tenants shall determine between them which tenant shall be the claimant for purposes of claiming the property tax refund and targeting. The joint tenant or tenant in common who claimed the property tax refund in 1981 is the only joint owner who qualifies to claim targeting in 1981. The joint owner who claims the property tax refund and targeting in 1981 need not be the same joint owner who claimed the property tax refund in 1980. In order for a joint owner to claim the property tax refund and targeting in 1981, the property must also have been the joint owner's homestead on January 2, 1980.

B. New construction. The claimant shall reduce the amount of the net property taxes payable in 1981 by the amount which is attributable to improvements. The amount attributable to improvements shall be determined by applying a ratio to the property taxes payable after reduction for the state-paid homestead credit and all other state-paid credits but before the reduction for the property tax refund. The ratio that shall be used is:

$$\frac{\text{Assessor's estimated market value of improvements}}{\text{Assessor's estimated market value of the entire homestead (including land)}}$$

This ratio shall apply to the estimated market value of all improvements which are included in the estimated market value for the first time for property taxes payable in 1981 regardless of the year the improvement was actually made.

C. Net property taxes payable.

1. A claimant who was required to reduce the property taxes payable for purposes of the property tax refund because

a. the homestead was used for business purposes and depreciation expenses were claimed or,

b. part of the homestead was rented to another, must make the similar reduction in the net property taxes payable which qualify for targeting. The same percentage reduction must be applied to net property taxes payable in 1980 and 1981. The largest percentage reduction must be used whether it be the 1980 percentage reduction or the 1981 percentage reduction.

2. The net property tax payable is only for that part of the property that qualifies as the claimant's homestead. On a duplex, only the property taxes attributable to the homestead portion qualify for targeting.

3. For purposes of computing the net property taxes payable that qualify for targeting, the property taxes payable must be reduced by the amount of the Class 3CC credit which was received under the provisions of Laws of 1980, ch. 607, Article IV, sections 3, 6, and 7.

4. The net property taxes payable in 1980 shall be reduced only by the amount of the property tax refund attributable to property taxes payable. No reduction shall be allowed for that part of a property tax refund attributable to rent constituting property taxes. If a taxpayer's property tax refund includes property taxes payable and rent constituting property taxes, the property tax refund shall be recomputed using only property taxes payable.

Department of Transportation

Notice of Withdrawal of Proposed Rules Establishing A Program of State Grants for the Development of Local Bicycle Trails

The above proposed rules came on for hearing on April 22, 1980, in a proceeding captioned *In the Matter of the Proposed Adoption*

KEY: RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language. **PROPOSED RULES SECTION —** Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material."

of Rules Establishing a Program of State Grants for the Development of Local Bicycle Trails (Bikeways). The Hearing Examiner, Harry Seymour Crump, in that proceeding, issued his report on June 18, 1980.

After review of the record herein, the commissioner hereby orders that the proposed rules establishing a program of state grants for the development of local bicycle trails (bikeways), as published at 4 S.R. 1493, March 17, 1980, and reviewed in the hearing of April 22, 1980, are withdrawn.

August 8, 1980

Richard P. Braun
Commissioner of Transportation



PANDA, ink drawing by Michael Floyd, Mayo High School, Rochester, MN.

TAX COURT

Pursuant to Minn. Stat. § 271.06, subd. 1, an appeal to the tax court may be taken from any official order of the Commissioner of Revenue regarding any tax, fee or assessment, or any matter concerning the tax laws listed in § 271.01, subd. 5, by an interested or affected person, by any political subdivision of the state, by the Attorney General in behalf of the state, or by any resident taxpayer of the state in behalf of the state in case the Attorney General, upon request, shall refuse to appeal. Decisions of the tax court are printed in the *State Register*, except in the case of appeals dealing with property valuation, assessment, or taxation for property tax purposes.

State of Minnesota — Tax Court

James R. Ree and Lynn D. Ree, Appellants,
Docket No. 2785

and

Glen C. Merfeld and Kathleen Merfeld, Appellants,
Docket No. 2786

v.

The Commissioner of Revenue, Appellee.

Order dated August 6, 1980.

The above-entitled matters were consolidated for trial. Both are appeals from two separate orders of the Commissioner of Revenue dated October 13, 1978. Said orders disallowed appellants' claims for property tax refund which were pursuant to Chapter 290A of Minnesota Statutes. Appellants, James R. Ree and Lynn D. Ree, are husband and wife and reside in the same residence with Glen C. Merfeld and Kathleen Merfeld, the other appellants. The Rees, as joint tenants, own a one-half interest in the property and the Merfelds, as joint tenants, own the other one-half interest in the property. It is contended by the appellants that the Merfelds and the Rees each own and occupy separate homesteads within the meaning of Chapter 290A. It is also contended that the Rees and the Merfelds are separate households within the meaning of that chapter, which, it is contended, explicitly recognizes that the homestead may be part of a multi-dwelling building.

Ronald B. Sieloff, appeared on behalf of appellants, Thomas K. Overton, Special Assistant Attorney General, appeared on behalf of appellee.

Decision

The Orders of the Commissioner of Revenue dated October 13, 1978 are hereby affirmed.

Findings of Fact

John Knapp

These two cases, involving the same facts and issues have been consolidated for purposes of this decision.

1. Appellants James R. Ree and Lynn D. Ree (referred to as "the Rees") are husband and wife residing in a house at 833 Goodrich Avenue, St. Paul, Minnesota 55105 (the property).

2. Appellants Glen C. Merfeld and Kathleen Merfeld (referred to as "the Merfelds") are husband and wife and reside in the same house with the Rees.

3. Mr. and Mrs. Ree own as joint tenants a one-half interest in the property. Mr. and Mrs. Merfeld own as joint tenants a one-half interest in the property. The Rees' interests in the property are that of tenants-in-common with respect to the Merfelds' interests.

4. There were property taxes payable with respect to the property at 833 Goodrich Avenue payable in 1976 and 1977.

5. The property at 833 Goodrich Avenue is a house which is a single dwelling unit which constitutes a single family residence and not a duplex.

6. The relationship of the Rees to the Merfelds (and vice versa) is not that of "husband and wife, dependents, roomers or boarders."

7. For the 1976 property tax refund, the Rees and Merfelds each claimed a property tax credit with respect to the property. Refunds were paid as claimed without audits. Audit of these claims is being held pending the outcome of this appeal at the request of taxpayers' counsel per telephone conversation on December 18, 1978.

8. For the 1977 property tax refund (for property taxes payable in 1977) the Rees and Merfelds each claimed a property tax credit. The Rees computed their credit using one-half the qualifying tax amount, one-half the state paid homestead credit, and only their own income. The Merfelds made a similar computation in computing their property tax.

9. The Department of Revenue disallowed the two credits claimed and recomputed a single credit using the total qualifying tax amount, the total state paid homestead credit, and the total income of all the residents.

Conclusions of Law

1. A single dwelling unit shared by claimants is a single homestead within the meaning of Chapter 290A of Minnesota Statutes.

2. Minn. Stat. § 290A.05, (1977) provides that property tax credit must be computed using the total income of all owner occupants of the homestead.

Memorandum

Appellants make three assertions in support of their claim. The first of these is that the Merfelds and the Rees each own and occupy separate homesteads within the meaning of Chapter 290A. The second, is that the Merfelds and Rees are separate households within the meaning of that chapter. The third is that Chapter 290A explicitly recognizes that a homestead may be part of a multi-dwelling building. As part of those assertions, appellants make further contentions. They contend that there is no statutory authority within Minn. Stat. § 290A.05 to require members of different households owning the same homestead or owning different homesteads to aggregate their income for purposes of claiming a refund under Chapter 290A. Furthermore, Appellants contend that Minn. Stat. § 290A.05 which deals with combined household income does not apply to multiple owners of the same property but only to an owner of property who had others merely occupying the property with him.

In order to properly answer the questions before this court, it is necessary to first address the question of what is a homestead. Minn. Stat. § 290A.03, subd. 6, defines a homestead as a dwelling occupied as a place of residence:

> "Homestead" means the dwelling occupied by a claimant as a place of residence and so much of the land surrounding it, not exceeding one acre, as is reasonably necessary for use of the dwelling as a home, except that this restriction shall not be applicable to agricultural land assessed as part of a homestead pursuant to § 273.13, subdivision 6. The homestead may be owned or rented and may be a part of a multi-dwelling or multi-purpose building and the land on which it is built. A mobile home, as defined in § 168.011, subd. 8, assessed as personal property may be a dwelling for purposes of this subdivision.

Initially upon reading the first sentence of the above quoted subsection, one could infer that as many people as there are who are living in your typical single family structure could claim a homestead. But such a reading would be to neglect the rest of the subsection which clarifies the first sentence. Further along in that subsection the legislature saw fit to provide that a homestead may be part of a multi-dwelling building. Therefore, the legislature included within this section a phrase which deals with a single family dwelling which can be considered a homestead and a phrase which deals with multiple family dwellings, e.g. an apartment complex, and provided that in such a complex there would be multiple homesteads.

There is no explicit indication of intent by the legislature to allow a single family dwelling to qualify for numerous exemptions. The fact that the legislature saw fit to allow a multi-dwelling building numerous exemptions does not validate the appellants' argument. Taxation is the rule. Exemption is the exception and must be explicitly stated. At best, it can be stated that here we are dealing with some doubtful language, but an exemption from taxes cannot be presumed from doubtful language. It must be expressed in words so clear and explicit as to leave no reasonable doubt that the exemption was intended to be given. *Great Northern Railway Company v. State of Minnesota*, 216 U.S. 206, 30 S. Ct. 344, in re *Junior Achievement*, 271 Minn. 385, 135 N.W. 2d 881.

This result is consistent with the case of *Schumann v. Commissioner*, 253 N.W. 2d 130 Minn. (1977) where the court interpreted the status of the old rent credit provisions as provided in Minn. Stat. §§ 290.981-290.992 (1974) and interpreted the rules as saying that occupants of a single dwelling unit were considered occupants of a single rental unit. Therefore it is consistent when interpreting the property tax refund statutes to determine that occupants of a single dwelling unit are occupants of a single property tax unit.

In assertion of their claim of two homestead exemptions for this one particular dwelling unit, appellants appear to be relying upon the facts that they are all co-owners of this single dwelling unit and that they are not all related to one another. Upon examining the statute however, it does not appear that either of these factors is relevant whatsoever. Minn. Stat. § 290A.03, subd. 13 provides for a method of determining which of the co-owners of a single dwelling unit will claim the homestead credit exemption. It does not say that if there are numerous co-owners that they all can claim the exemption. It clearly says that the parties will determine between them which of them is to claim the exemption.

Appellants have further contended that it is improper for the commissioner to aggregate the incomes of the Rees and the Marfelds in determining the property tax credit. Minn. Stat. § 290A.05 (1977 Supp.) provides an answer to this issue.

> If a person occupies a homestead with another person or persons not related to the person as husband and wife, excluding dependents, roomers or boarders on contract, and has property tax payable with respect to the homestead, the household income of the claimant or claimants for the purpose of computing the refund allowed by section 290A.04 shall include the total income received by the other persons residing in the homestead. If a person occupies a homestead with another person or persons not related as husband and wife or as dependents, the property tax payable or rent constituting property tax shall be reduced as follows:
>
> If the other person or persons are residing at the homestead under rental or lease agreement, the amount of property tax payable or rent constituting property tax shall be that portion not covered by the rental agreement.

It has been stipulated that the Rees are husband and wife. It has also been stipulated that the Merfelds are husband and wife. There is no indication that the four of them are related in any way. The four of them are co-owners of the property, none of them are dependents of the others, roomers or boarders of the others. Therefore they do not come within the listed exceptions within the above quoted section. Since it is clear that the Merfelds and Rees are co-owner occupants of this dwelling and it is clear from reading the subsection quoted above that a claim of co-owner occupants of a homestead must be computed using the total income of the co-owner occupants, it was proper for the commissioner to aggregate the incomes of the Merfelds and the Rees in determining the property tax credit in this case.

This Court having considered all the facts and evidence before it finds according to the above analysis that the Orders of the Commissioner are hereby affirmed in full.

John Knapp

SUPREME COURT

Decisions Filed Friday, August 15, 1980

50282/Sp. State of Minnesota vs. Henry Walter Butler, Appellant. Hennepin County.

Evidence of defendant's guilt was sufficient, trial court did not commit prejudicial error in any of its evidentiary rulings, and trial court's instructions were adequate.

Affirmed. Rogosheske, J.

48671, 48672, 49180/157 Roy Vieths, Plaintiff, vs. Wayne Ripley and Harry Munson, d.b.a. Munson Crane Rental Service, defendants and third party plaintiffs, vs. Archer-Midland-Midland Company, third party defendant, Appellant (48672), ADM Milling Company, third party defendant, Appellant (48671 and 49180). Goodhue County.

Where a workman is injured by an electrical current that traveled from an uninsulated, unmarked, high voltage powerline through a crane the workman was touching, evidence of negligence of appellant owner of the powerline was sufficient where the jury could have found appellant knew or should have known the crane would be operating near the powerline.

Similarly, evidence of negligence of appellant employer was sufficient.

There was insufficient evidence for a jury to find that the workman's employer was acting as an agent for the powerline owner and it was therefore error for the trial court to impute the negligence of the workman and his employer to the owner.

The crane operator was not negligent as a matter of law where evidence sustains a jury finding that he reasonably depended upon the injured workman not to direct the crane into a dangerous position.

Instructions to the jury on Article 4 of the National Electrical Safety Code were not prejudicial.

Reversed and remanded. Rogosheske, J. Took no part, Peterson, J., Todd, J. and Amdahl, J.

50375/200 The Brothers Jurewicz, Inc. vs. Atari, Inc., Appellant. Hennepin County.

In an action on a contract containing an arbitration clause, the general rule is that the issue of whether the right to request arbitration has been lost due to laches and waiver should be decided by an arbitrator rather than a trial court.

When an arbitration request is made after litigation has been instituted on a dispute and the party opposed to arbitration claims laches or waiver predicated solely upon participation in the lawsuit by the party seeking arbitration, a limited exception to the general rule exists giving the trial court jurisdiction to decide the issue.

Because the trial court's finding that Atari was guilty of laches was based solely on Atari's failure to request arbitration until after the litigation had proceeded for nearly 1 year, rather than on the underlying contract dispute between the parties, it was proper for the trial court to assume jurisdiction of the Brothers Jurewicz' laches defense to Atari's motion to compel arbitration.

Atari's participation in litigation for nearly 1 year with constructive knowledge of its right to demand arbitration, and without moving the court to compel arbitration, constituted laches.

Affirmed. Rogosheske, J.

50549/218 In the Matter of the Alteration of the Outlet Elevation of Plum Grove Lake (Lake 3-564), Becker County, Minnesota. Becker County.

Minn. Stat. § 105.38 (1) (1973) is the law of the case, because all parties to this dispute applied it as the controlling statute in addressing the question of whether Plum Grove Lake was public waters.

Because the record is replete with evidence concerning the beneficial public purposes served by Plum Grove Lake, the commissioner's conclusion that the lake is public waters is amply supported by substantial evidence.

Reversed and remanded with instructions that the commissioner's order be reinstated. Rogosheske, J. Took no part, Amdahl, J.

50264/Sp. State of Minnesota vs. David Harold Affeldt, Appellant. Martin County.

Evidence of defendant's guilt held sufficient.

Statute making it a crime to publish false statement relating to value of corporate property with intent to defraud is not void for vagueness.

Trial court's instructions, which were not objected to, were not so inadequate as to require a new trial.

Affirmed. Peterson, J.

49060/Sp. State of Minnesota vs. Jerome Peter Sufka, Appellant. Benton County.

Deputy sheriff deliberately elicited statements from petitioner in the absence of petitioner's attorney and state failed to meet its burden of proving that petitioner waived his right to counsel; however, admission of statements, even if obtained in violation of petitioner's right to counsel, was harmless error beyond a reasonable doubt.

Petitioner, by failing to object to admission of extrajudicial statements as being violative of R. 410, R. Evid., is deemed to have forfeited his right to have this issue considered on this appeal.

Trial court did not clearly abuse its discretion in denying a midtrial request for a continuance to locate a potential rebuttal witness.

Affirmed. Todd, J.

Decisions Filed Tuesday, August 12, 1980

51372/Sp. State of Minnesota, Appellant, vs. Mark Edward Dineen. Swift County.

Abandonment, if any, of motor vehicle was prompted by threat of search of vehicle by officer who did not have probable cause to search.

Affirmed. Sheran, C. J.

51407/Sp. State of Minnesota, Plaintiff, vs. Yves Montand Guy, Michael Lee Kidd, Michael Douglas Harvey, Daniel Maurice Winston. Hennepin County.

Certified question, based on doubt as to whether defendants charged with possessory offenses had automatic standing under federal constitution, was resolved by decision of United States Supreme Court while this appeal was pending; accordingly, issue is no longer doubtful, but case is remanded so that defendants may have opportunity to demonstrate, if they can, that their own Fourth Amendment rights were violated.

Remanded. Sheran, C. J.

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Department of Health
Emergency Medical Services Section

Eligibility List for EMT and Paramedic Examiners

The Minnesota Department of Health, Emergency Medical Services Section, is in the process of formulating a list of eligible individuals interested in working part time conducting EMT and Paramedic written and practical examinations. Physicians, Registered Nurses, Paramedics and EMTs interested in being placed on the department's list of eligibles should send a resume and cover letter to:

Ernest W. Kramer
Training Coordinator
Minnesota Department of Health
EMS Section
717 Delaware Street S.E.
Minneapolis, Minnesota 55440

Applicants should have considerable experience in emergency care including teaching as well as the provision of emergency care. If anyone has questions call Mr. Kramer at (612) 296-5281.

State Arts Board

Notice of Request for Proposals for Regional Arts Program Evaluation

The Minnesota State Arts Board is requesting a proposal from an individual with arts planning expertise to examine the relationship between the Minnesota State Arts Board and regional arts councils regarding grants and service delivery, to determine how this relationship might be improved and to suggest how such improvements might be made.

The total amount of the contract will not exceed $5,000.00.

Inquiries and formal expressions of interest should be directed to:

Jim Olsen
Minnesota State Arts Board
2500 Park Avenue
Minneapolis, Minnesota 55404
Telephone: (612) 341-7177

A formal expression of interest must be submitted to the Minnesota State Arts Board no later than 12:00 p.m. (noon), September 4, 1980.

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Department of Human Rights

Notice of Intent to Prepare Department of Human Rights List for Future Rulemaking Hearings

In accordance with Minnesota Law, 1980, Chapter 615, the Minnesota Department of Human Rights is establishing a list of persons to receive official notice of its rulemaking proceedings. The law requires each agency or department to establish and maintain such a list to replace the list currently maintained by the Secretary of State.

If you wish to receive notice of rulemaking proceedings of the department, please notify the department in writing. You will then receive notice of any rulemaking proceedings initiated after the date on which your request is received. Please note that this procedure will put you only on the list of the Department of Human Rights. Other agencies and departments will be establishing their own lists.

Please send your written request to:

Mary A. Hartle
Minnesota Department of Human Rights
4th Floor Bremer Towers
7th Place and Minnesota Street
St. Paul, Minnesota 55101
(612) 296-9048

Department of Transportation

Notice of Intent to Solicit Opinion Concerning Proposed Rules Establishing A System of State Grants for the Development of Local Bicycle Trails

Notice is hereby given that the Commissioner of Transportation is considering the adoption of rules which would establish a system of state grants for the development of local bicycle trails.

Minn. Stat. § 160.265 (1978) authorizes the Commissioner of Transportation to establish, by rule, procedures for the administration of grants for local bicycle trails to units of government as defined in Minn. Stat. § 4.36, subd. 1. Such units of government include counties, cities, and home rule charter cities, towns, school districts, public post-secondary educational institutions, special park districts, or any elected park and recreation boards.

Please be advised that the commissioner has withdrawn the earlier proposed rules which were published in the *State Register* at 4 S.R. 1494 and which were reviewed at a hearing held April 22, 1980.

All persons interested in this subject matter of rules for state grants on local bicycle trails should consider this notice to be separate and distinct from the earlier rule proceeding.

The commissioner may not necessarily entertain or use proposed regulatory statements developed in the earlier rule proceeding. Those affected and those who participated in the earlier hearing are earnestly solicited to make their views known and to provide whatever information that may be relevant to this matter.

The purpose of these rules for state grants for the development of local bicycle trails would be to adopt procedures to establish: grant project eligibility; project priority; requirements for matching funds; grant conditions; distribution and depletion of project monies; project accounting; retention and use of project facilities; and contract expiration.

All interested or affected persons or groups may submit information on this subject of rules for state grants for the development of local bicycle trails. Written or oral information and comment should be addressed to:

Minnesota Department of Transportation
Office of Environmental Services
Attention: Leonard G. Eilts, Acting Director
612 Transportation Building
St. Paul, Minnesota 55155
Telephone: (612) 296-7528

Any written material received will become a part of the record of any rules hearing held.

August 8, 1980

Richard P. Braun
Commissioner of Transportation

Department of Labor and Industry Rehabilitation Services Division

Announcement of Open Meeting

Notice is hereby given that the Rehabilitation Review Panel for Workers' Compensation will conduct an open meeting on Thursday, September 18, 1980 from 9:00 a.m. to noon and 1:00 to 3:00 p.m. The meeting will be held at the auditorium of the State Office Building, Wabasha Street and Park Avenue, St. Paul, Minnesota.

The purpose of the open meeting is to receive views and comments from any interested parties on rehabilitation issues as they relate to M.S. 176.102. Registration of those parties wishing to present verbal comments will be held between 8:30 and 10:00 a.m. that day at the auditorium.

Errata

1. At 5 S.R. 113, July 28, 1980, a proposed rule of the Livestock Sanitary Board (Board of Animal Health, effective August 1, 1980), 3 MCAR § 2.001 (LSB 1) Importation of cattle and bison., contains an error. Paragraph A. should read as follows:

"A. (a) Where used in ~~these~~ this rules ~~and regulations~~ the following words and terms ~~shall be~~ are defined as follows:"

2. At 5 S.R. 114, July 28, 1980, an adopted rule of the Office of the Secretary of State, Election and Legislative Manual Division, contains an error. Rule 1 MCAR § 2.4103 Instructions to absent voter., paragraph (12) of the form should read:

"(12) ~~(13)~~ You may mark and mail or deliver your ballots at any time after you receive them. However, if mailing your ballots, allow sufficient time so that they can be delivered by the U.S. Postal Service on election day. If you or your agent deliver in person your Absentee Ballot Return Envelope, the auditor or clerk must receive it before ~~5~~ 4:30 p.m. on the day before an election day."

3. At 5 S.R. 121, July 28, 1980, an adopted rule of the Department of Transportation contains an error. Rule 14 MCAR § 1.4000 D.2. should read:

"2. If a rehabilitation project is on a rail line owned by a bankrupt railroad, previously owned by a bankrupt railroad, or a rail line has been abandoned under Interstate Commerce Commission regulations, 49 CFR 1121, the division of costs shall be by the following formula:"

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FOR LEGISLATIVE NEWS

Publications containing news and information from the Minnesota Senate and House of Representatives are available free to concerned citizens and the news media. To be placed on the mailing list, write or call the offices listed below:

Briefly/Preview—Senate news and committee calendar; published weekly during legislative sessions. Contact Senate Public Information Office, Room B29 State Capitol, St. Paul MN 55155, (612) 296-0504.

Perspectives—Publication about the Senate. Contact Senate Information Office.

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This Week—weekly interim bulletin of the House. Contact House Information Office.

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

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IN THE MATTER OF THE PROPOSED ADOPTION OF AMENDED RULES AND NEW RULES OF THE DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001 TO 1.6004, 1.6020, 1.6030, AND 1.6225)

STATEMENT OF NEED AND REASONABLENESS

This document has been prepared as a verbatim affirmative presentation of the facts necessary to establish the statutory authority, need for and reasonableness of the proposed new rules. It is submitted pursuant to 9 MCAR Section 2.104 requiring a Statement of Need and Reasonableness. This entire statement is one document. However, the Statement of Need and Reasonableness for each rule has been typed separately for ease in understanding and to reduce the cost for a person who is interested only in one rule.

A Notice of Intent to Solicit Outside Opinion in the preparation of the individual income tax and property tax refund rules was published in the State Register on January 29, 1979. A Notice of Intent to Solicit Outside Opinion in the preparation of the energy credit rule was published in the State Register on June 25, 1979. These proposed rule amendments and new rules have been submitted to those people who contacted us, for their comment. A meeting was held on May 29, 1980 at which time these rules were discussed with several interested people. All interested parties were allowed an additional month in which to submit comments. Those people who had been involved in the preparation of the energy credit rule

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in 1979 were again contacted concerning the proposed amendments in the energy credit rule. Suggestions and comments that were received have been duly considered.

Authority to Adopt Rules

Minn. Stat. Section 290.52 grants the Commissioner statutory authority to promulgate rules concerning the income tax law. Section 290.06, subd. 14 grants the Commissioner of Revenue authority to promulgate rules establishing additional qualifications and definitions for the energy credit. The Commissioner of Revenue has consulted and has cooperated with the Energy Agency in the preparation of these rules. Section 290A.20 grants the Commissioner of Revenue statutory authority to promulgate rules concerning the property tax refund law. Targeting is a part of the property tax refund law.

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Rule 13 MCAR Section 1.6001 - Resident Defined.

Statement of Need and Reasonableness

A.1. The definition of "resident" is contained in Minn. Stat. Section 290.01, subd. 7. The definition that is proposed consists of several modifications to the current rule defining resident. This paragraph removes duplication of the statute and makes clear that it is possible for a person to be a part year resident of the state of Minnesota. The rule adds the word "person" because later in the rule the word "person" is used in place of "individual." This makes it clear that this rule refers to individual persons. The term "abode" is removed and the term "a home" is substituted to be consistent with the remainder of the rule and to modernize the words in the rule. Obsolete or unclear provisions of the rule are deleted and replaced so that the rule would more clearly state its purpose. The second sentence of this paragraph contains the definition for the term "domicile." This definition is the same definition as was used by the Minnesota Supreme Court in Miller v. Commissioner of Taxation, 240 Minn. 18 at 19 (1953) and Commissioner of Revenue v. Stamp, (August 29, 1980).

A.2. The changes in this part eliminate language that is not needed. The first sentence of the first paragraph adds nothing to the rule and is deleted. In several places in this paragraph the term "residence" is stricken and the term "domicile" is substituted because that is the more proper term. Where possible, this rule would delete references that use the words "his" or "he" and replace these terms with a sex neutral term. Other grammatical

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changes are made in this paragraph.

The second paragraph of this part changes the word state to jurisdiction to recognize the fact that it is possible for a person to move into another nation or to a place such as the District of Columbia, which is not a state. Again, grammatical changes were made to clarify the meaning of the rule. The word "permanently" was added at an earlier place in the second sentence because it was clearer there than in the place where it had previously been. This makes it clear that a person can have two intentions, one, to remain there permanently, or two, to remain there indefinitely. Previously the word permanently was modifying the word indefinately. The third sentence of this paragraph states a presumption that is based in large part on the decision of the Oklahome Supreme Court in Suglove v. Oklahoma Tax Commission, 605 P.2d 1315 (1979). In this case the court held that taxpayers who were formerly residents of Oklahoma but who had moved to Jakarta, Indonesia on an indefinite job assignment remained domiciled in Oklahoma. The court said:

> "Applying these general principles to the present case, it is clear that state-made distinctions between those who move abroad and those who move to another state are not constitutionally impermissible so long as there is a reasonable basis for a varying treatment. We hold that a reasonable basis does exist here. Moves from one state to another are a common occurrence today. They are commonly considered to be permanent, or at least for an indefinite time and without intention of returning to the previous domicile. A move from one state to another is an ordinary event. The person remains within the same culture and among people who speak the same language. A person who moves from one state to another is not a foreigner anywhere in the United States. One's friends and family are still within a ressonable distance. In the absence of countervailing factors, it is not unreasonable to infer that such a move is permanent and constitutes a change of domicile.

> "On the other hand, a move to a foreign country entails a drastic change in one's life, thus making the intention to stay permanently in a foreign country less likely. Moving to a foreign country means leaving one's own culture, one's family and friends in a way in which most people would be reluctant to do. It is hence not unreasonable to infer that when an individual moves abroad on a foreign-situs job assignment he is not necessarily adopting it as a new domicile."

Many of the changes in the third paragraph of this part remove the sex discrimination that is contained in the current rule. The provisions when a husband and wife can have a separate domicile are clarified and these provisions are prefaced with the words that this is a presumption because, as is stated in the middle of this paragraph, there is always the possibility of affirmative evidence to rebut this presumption. The language is updated to reflect the change in terms used in the marriage laws. An exception to the rule that a husband and wife have the same domicile is allowed for the self evident situation when the marriage has been dissolved and in fact they no longer are husband and wife. This is mainly for clarification purposes. Other words which are easier to understand are substituted for the terms "abode" and "resides."

In the fourth paragraph of this part, terms that are sex neutral have been used and obsolete words have been replaced with words that are more consistent with this rule. The third sentence of this paragraph covers the situation when a child is properly under the custody of one of the parents. The domicile of that parent, then, is the domicile of the child. The next sentence of this paragraph makes it clear that a person who has applied for immigrant status into the United States and is a permanent resident

alien can have a domicile in this state. This person would no longer be covered by a visa nor would this person have indicated to the Immigration Services that that person intends to return to the foreign nation. Eventually a person in permanent resident alien status may become a United States citizen. The last sentence of this paragraph makes it clear that the domicile of a member of the armed forces is governed by the facts just before that person entered the armed forces. It is possible for a person in the armed forces to establish a new domicile and that fact is recognized. This provision is based on the federal law contained in 50 App. U.S.C. Section 574 which states "For the purposes of taxation in respect of any person, or of his . . . income or gross income by any state . . . such person shall not be deemed to have lost a residence or domicile in any state . . . solely by reason of being absent therefrom in compliance with military or naval orders, or to have acquired a residence or domicile in or to have become resident in or a resident of, any other state . . . while, and solely by reason of being, so absent."

A.3. In this paragraph the changes again relate to removing sex discriminatory words and making the words sex neutral. The word "residence" has been deleted because it is inappropriate to use the word that is being defined. Also, the more appropriate term is the word "domicile." The word "removal" is modified to make it clear that what we are talking about is physical removal. A sentence is added to provide that an individual can have only one domicile at any particular time. This rule on the continuing quality of a domicile is set forth in American Law Institute, Restatement, Conflict of Laws, Chapter 2, Section 23 as follows: "A domicile once established continues until it is superseded by

a new domicile." In McCutchan v. Commissioner of Taxation, Minnesota Board of Tax Appeals Docket No. 563, January 20, 1956, the Minnesota Board of Tax Appeals stated that "Every person has at all times one domicile, and no person has more than one domicile at a time." This quote by the Minnesota Board of Tax Appeals was based on American Law Institute, Restatement, Conflict of Laws, Sections 11 and 23. See also Commissioner of Revenue v. Stamp, Minn. Sup. Ct. (August 29, 1980). The rule is changed to provide more certainty to the fact that acts by the taxpayer are given weight than declarations. The old rule is vague on this point and the change is necessary to add certainty to the rule. In Commissioner of Revenue v. Stamp, (August 29, 1980), the Minnesota Supreme Court said that "the Tax Court permissibly found that taxpayers' Minnesota-related activities contradicted their stated to make Florida their home."

B. As the previous paragraph stated, acts are carefully examined to determine a person's intention to change domicile and where that person intends to make their domicile. The Department has used a number of items to determine domicile in the past. These items are codified in this part B. This will provide a listing of items to be used by the Department in an attempt to determine a person's domicile. It will also notify taxpayers of the items that the Department does use to determine domicile. As is stated at the end of this part, no one item by itself may determine what a person's intent was, but the total amount of the items must be examined. Generally, these items used to determine domicile are based on the various residency cases that have been decided.

The following is a listing of the more prominent and more recent cases defining residence:

1. Miller v. Commissioner of Taxation, 240 Minn. 18 (1953).
2. In Re Estate of Smith, 242 Minn. 85 (1954).
3. Commissioner of Revenue v. Stamp, Minn. Sup. Ct. (August 29, 1980). See also Stamp v. Commissioner of Revenue, Minn. Tax Court Docket No. 2572, (June 27, 1979).
4. McCutchan v. Commissioner of Taxation, Minnesota Board of Tax Appeals Docket No. 563, (January 20, 1956).
5. Sarek v. Commissioner of Revenue, Minnesota Tax Court Docket No. 2524, (April 19, 1979).
6. Bolton v. Commissioner of Revenue, Minnesota Tax Court Docket No. 2600, (March 18, 1980).
7. Truex v. Commissioner of Revenue, Minnesota Tax Court Docket No. 2505, (May 16, 1980).

B.1. The factor of where a person's domicile was in the prior years is important because of the previous provisions which state that once a person's domicile has been shown to exist, it is presumed to continue until the contrary is shown.

B.2. The previous rule is amended to remove the provision that voting is a presumption of residence. The amendment merely states that where a person votes or is registered to vote is an item to be considered, along with the other items, when determining residence. The provision of registration is listed to govern where registration is required. However, if a person has voted by using provisions such as Minnesota's election day registration, that item can also be considered. Federal law contained in Public Law 94-203

as adopted in Minn. Stat. Section 203A.31, subd. 5 and Section 207.025 allows an United States citizen who resides outside of the United States to vote in federal elections for President, Vice President, U.S. Senator and U.S. Representative even though they are not residing in Minnesota. This federal law provides that the fact that a person voted under this provision is not to be considered as an element in the determination of residence in a particular state for income tax purposes. The provision concerning casting an illegal vote was changed to more clearly define the sentence by using the word "domicile" instead of "residence."

B.3. Whether or not a person is a student has a determination as to whether or not that person is a resident of Minnesota. Clearly, a person who is a student may have a more temporary intention of staying in Minnesota and may intend to leave the state and return to their original home as soon as their studies are done.

B.4. The type of employment, whether it is temporary or permanent, is also an item to be considered in determining the long term intention of a person to make Minnesota their domicile.

B.5. Where a person's employment is located also shows an intention of that person as to where their domicile is to be located. Again, however, as is stated at the beginning of this rule, no one item can determine by itself where a person intends their domicile to be located.

B.6. Where a person's living quarters are located and whether they are owned or rented is also a determination. Clearly, if they are owned, it would indicate a stronger intention to make a permanent domicile change. This intention is possibly not as strong if the quarters are merely rented.

B.7. What has happened to the former living quarters is also an item of concern. Were they sold or offered for sale? This would indicate an intention to abandon the former domicile. Were these quarters merely rented or available for rent? This would indicate an intention to return to that former domicile.

B.8. Whether or not the homestead status has been requested on living quarters for property tax purposes is important to make sure that a person's intention for property tax is consistent with the person's intention for income tax. Both the newly purchased and the former living quarters must be examined. A person who wants to establish a new domicile will clearly have a consistent intention when it comes to receive a property tax benefit and when required to pay the income taxes that are due.

B.9. The ownership of other real property is important to be considered. Where this ownership is is an item indicating a person's intention. It is an item to be considered because where a person intends to make their domicile is, in many cases, also where that person will make their investment in real property.

B.10. Where a person has a valid driver's license is a common indication of where a person intends to be domiciled. This can be verified by reviewing the various court decisions that were cited.

B.11. Where a person has professional licenses is important to indicate where that person may intend to work. Again, this is another item to be considered when determining where a person wants to reside.

B.12. Much the same thing can be said about location of a person's union membership. This is the same thing as professional licenses. This shows where a person intends to work and make their permanent residence.

B.13. Where motor vehicles are registered and where they are actually located indicates where a person is spending much of their time. Where cars are actually located can show where the person spends their time and where they really intend their residence to be.

B.14. Whether a person has purchased resident or nonresident fishing or hunting licenses is also an item much like driver's licenses. This is merely another indication of what a person's intention has been.

B.15. Whether the person has filed resident or nonresident income tax returns. Many states have different returns for nonresident than for resident. While Minnesota uses the same return, different laws apply to a nonresident than apply to a resident. This is, again, one indication of a person's intention.

B.16. Whether a person has fulfilled the tax obligations required of a resident. If a person clearly intends to become a resident of a state, that person will fulfill all obligations. It is the Department's understanding that Florida imposes a personal property tax on intangibles. A person who truly intends to become a resident of Florida would subject themselves to this intangible law. If they intend to move from Minnesota and become full residents of Florida, they will then want to be governed by all the laws of Florida.

B.17. The location of a person's bank accounts, especially the most active checking account, indicates where a person's contacts are, where a person is purchasing materials, and where they are spending leisure time. This also indicates where they desire these accounts for their own convenience which also would show their intention concerning domicile.

B.18. Location of any other transactions with financial institutions, such as loans, credit cards, brokerage firms, etc. This information would indicate where the person is actually spending their time.

B.19. The location of a place of worship at which the person is a member indicates where the individual has established roots in the religious community. This can also indicate where a person is spending their leisure time and where they intend to become involved and make friends.

B.20. The location of business relationships and the place where business is transacted. As can be seen from reviewing some of the Tax Court decisions where a person is involved in a business means where they are spending their time operating a business. Quite often, they will want to be closely situated to this business to keep track of it. The time that is involved in running a business will be substantial. This will all indicate where a person intends to make their home.

B.21. The location of social, fraternal, athletic organizations, other clubs, etc. of which the person is a member. This would show where the person spends their leisure time, where they have their friends, and where they intend to make a commitment of themselves.

B.22. Where their mail is received and the address that they have given to their employer is an important evidence of their outward intent, as is demonstrated to individuals they have contact with. It also indicates where they intend to receive their communications with other people for their convenience.

B.23. The percentage of time, not counting hours of employment, that a person is physically in Minnesota as opposed to the percentage

of time that they are not in Minnesota is to be considered to show where a person relaxes, where they have their friends, and where they sleep. This goes to show where a person spends the time that they have control over.

B.24. Where a person receives unemployment compensation from is important because if a person has indicated that one state is their residence for receiving a benefit, it should also be their state of residence for income tax purposes. A person should be consistent. Again, this would be no problem for a person whose true intention is to make a certain state their domicile.

B.25. Where a person, their spouse, or their children attend schools, and whether resident or nonresident tuition is charged is another indication of an intention that has been manifested to the schools as to where that person truly intends their domicile to be.

B.26. A statement made to an insurance company concerning the person's residence for insurance purposes has been cited in the Tax Court decision of Truex v. Commissioner of Revenue as an item to be considered in determining a person's domicile. If a person indicates to the insurance company that a certain house is that person's residence and where they spend large amounts of time, this person's statements should also be considered for purposes of determining their domicile for income tax purposes. Again, it goes to point out the fact that a person who truly intends to establish a domicile is to be consistent with the statements that they have made.

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Rule 13 MCAR Section 1.6002 - Income Tax Returns for Husband and Wife.

Statement of Need and Reasonableness

The provisions governing the filing of joint, separate or combined income tax returns for husband and wife are contained in Minn. Stat. Sections 290.38 and 290.39, subd. 2.

A. The first sentence of this paragraph stating when the determination is to be made as to whether or not an individual is married is copied from the provisions of Section 143(a)(1) of the Internal Revenue Code. The determination of whether or not an individual is married is to be made at the close of the taxable year. This is identical to the provision that was contained in the old rule under part F.3. This provision is being repealed in that place and is being put at the beginning to place it in proper form. An exception is to be made for a surviving spouse who does not remarry during the taxable year. This exception can also be based on the second paragraph of Section 290.38 in addition to the provisions of the Internal Revenue Code. As nearly as possible it is important to be consistent with the federal provision to provide simplicity. The second sentence defines the term "married." A person is not considered to be married if 1. the marriage has been dissolved, 2. if the married couple has been legally separated, or 3. if the married couple does not live together unless the spouse is only temporarily away from home. This, again, is consistent with the provisions of Section 143(a)(2) and (b). The Internal Revenue Code uses a similar definition for the determination of marital status in the following other provisions: Section 121(d)(6), Section 44A(f)(3) and (4), Section 6013(d)(2),

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and Section 6015(b). It should be noted that the Internal Revenue Code cross-references Section 143 in numerous other Code provisions, and this is the general federal income tax law defining the term "married."

Starting with the 1968 Minnesota income tax instructions, the term "married" has been defined according to the provisions of this rule. The term "married" was defined in the 1968 instructions as follows: "If you are married and not living with spouse or are divorced or legally separated on or before the end of the taxable year, you are considered single for filing requirements purposes." The 1969 instructions added to this provision by saying: "If you are unmarried, divorced, legally separated, widowed, or if you are married and not living with spouse at the end of the taxable year, you are considered single for filing requirement purposes. If you are married and living with spouse at the end of the taxable year, or if you and your spouse are not living together due to military service or other temporary job assignment away from home, hospitalization, or other confinement, you are considered married for filing requirement purposes." The rule closely follows the explanation contained in the 1979 Minnesota income tax instructions on page 3, "You are single if you are: unmarried, divorced, widowed or legally separated at the end of your tax year. You are also considered to be single if you are married and do not live with your spouse, unless your spouse is only temporarily away from home."

This definition of the term "married" is also consistent with the other references in Chapter 290. Many of these references in

Chapter 290 simply use the words "husband and wife," "married claimant," or "spouse." However, Section 290.012, subd. 3 states that a divorced or separated spouse can't be claimed as a dependent for purpose of the low income alternative tax. Section 290.06, subd. 3(f)(2), (4)(c), and (5)(b) state that in order to claim the married credit, the married individual must live with the spouse. Minn. Stat. Section 290.09, subd. 15(a) states that a husband and wife must live together and must both take the standard deduction or they must both itemize their deductions. Minn. Stat. Section 290.93, subd. 2 states that a husband and wife who are legally separated can't make a joint declaration of estimated tax.

Minn. Stat. (1979 Supplement) Section 518.06, subd. 1 provides that "A dissolution of marriage is the termination of the marital relationship between a husband and wife. A decree of dissolution completely terminates the marital status of both parties. A legal separation is a court determination of the rights and responsibilities of a husband and wife arising out of the marital relationship. A decree of legal separation does not terminate the marital status of the parties." This statute makes it clear that Minnesota law does provide that a person is no longer married once the marriage is dissolved. However, the statute contradicts the position of the Department that an individual is not married when they are legally separated. However, it can be argued that this statute applies to a number of property relationships. A person who is legally separated should not be forced into a tax relationship that is undesired. It is very important that the Minnesota income tax, wherever it would be possible, be consistent

with the other provisions of the Minnesota income tax so that one provision does not contradict the other provision. Also, for clarity and simplicity purposes, it is very important that as closely as possible, the Minnesota income tax parallel the federal income tax. This is why this rule defines an individual who has been legally separated as not being married. The rule goes on to define the fact that a person who does not live with their spouse also is not married unless the spouse is only temporarily away from home. Again, this is being consistent with past interpretations and with federal law. It also is consistant with the provisions of various parts of the Minnesota income tax law. The 1969 instructions cited examples of when a person is temporarily away from home. These examples are not cited in this rule because of the fear that this would restrict the use of the word "temporarily." Clearly, a person such as a hostage in Iran who is being held away from home against his wishes, would be considered to be only temporarily away from home.

The third sentence in this part stating that a husband and wife who have different taxable years cannot file a joint or combined return is based in part on the opening sentence of the second paragraph of Section 290.38. Clearly, the intent is that if there is a different taxable year being used by a husband and a wife, they need to file separate returns. The same logic would follow for a combined return because the credits and the tax liability are combined on a combined return. Also, it would be administratively difficult to have two different tax years being handled on

the same tax return. However, an exception to this restriction is contained in the fourth sentence when it states that if the different taxable years result from the fact that one spouse died; a joint or combined return can be filed by the married spouse, provided that spouse is not remarried before the close of that taxable year. With respect to joint returns the legal basis for this is contained in the second paragraph of Minn. Stat. Section 290.38.

The remaining paragraphs of part A. consist of paragraphs of the current rule that are being repealed. They are being repealed because they deal with filing requirements and the reporting of income on a joint or separate return. The filing requirements contained in the repealed part of the rule are now in most cases outdated. The filing requirements are based on Section 290.37, subd. 1. The filing requirements can also be dealt with in a separate rule. These provisions are merely recopying the outdated provisions of an old statute. The fact that a married couple must report all their income is covered under the provisions of part C.

B. This part lists the three options that are open to a husband and wife. They may elect to file a single return jointly, which is called a joint return. This is allowed under the provisions of Section 290.38. The provision that a husband and wife could each file separate returns is of course consistent with federal law. It would also be allowed under the provisions of Section 290.38. The tax liability is imposed on each person separately as is provided in Section 290.03.

The third method that a husband and wife may elect to use to file their returns is to file separately on one return. This is commonly called a combined return. This provision is contained in Section 290.39, subd. 2.

C. The first sentence in the first paragraph states that a husband and wife who elect to file separate or combined returns must each report that spouse's own federal adjusted gross income. This is based on the provisions of Section 290.01, subd. 20. This statute makes it clear that each person is to compute their own federal adjusted gross income. No provision is made for totaling federal adjusted gross income of each spouse when separate or combined returns are filed. The statute in Section 290.39, subd. 2 states that when a husband and wife file a combined return, they have elected "to file separate Minnesota income tax returns on a single form." Therefore, a combined return is to be treated as a separate return. On separate returns, each spouse would be taxed only on that spouse's income and would only be able to claim those deductions and credits that that spouse is separately entitled to claim. This would be based on the provisions that would allow a deduction or a credit only to that person who is entitled to that deduction or credit or who paid the expense on which the deduction or credit is based. The rule does make a special exception for the married credit. This provision is contained in Section 290.06, subd. 3f(2) which allows a married individual living with husband and wife who files a joint, combined or separate return to divide the married credit however they like. It should be noted that the law providing for a combined return allows the spouses to divide their itemized deductions between them in any manner that

they elect (see Section 290.39, subd. 2(c)). The rule does provide that if each spouse is equally liable for an item of deduction and that item is paid from a joint account, that item may be considered as being paid by either spouse. Each spouse then may be entitled to that deduction. They would need to decide which one could take the deduction. Each spouse could, of course, not take the entire deduction.

The second paragraph specifies how income and losses are to be divided. Income and losses from jointly held property, such as intangible assets, tangible assets, personal property, or real property, are to be divided based on the percentage of ownership in that property. The proper way to determine who must report the income or who is entitled to the loss should be based on who owns that property and in what proportion that is to the other owner. When a business is involved and a partnership agreement has been entered into, the rule provides that the Department would honor the provisions of the partnership agreement as is provided in other laws for recognizing the business income and losses from a partnership. However, when there is no partnership agreement, the income and loss must be reported on the basis of participation and contribution to the partnership venture. The Department uses three factors to determine how the participation and contribution are to be determined. Each of these factors is to be given equal weight. The first factor is, of course, who bought the capital assets. This is the same as was discussed earlier under jointly held property, namely, who contributed the money to purchase the

assets of the business. The second factor is who is actually doing the labor, and the third is who is making the management decisions. Using these three factors it can be determined who is involved in this business and to what percent. The income and loss would then need to be reported accordingly. For example, if the husband contributed 75 percent of the money to buy the capital assets, 75 percent of the labor, and performs 75 percent of the management decisions and the wife performs 25 percent under each three categories, then 75 percent of the income and losses from that business would be reported by the husband and 25 percent by the wife. If the percentages vary for each factor, then each factor would be assigned equal weight and the totals would be averaged. These factors are necessary to prevent the assignment of income or loss to a person not involved in the business for the purpose of receiving a tax benefit. Three factors are used to allocate the income as fairly as possible after examining the total situation.

This part then goes on to give more specific details to expand on the first sentence of the part. Interest income from a joint bank account or joint bonds or stocks is to be divided equally. This would be assuming that when the term "joint" is used, each person owns an equal half interest in these assets. This avoids the necessity of examining records to precisely determine the allocation. It also prevents the shifting of income to achieve a tax benefit. A gain or loss from the sale or exchange of a capital asset is to be reported as required under the provisions of Section 290.01, subd. 20 by the spouse owning the asset. These provisions

would also be governed by the determination of federal adjusted gross income; however, the problems in this area arise because in many cases the spouses will have filed a joint federal return and will now desire to file a combined Minnesota return. That is why these rules are needed to specify how this income is to be split. Otherwise, as provided in Section 290.01, subd. 20 the determination of federal adjusted gross income is to be based on federal law. The last sentence of the rule specifies that where a capital asset has been sold or exchanged, the spouses must report the gain on that asset based on their percentage of ownership. Again, this is consistent with the first sentence of this part.

D. This part allows a husband and wife who are residents of a community property state or nation to split their income based on the law of their residence. Examples of community property states are California, Washington and Arizona. Examples of community property nations are Denmark and the Netherlands. The Internal Revenue Code allows a husband and wife to split their income based on the law of their residence. Revenue Ruling 59-199 allowed a husband and wife who were citizens and residents of the Netherlands to divide their income based on the community property laws of the Netherlands. This Revenue Ruling is supported by the U.S. Tax Court in Alejandro Zaffaroni, 65 T.C. No. 84, (1976). Since their federal adjusted gross income is determined under federal law and under the provisions of their state's or nation's law, Minnesota would accept this. Minnesota is not a community property state; therefore, for a resident of Minnesota or a resident of any other state or nation which is not community property, it is not proper to split the income or losses or to assign them to

the other spouse. Each spouse must report their own income. The exceptions to this rule are if there is a business relationship and this was specified in part C., above, or if the income splitting is required under the provisions of the Internal Revenue Code. Minnesota would accept income splitting in this case because it would then be used in the determination of federal adjusted gross income.

E. The law specifies in Section 290.38 that "If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several." Because the law has clearly specified the liability on a joint return, no rule was necessary; however, the liability of each spouse on a separate return which they have filed by themselves would be limited to the liability on that return. This provision makes it clear that a spouse cannot be liable for the tax on the other spouse's return. The law in Section 290.39, subd. 2 states that a combined return is to be treated as a separate return filed on one form. Therefore, the same provision should apply to a combined return except that the law does allow the combining of the withholding and estimated taxes to remove the liability of the other spouse or to create a refund payable to both spouses. Because a combined return is really two separate income tax returns, the rule makes it clear that if an adjustment is made to an item of income or a modification to income such as those additions and subtractions contained in Section 290.01, subd. 20 and this adjustment is attributable only to one spouse, only that spouse is liable for any additional tax. This, again, is based on the principle that two separate returns have been filed on one form.

An item of omitted income or an improperly computed addition or subtraction is attributable only to that spouse. This is not necessarily true with the itemized deductions because the law allows these deductions to be moved around between the spouses in the way that they elect. Also, the credits are combined on the form.

F. A very difficult area is the calculation of a refund or an additional tax on a prior year when the spouses have become divorced or no longer married in the meantime. Early this year the Internal Revenue Service issued several Revenue Rulings explaining their position on this issue. Revenue Ruling 80-8 deals with the issue of a claim for refund filed by a divorced taxpayer with respect to a year on which a joint return was filed. The holding in this Revenue Ruling is as follows:

> "The Service will accept a claim for credit or refund filed by a divorced taxpayer on a Form 1040X with respect to a jointly filed individual income tax return if the Form 1040X is signed by only one of the taxpayers, and the Service will issue a refund in the name of the taxpayer that filed the Form 1040X.
>
> "(2) The amount of the taxpayer's individual refund will be determined by recomputing the taxpayer's share of the joint liability and subtracting that amount from the taxpayer's contribution toward the joint liability. The amount of the overpayment refunded to the taxpayer will be limited to the amount of the joint overpayment.
>
> "In the present case, A's and B's joint tax liability as originally reported was $6,668. A's and B's joint liability as reported on the Form 1040X, filed by A is $3,484. The total joint refund is $3,184 ($6,668 - $3,484). B's recomputed separate tax liability is $5,350 and A's recomputed separate tax liability is zero. A's recomputed individual liability is (0/0 + $5,350) X $3,484 = 0. B's recomputed individual liability if ($5,350/0 + $5,350) X $3,484 = $3,484. A's individual refund is $1,640 ($1,640 - 0). B's individual refund would be $1,544 ($5,028 - $3,484). The total of A's and B's individual refunds equals the amount of the joint refund. The Service will issue A an individual refund of $1,640 upon the filing of a Form 1040X with only A's signature. Upon the filing of Form 1040X by B, the Service will issue an individual refund to B of $1,544."

Revenue Ruling 80-7 is similar and it deals with the proper method to provide for the computing of the amount of an overpayment shown on a joint return that may be credited to one spouse's unpaid separate tax liability from a prior year. Revenue Ruling 80-6 provides the proper method for computing the amount to be refunded to an unmarried taxpayer who incurred a net operating loss that was carried back or carried over to a year in which the taxpayer was married and filed a joint return. These two Revenue Rulings are consistent with the main one. It also should be noted that in Maragon v. United States, 153 F. Supp. 365, 52 AFTR 196, (Ct. Cl., 1957) the Court of Claims ruled that each individual taxpayer continues to have a separate interest in the various items from which the tax is computed and, therefore, it follows that each individual spouse has a separate interest in any overpayment.

The provisions of this part are based on these provisions of the federal Revenue Ruling and also on the applicable Minnesota statutes. The part begins by stating that a husband and wife who are no longer married within the definition of part A. can file an amended return for that year. The definition for "married" is the same as that which is used in part A. to be consistent. An amended return, refund claim, or loss carryback would be allowed to be filed by one of the former spouses if that item belongs to that spouse to the extent of that spouse's tax liability. Where a joint return was filed, the spouse's tax liability would be determined according to the formula provided in the rule. This is the same formula that is provided in Revenue Ruling 80-8.

This formula recognizes the fact that on a joint return each spouse is liable for the tax that is due. Therefore, if a refund is to come, then part of it belongs to each spouse. The spouse's share of the joint liability is then subtracted from the spouse's contributions that were made to pay that liability. This determines the amount of the refund. The refund amount cannot exceed the amount of the joint overpayment that is shown on the amended return. This is a protection that is contained in Revenue Ruling 80-8. It is also a necessary protection to prevent one spouse from filing a claim for refund and by so doing to create a balance due for the other spouse. If that is to happen, it should be the result of an action by that spouse or of an audit by the Department. This part of the rule then provides that when a combined return is filed, the tax liability will be determined as if an amended combined return had been filed. A combined return is equivalent to a separate return with the exception that the deductions and credits can be used by either spouse. Therefore, it is appropriate that the rule merely provide that on a combined return the liability would be computed as if an amended combined had been filed. Again, the protection must be maintained to prevent one former spouse from creating a balance due for another former spouse by filing a claim for refund. That situation should not be allowed to occur.

When the Department does an audit on a combined return, the Department automatically adjusts the taxpayer's distribution of their itemized deductions to provide the greatest tax benefit to both spouses. This provision is included in this rule to provide

that on an amended joint or combined return the Department would automatically use this provision to divide those items that belong to both spouses between the spouses to provide them with the greatest tax benefit. However, the rule does provide that if the spouses previously had elected to use another method such that it was clear that one spouse had claimed all the joint items and this was the method that both spouses had used previously when they filed their returns, the Department then would honor that method. The rule also cross-referenced a current income tax rule which provides for the splitting of a joint estimated tax declaration. The next sentence of this part makes it clear that a credit which is not paid for out of joint funds belongs to the spouse who made the payment. In other words, this credit would belong to the spouse who made the expenditures on which the credit was based. A spouse who purchased pollution control equipment out of that spouse's own funds would be the only spouse who would be entitled to that pollution control equipment credit. The next sentence of this part provides that the homemaker credit may be divided equally between the spouses. The homemaker credit provided in Section 290.06, subd. 3e is allowed to a taxpayer and his spouse, if any, if they have a young child at home that must be cared for. A married couple must file either a joint or combined return. The law does provide that only one spouse may claim the credit; however, in this situation where an amended return is being filed and the credit really belongs to both spouses in that one spouse earned the income and the other spouse stayed home to take care of the child, the Department would allow this credit to be divided equally between the spouses. If, of course, the spouses could

agree as to who should be allowed this credit, the Department would agree with that. The homemaker credit is different from the other credits in that it is not based on a monetary expenditure. It is based on an expenditure of time, namely, that the taxpayer was not employed but remained home to care for the children. The taxpayer who was not employed quite possibly may have no income and so could not use the homemaker credit; therefore, it is entirely possible that the person who really earned the credit with the expenditure of that person's time may not be the person who can use the credit to offset the income tax liability. This is why the Department is proposing that this credit be split equally between the two spouses. This credit is also really the subject of a combination of the efforts of both spouses. The rule provides that the married credit may be divided equally between the spouses. This is consistent with the law as provided in Section 290.06, subd. 3f(2) which provides that "If the spouses file separate, combined or joint returns the personal credits may be taken by either or divided between them." The last sentence of this part states that the homemaker credit and the dependent care credit are not allowed to be claimed on separate returns filed by married couples. This is consistent with the provisions of the law which provides that these two credits must be filed on a joint or combined return. See Section 290.06, subd. 3e and 290.067, subd. 2.

The fourth paragraph provides that when an amended joint or combined return or claim for refund is filed by one former spouse,

the spouses are no longer married, and the other spouse does not cooperate in the filing of an amended return, no refund will be given to the spouse who didn't file the return. This is consistent with the holding in Revenue Ruling 80-8 which requires the filing of an amended return before a refund would be issued to the other spouse. Section 290.50, subd. 1(a) states "A taxpayer who has paid or from whom there has been collected an amount of tax for any year in excess of the amount legally due for that year, may file with the Commissioner a claim for a refund of such excess." The statute goes on to provide that an income tax return or an amended return claiming an overpayment constitutes a claim for refund. Clearly, the statute does not allow the Commissioner to simply make refunds to a person unless there has been an application for a refund. The statute, of course, does make an exception for the situation where the Commissioner does an audit and determines that the taxpayer has a refund coming. This provision is contained in Section 290.46. However, as the rule provides, without a claim for refund or an amended return, no refund would be paid to that spouse. If the spouse was interested in receiving a refund, that spouse could either file for one or could cooperate with the other spouse and together secure a combined refund that they could then determine how to divide. The second sentence of this paragraph continues by providing that one spouse cannot create an additional tax liability against another spouse. This prevents situations from occurring of one spouse filing an amended return to receive a refund and at the same time creating a balance due for the other spouse. The

position of the Department in this part is consistent with the Revenue Rulings. An exception is made in the rule for creating an additional tax liability if there has been an audit done by the Department. This audit may be occasioned by the fact that the Department has received additional information on which to base an audit from the filing of an amended return by the one spouse. Of course, if an amended return is filed by that spouse, there could be an additional tax liability created against that spouse.

Following the new language of this part, there are five paragraphs of the current rule that it is proposed to be repealed. The first paragraph provides that if a spouse did not have separate income that spouse could not file a separate income tax return. It is proposed that this provision be repealed because it is possible currently for a spouse with no income to file a separate return to claim the $1 political checkoff. The remainder of this paragraph and the next four paragraphs really duplicate in the rule what is already contained in Minn. Stat. Section 290.38. This is the reason for their repeal to eliminate provisions that are already clearly covered by the statute or are covered by this rule in a different place.

G. The current rule provided that people who were married during the taxable year could file a joint return if they were still married at the end of the year. This rule is also extended now to include combined and separate returns. The option is always available to a married person to file a separate return. The 1971 legislature added the option of filing a combined return and so

combined returns did not exist at the time this rule was initially promulgated in 1963. The same principle would of course apply to combined returns as applies to joint returns. The next sentence merely codifies in this part of the rule what was stated at the beginning in part A. A person who may have been legally separated or living apart during the year would still be considered to be married and allowed to file a joint, combined or separate return if they were living together at the close of the year. As is stated at the beginning of this rule, the determination as to whether or not a person is married is made at the close of the year. The provision that a joint return must include all of the income is deleted because this has already been covered by the rule. The fact that the married credit must be pro-rated was repealed by the 1977 legislature and so no longer applies to resident individuals. (Laws 1977, Ch. 423, Article I, Sec. 5.)

H. This paragraph in large part continues with the existing rule providing for the signatures that are necessary on the return. An exception is made for the signing of a return in the case of the death of a spouse. The preparation and signing of the return when a spouse has died is covered by the provisions of the third paragraph of Section 290.38. This existing rule is also modified to include combined returns since they were provided by statute after this rule was first promulgated. Because the combined return means that the two spouses are filing separately on one form, both signatures are necessary so, therefore, the same provisions would apply to a combined return as applies to a joint return. The other changes in this part are grammatical corrections.

I. The current rule provided for the change of election of a husband and wife from a joint to separate returns and vice versa. The proposed rule allows a taxpayer to change their election from a combined return to a joint return or vice versa, or from a combined return to a separate return or vice versa. The statute does not specifically provide for this change of election in Section 290.39, subd. 2; however, the election to file a combined return can be made. It would seem appropriate that if a taxpayer decided to reverse this election, that they should have that option. The rule then provides how this election is to be reversed. If a taxpayer filed separate returns and now decided to elect to file a combined return, the rule would provide that both spouses must sign and file an amended combined return. This provision also applies in the change of an election from separate returns to a joint return, from a joint to a combined return, from a combined to a joint return. If a taxpayer had filed a combined or a joint return and now wished to file a separate return, they would each need to file separate returns to properly reflect that change in election. The statutes already provide that the change of election is to be done within the period provided for the assessment of additional taxes. This provision is retained in the rule to lend clarity to the rule; however, the explanation that is contained at the end of this sentence is deleted because it would not necessarily be accurate. Generally the statute of limitations is three and one-half years from the filing of the return (Section 290.49, subd. 1). However, additional taxes can be assessed within an extended period of time when there has been a federal audit (Section 290.56), omission of income in excess of

25 percent (Section 290.49, subd. 3), fraud (Section 290.49, subd. 6), or agreement to extend the time (Section 290.49, subd. 8).

J. This part is based on the last paragraph of Section 290.38. The first sentence in this part is virtually identical to the paragraph contained in the law because it is necessary to repeat the sentence to indicate the subject matter that is being discussed. The paragraph specifies that if a benefit can be received on the federal return, such as the disability income exclusion, that can be claimed only if a joint federal return is filed, this benefit will be recognized on the Minnesota return even though the federal adjusted gross income is to be determined as if a separate return has been made. The reasoning is that it would not be fair to the taxpayers to not allow them this tax benefit simply because of a different filing status for Minnesota. This tax benefit was already in federal adjusted gross income. The provision concerning the disability income exclusion that requires these taxpayers to file a joint federal return is contained in Section 105(d)(5)(A) of the Internal Revenue Code. It should also be noted here that this provision defines a taxpayer as not being married if the husband and wife live apart at all times during the taxable year.

The rule does go on to provide the opposite side of the situation, namely, if federal law allows a deduction in the computation of federal adjusted gross income and that deduction is reduced by one-half if separate federal returns are filed, the federal adjusted gross income used to file separate or combined Minnesota returns must reflect the reduction made in federal adjusted gross

income. This gets back to the basic principle again that a separate or combined return is based on that individual's own income and where a deduction is limited because separate returns were filed, Minnesota will also follow that limitation. This is based on Section 290.01, subd. 20 which defines federal adjusted gross income. Section 1211(b) of the Internal Revenue Code specifies the limitation provided on allowable capital losses. For tax year 1980 the limitation is that no more than $3,000 of capital losses may be deducted in the computation of the taxpayer's federal adjusted gross income. This federal law also provides that "In the case of a separate return by a husband and wife, the applicable amount shall be one-half of the amount determined under the preceding sentence." Each spouse is taxed on that spouse's own capital gains and losses when a combined or separate Minnesota income tax return is filed. Each spouse is using only their items of income contained in federal adjusted gross income. Because each spouse is taxable only on their own income, when a combined or joint return is filed, it is reasonable to limit the allowance of the loss deduction as is provided for in federal law.

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13 MCAR Section 1.6003 - Minnesota Gross Income For Individuals Who Are Full Year Minnesota Residents. (Federal Adjusted Gross Income.)

Statement of Need and Reasonableness

A. The beginning point in the determination of Minnesota gross income is federal adjusted gross income. This is provided in Minn. Stat. 290.01, subd. 20, the second through the sixth paragraphs, and in Minn. Stat. Section 290.17, subd. 1. Minn. Stat. Section 290.01, subd. 20 and various other provisions contained in Chapter 290 do, of course, provide for addition and subtraction modifications to federal adjusted gross income. However, the point at which Minnesota gross income determination begins is with federal adjusted gross income. Federal adjusted gross income for a Minnesota resident should be the same as that which is used for federal purposes. As is provided in the previous rule, 1.6002 dealing with income tax returns for husband and wife, it is, of course, possible that federal adjusted gross income as shown on a joint federal income tax return could be different from the federal adjusted gross income that is reflected on combined or separate Minnesota income tax returns filed by that husband and wife. This could occur in the area of capital gains. The rule goes on to provide that if no federal return was filed, federal adjusted gross income still is calculated using the appropriate Internal Revenue code just as if a return had been filed. Federal adjusted gross income is based on the most recent federal definition of that term which has been adopted by the state legislature. Based on the decision by the Supreme Court in Wallace v. Commissioner of Taxation, 289 Minnesota 220 at 228 (1971), the Supreme Court said, "We must accordingly hold that the

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effect of Minn. Stat. 290.01, subd. 20, was to adopt the federal law by reference as it existed at the time that statute was adopted. The legislature did not, or could not, grant the Congress the right to make future modifications or changes in Minnesota law." This Minnesota Supreme Court decision necessitated the fact that whenever there have been changes in the federal Income Revenue Code, the Department proposes what is called an Update Bill to the Minnesota legislature to update the references contained in Chapter 290 to provide for the most recent changes in the Internal Revenue Code. This case is also the authority for the provision in this rule concerning provisions of federal law which affect federal adjusted gross income and which have a future effective date. An example of this can be shown in the 1976 Tax Reform Act which increased the holding period of capital gains. The 1976 Reform Act was passed by Congress and signed by the President in October, 1976; however, the provisions increasing the holding period did not become effective until future years. For 1976 and prior years, a long term capital gain was the gain on any capital asset held more than six months. This was increased to nine months for 1977 and one year for 1978. When the 1977 Minnesota legislature passed the provision updating the reference to federal adjusted gross income as contained in the Internal Revenue Code of 1954 as amended through December 31, 1976, they had full cognizance of the future federal provision that had a delayed effective date and so, based on the Wallace decision, the Minnesota legislature could fully adopt that provision. This rule is intended to eliminate any ambiguity in this area occurring in the future. The rule does end by providing that if there is a provision which affects federal adjusted gross income and which was

passed by Congress after the end of the year for which the legislature updated the Internal Revenue Code, that provision would not yet be included in the Minnesota definition of federal adjusted gross income until the legislature does pass a law updating the reference to the Internal Revenue Code. An example could be cited using 1980 law changes. The 1980 legislature updated the reference to federal adjusted gross income by defining that term as it existed on December 31, 1979. The Minnesota legislature did this update in the Omnibus Tax Bill. The Omnibus Tax Bill was signed by the Governor at the end of April, 1980. By this time already the Windfall Profits Tax Bill and the Technical Corrections Bill had already been signed by President Carter; therefore, it would have been possible for the legislature to recognize these law changes. In fact, the legislature did adopt the exclusion of interest and dividends (see Laws 1980, Chapter 607, Article I, Section 1). However, because the legislature only adopted the Internal Revenue Code as it existed on December 31, 1979, the rest of the Windfall Profits Tax Bill and the Technical Corrections Bill were not included. These changes would not be adopted until a future legislature updates the references to the Internal Revenue Code to December 31, 1980 or some future date.

B. As provided in Minn. Stat. Section 290.17, subd. 1, all income and losses are assignable to Minnesota for Minnesota residents. There is, of course, an exception made for those out of state losses which are connected with preference items and that is explained in part C. Pay from a military member who is a Minnesota resident and who is outside of Minnesota is assignable and included for Minnesota income tax purposes. This is based on the federal law contained in 50 App.

U.S.C. Section 574 which provides that for a person in the military they shall not have lost their residence or domicile in any state solely because they are now in the military. It also prevents double taxation when it provides that "For the purposes of taxation in respect of the . . . income or gross income of any such person by any state . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval service shall not be deemed income for services performed within, or from sources within, such state . . . ." The Minnesota Supreme Court in Sebrechts v. Commissioner of Taxation, 308 Minnesota 274 at 276 (1976), stated, "It is clear that Navy pay is assignable to taxpayer's Minnesota income under Minn. Stat. Section 290.17 even though it is not income from sources within the state."

C.1. This part deals with the disallowance of part of the out of state losses which are recognized by Minnesota residents. Prior to 1978, Minnesota taxed its resident individuals only on that income which was earned within or assignable to Minnesota. Income from real estate or other real property investments located outside of Minnesota was not assignable to Minnesota. The losses connected with this income would follow the same rule. The 1977 legislature decided to change this. Starting with tax year 1978, all income from whatever source, which was earned by a Minnesota resident was to be assigned to Minnesota. Out of state losses were allowable only to the extent of out of state income (see Laws 1977, Chapter 423, Article I, Sections 1 and 11). The 1978 legislature modified this to provide for a three year carryforward of losses which were not allowed as a deduction because they exceeded the amount of the out

of state income (see Laws 1978, Chapter 767, Section 18). The 1979 legislature further modified this provision and made the modifications retroactive to the 1978 tax year (see Laws 1979, Chapter 303, Article I, Section 18). This 1979 law change repealed the prior provision which had stated that out of state losses were allowable only to the extent of out of state income. This old provision had required that a taxpayer net out all of his out of state income against all of his out of state losses. The prior law had required an aggregation theory; however, the legislature repealed this provision and substituted new words. These words did not include a reference to netting out of state losses against out of state income. The words simply say that losses which are out of state losses are deductible; however, these losses must be reduced by the amount of the taxpayer's items of tax preference which are attributable to these out of state losses. The legislature also in the same provision repealed the carryforward for disallowed losses. The 1980 legislature also made a change in this area. They provided for the determination of basis for out of state assets on which some of the out of state losses were disallowed because they were attributable to tax preference items (see Laws 1980, Chapter 607, Article I, Section 21).

The first two sentences of this part simply restate the provisions of Minn. Stat. Section 290.17, subd. 1. It is important to restate the statute to provide a context on which the reader of these rules may begin to operate and to clearly state the restriction on these losses. The rule also clarifies that no modification can be required

in excess of the losses. It is the losses that are modified, not the tax preference items.

The last sentence of the first paragraph provides that the preference item depletion and the preference item capital gains deduction are not used to reduce a taxpayer's out of state loss. The reason for this is that under the old law the taxpayer was required to aggregate all out of state income and all out of state losses; however, the new law no longer allows aggregation. The new law required that a taxpayer determine his out of state losses on a venture by venture basis as is described in part No. 2 of this part. If a venture yields a net loss, then there could be no preference item of depletion. Section 57(a)(8) of the Internal Revenue Code describes the depletion preference item as being the deduction of depletion in excess of the adjusted basis of the property. Section 613 and Section 613A of the Internal Revenue Code define the depletion allowance as a percentage of the taxpayer's taxable income from that property. If the property yielded a loss, the taxpayer would have no income from that property and therefore could not use percentage depletion on that property and so there would be no preference item. As provided in Section 612 of the Internal Revenue Code, cost depletion cannot be used when there no longer is any basis in the asset. Much the same rationale also applies to the capital gain deduction. As provided in Section 1222(11) and in Section 1211(b) of the Internal Revenue Code, the taxpayer's capital losses are netted out against the taxpayer's capital gains. If the net result is a capital gain, then the taxpayer would have no capital loss from the sale of these out of state assets. If the net result is a capital loss, then the taxpayer would not have

been able to use the capital gain deduction so there would be no preference item in connection with the sale of these assets. The capital gain deduction is allowed only against the net capital gain as provided in Section 1202(a) of the Internal Revenue Code. Property which is used in the trade or business of the taxpayer and which is sold is entitled to capital gains treatment if the gains exceed the losses. However, if the losses exceed the gains, the gains and losses are treated as ordinary income and as ordinary losses and so there would be no capital gains preference item in connection with them.

Minn. Stat. Section 290.17, subd. 1 provides that the out of state losses are to be reduced by the items of tax preference as defined in Section 57 of the Internal Revenue Code. Because there has been confusion with the definition of the preference item of intangible drilling costs, the rule provides in this paragraph the definition for intangible drilling costs. This is the same definition that is contained in Section 57(a)(11)(A) of the Internal Revenue Code. It is provided here for clarification purposes. It should also be noted that this does provide that the income that is used to determine excess intangible drilling costs is the income which is only from productive wells, and this is consistent with the other provisions of Section 57(a)(11). The cost from a dry hole is not included as an item of excess intangible drilling costs and so, therefore, any income that might come from a dry hole also should not be included in the calculation.

C.2. This part specifies the Department's interpretation of Minn. Stat. Section 290.17, subd. 1, which repealed the provision allowing the aggregation of out of state income against the aggregation of out of state losses. Based on this law change, the rule specifies that each loss is to be considered separately for the purpose of making the calculation as to which losses are not allowed. These losses would be determined on a venture by venture basis. The rule then specifies that a separate loss consists of each separate operation within an individual proprietorship. In other words, an individual proprietorship may run a grocery store and own an apartment building. This would not be one operation but it would be two separate operations, and so the items of income and loss would be reported separately. The rule goes on to provide that each separate operation within a limited partnership, etc. is to be looked at separately. For purposes of determining this restriction on the deduction of out of state losses, it should be remembered that for purposes of determining income, losses, and preference items attributable to an oil well, that the Internal Revenue Code requires that these items be broken out parcel by parcel and so this information must already be acquired for federal purposes in the area of gas and oil. Item C. of this part provides that the sale of a capital asset or a Section 1231 asset is to be treated separately and is not to be considered as a part of the ongoing operation. The rationale behind this is that really it is a different venture when a person sells off part of their assets in a reduction of the business. However, if the assets are sold as inventory items, then this would be part of the business. An example could be provided using a farmer who sold off a quarter of his farm. The capital gain on the sale of that real

estate would be a separate venture from the ongoing farming venture. There are two ventures involved--one, the venture of selling part of the farm and the other the ongoing venture of farming. Simply because there are preference items associated with the venture of selling part of the farm should not mean that if there is a farm loss associated with the venture of farming, that that farm loss should be reduced by the amount of the gain on the sale of the farm real estate.

C.3. Minn. Stat. Section 290.17, subd. 1a was added by the 1980 legislature in the Omnibus Tax Bill. This part of the rule is based on that statute and closely restates the statute here to provide direction to taxpayers who are involved in this situation. It also provides a completed package to these people. It is important to include it in this rule to prevent confusion.

C.4. At the end of this rule is a provision dealing with net operating losses for resident individuals. This provision is included here to complete the package dealing with out of state losses so that the package is all in one piece. It does not contradict what is in the last part of this rule. The provision requiring an adjustment to a net operating loss is contained in Section 290.095, subd. 1(b).

C.5. This part is included here to provide a complete package for a person involved with the disallowance of out of state losses similar to the previous part C.3. and C.4. This addition modification is based on the provisions added to Minn. Stat. Section 290.01, subd. 20 and codified as clause (a)(18) in Laws 1980, Chapter 607, Article I, Section 1.

D. The opening sentence of this part restates the provision contained in part B., namely, that all income and losses are assignable to Minnesota. The listing of income and losses from sources outside

of Minnesota is provided in this part because it is these types of losses that possibly can be limited as provided in part C. when preference items are incurred in connection with these losses. Therefore, a definition is needed to clearly specify what is being discussed in part C. Minn. Stat. Section 290.17, subd. 2 governs the assignability of income to Minnesota for nonresident individual taxpayers under the same rules that applied to resident taxpayers prior to 1978. This section of the statute can be examined to determine whether income is out of state income for resident individuals even though all income for a resident individual is assignable to Minnesota.

D.1. Farm income or loss from a farm located outside of Minnesota is income from outside of Minnesota because it is tangible real property. Minn. Stat. Section 290.17, subd. 2(2) defines this as being out of state income.

D.2. Generally, income, gains or losses from tangible property, such as real estate, is assigned to the state in which the property is actually located. This provision is also codified in Minn. Stat. Section 290.17, subd. 2(2). Oil and gas leases were defined as an interest in real estate in Benson v. Commissioner of Revenue, Minnesota Tax Court Docket Nos. 1997 and 2089, July 25, 1977. The rule expands on this to include similar other interests in the same category. The other examples contained in the third sentence of the first paragraph were also defined as an interest in real estate in In Re Estate of Abbott, 213 Minnesota 289 (1942).

The second paragraph of this part provides for the determination of the basis of tangible property which is situated outside of

of Minnesota and which is utilized in a trade or business. This provision does not cover intangible property because that type of property is always assigned to the domicile of the individual (Section 290.17, subd. 2(2)). This paragraph is concerned only with tangible property located outside of Minnesota because tangible property located inside of Minnesota has always been subject to income tax whether owned by a resident or nonresident individual (Section 290.17, subd. 2(2)). This paragraph is only concerned with trade or business property because property which is not used in a trade or business would not have adjustments made to its basis to reduce its basis for obsolescence or wear and tear. The first sentence of this paragraph stating that the basis of these assets is the cost basis less depreciation allowable for income tax purposes is based on the provisions of Section 290.14 which states that "The basis for determining the gain or loss from the sale or other disposition of property . . . shall be the cost to the taxpayer of such property . . . ." Section 290.12, subd. 2 allows a deduction for depreciation when it says "The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence, amortization, depletion . . . which could, during the period of his ownership thereof, have been deducted by the taxpayer under this chapter in respect of such property." This last quotation from Section 290.12 is also the legal basis for the statement made in the second sentence. Prior to 1978, a Minnesota resident did not need to include as income on his Minnesota income tax return the income or loss that that person recognized on his out of state property (see Laws 1977, Chapter 403, Article I, Section 1 and Section 11). Because this taxpayer could not have included any income or loss

from this property, the taxpayer also was not entitled to depreciation and so, therefore, there would have been no statutory provision allowing the Department to require the taxpayer to reduce his basis below cost. The third sentence states that the amount of depreciation allowable in any year is the amount claimed on the federal return and this amount is not adjusted even though there is a higher Minnesota basis. This is based on the provisions of Section 290.01, subd. 20 which states that as is provided in part A. of this rule, the beginning point of determining Minnesota gross income is federal adjusted gross income. The depreciation allowance is included in federal adjusted gross income (see Federal Schedules C, D, E, and F). Also, Section 290.16, subd. 1 provides for the basis of the asset that is to be used for the computation of the depreciation allowance. Subd. 1a of this section provides that the provisions of Section 290.16 do not apply to an individual because an individual is governed by Section 290.01, subd. 20. A taxpayer is allowed a subtraction modification when an asset is sold which has a higher Minnesota basis than federal basis (Section 290.01, subd. 20(b)(2)). The last sentence of this paragraph then provides that when a person moves into Minnesota and had owned property prior to moving into Minnesota, the basis of this property which is located outside of Minnesota and which is used in their trade or business is the federal adjusted basis of that property. The justification for this is contained in Section 290.12, subd. 2 which states "In respect of any period since December 31, 1932, during which property was held by a person or an organization not subject to income taxation under this act, proper adjustment shall be made for exhaustion, wear and tear, obsolescence, amortization, and depletion of such property to

the extent sustained." This law requires that all the depreciation that has occurred now be used to reduce the basis of the property. The result of this statute is that the basis of these assets would be the same as the federal adjusted basis as provided in Sections 1011, 1012 and 1016 of the Internal Revenue Code. The advantage of this provision is, of course, that as we progress from 1978 the basis for out of state assets will in more and more cases be the federal adjusted basis for all people, residents and nonresidents alike. It should be remembered that where the gain on the sale of an out of state asset is taxed in another state and in Minnesota, there is a credit provided by Minnesota law for the tax paid to the other state (see Section 290.081).

D.3. Income or losses from a business which is located outside of Minnesota would be classified as income from outside of Minnesota. This principle can be based on the provisions of Section 290.17, subd. 2(1), (2) and (3).

D.4. This part of the rule provides that income from a business or tangible property which is located outside of Minnesota is income or loss from outside of Minnesota even if that income or loss is earned by some other entity. For partnerships, this provision that the income earned by the partnership would still be characterized as out of state income for the partner is based on the provisions of Section 290.311, subd. 1(b). As provided in Section 290.975, the characterization of income earned by a Minnesota electing small business corporation is the same as though that corporation were a partnership. The same principle also applies to estates and trusts as provided in Section 290.23, subd. 9(2).

D.5. As provided in Section 290.17, subd. 2(2), the income or loss from an intangible asset is assigned to the state of domicile of that person; therefore, an intangible asset owned by a Minnesota resident would not be classified as out of state income. The definition that is used to determine what an intangible asset is is taken from Cargill, Inc. v. Spaeth, 215 Minnesota 540 at 549 (1943), in which the Minnesota Supreme Court uses the definition contained in Graves v. Schmidlapp, 315 U.S. 657 at 660. The rule then goes on to list some intangible assets. The first three examples of intangible assets are based on the provisions contained in Hillstrom v. Commissioner of Revenue, 270 N.W. 2d 265 at 267 (1978). Clause E is much the same as Clause A. However, they can be distinguished in that Clause E deals with the actual gain or loss from the sale of a certain stock, whereas Clause A deals with the income that can be earned from owning a certain note or stock or bond, such as interest. Clause D provides that a dividend is an intangible. This is the commonly accepted description of a dividend and it does conform with the definition of an intangible asset. Clause F also provides that the interest on a savings account is an intangible asset and, again, this is current administrative practice and it conforms with the definition in that a savings account is really a legal relationship between the bank and the individual. Clause G concerning the treatment of a distribution made by a small business corporation which has made a federal election but which has not made a Minnesota election is based on current administrative practice which recognizes that this distribution is in fact a dividend from that corporation and so it would be an intangible asset. This is also based on the provisions of Section 290.01, subd. 20(c)(3)

which says that this distribution of previously taxed income is to be treated as a dividend.

E. In order to understand this part on net operating loss, one must explore the history of the Minnesota income tax. Prior to 1961, the Minnesota income tax law used its own definition of gross income. In Laws 1961, Chapter 213, Article IV, Section 1 and Extra Session Laws 1961, Chapter 51, Section 1, the Minnesota income tax now used as its starting point the provisions of federal adjusted gross income. These two provisions amended Section 290.01, subd. 20, which defined gross income for Minnesota. The purpose of the legislation was to provide that beginning with 1961, Minnesota would use federal adjusted gross income as the beginning point and make certain addition and subtraction modifications to this. The legislature was trying to tie Minnesota's income tax law in more closely to the federal law. By adopting federal adjusted gross income, the legislature provided that a taxpayer's business deductions would have already been calculated because they are included in the determination of federal adjusted gross income. See Section 62(1) of the Internal Revenue Code. The provisions defining a net operating loss are contained in Section 290.095. Prior to 1962, an individual was allowed to compute a net operating loss for Minnesota. This meant that an individual may not have a net operating loss on the federal return but could have a net operating loss on the Minnesota return. This could occur where the deductions that were allowed would have exceeded the taxpayer's gross income, therefore creating a loss situation which could then be carried back or carried over. However, in Laws 1963, Chapter 355, Sections 5 to 7, the Minnesota legislature decided to change this. The legislature provided in Section 290.095,

subd. 1(b) that "A net operating loss deduction shall be available under this section only to corporate taxpayers except as provided in subdivision 6 hereof . . . ." Subd. 6 of Section 290.095 clearly provided the limitation on the deductions of losses and provided the phaseout of this provision. Subd. 6 was necessary as a transitional provision to provide the transition from when a net operating loss was allowed for Minnesota to the new method of computing net operating losses. Because subd. 6 was merely a transitional provision and because subd. 1(b) is really the limiting provision, the 1980 legislature in Laws 1980, Chapter 419, Section 46 did repeal subd. 6. The fact that net operating losses are now available only to a corporation is consistent with what the legislature had earlier done in changing Section 290.01, subd. 20. The 1963 legislature was saying that they no longer wanted to have a separate Minnesota net operating loss deduction; they wanted to conform more closely with the federal law. They wanted to allow a net operating loss deduction only when there was a business net operating loss deduction and it was allowable in the determination of federal adjusted gross income. They were trying to tie this provision in more closely with the federal law and be consistent with the intention of the 1961 legislature. The Minnesota legislature again used this interpretation that a net operating loss is allowed only as the result of it being included in federal adjusted gross income when it added subd. 9 to Section 290.095 in Laws 1967, Chapter 597.

This is the basis of the statement contained in the first sentence of this part. The net operating loss deduction only exists because it was a business loss deduction which was used to determine federal

adjusted gross income, which Minnesota uses as the beginning point of Minnesota gross income. However, as provided in Section 290.095, subd. 1 (1979 Supplement), the deduction for net operating losses cannot be used if the losses are in connection with tax preference items. This is explained in part C.4. of this rule.

The rule provides that an adjustment must be made in the computation of a net operating loss if there is a difference in the computation of federal adjusted gross income. This would occur if there was a change in the federal Internal Revenue Code which had not yet been adopted by the Minnesota legislature. Because the Minnesota legislature had not yet provided for this change and because the Minnesota income tax was computed on the basis of a prior Internal Revenue Code, there would need to be an adjustment made to the computation of this net operating loss. The rule also provides that a taxpayer can make an adjustment where there has been a sale of this property and there was a higher Minnesota basis than a federal basis. This can occur in various different situations, some of which are explained in the second paragraph of part D.2. of this rule. This provision is contained in this rule because of the benefit that it can give to a taxpayer because it allows the taxpayer to increase his net operating loss deduction. This addition to the federal net operating loss deduction is allowed only if these losses were connected with the losses that were contained in the federal net operating loss deduction. The legal basis for allowing this increase to the net operating loss deduction is contained, as the rule provides, in Section 290.01, subd. 20(b)(2) and (4).

Two common mistakes made by taxpayers are that they will attempt to increase their federal net operating loss deduction by the amount of the pension exclusion subtraction and by the amount of the investment credit subtraction contained in Section 290.01, subd. 20 (b)(6) and (7). The reason these two subtractions are not allowed to increase an individual's net operating loss deduction is that these items are not connected with the federal net operating loss deduction. The law also does not provide for a carryback or a carryover of these items. The purpose of the pension exclusion subtraction is really accomplished when the taxpayer's Minnesota gross income was reduced to zero by the federal net operating loss deduction; therefore, none of the individual's pension was taxed in Minnesota and there was no need for the pension exclusion subtraction. The purpose of the investment credit subtraction has also been accomplished in a similar manner. The purpose of the investment credit subtraction is to provide that Minnesota will not tax the investment credit of an individual. This occurs in that the federal income taxes of an individual are allowed as a deduction because an individual's federal income tax is being reduced in that that person has been allowed an investment credit. That person's deduction of federal income taxes on the Minnesota return would be smaller and, therefore, the Minnesota income tax would be larger. In effect, Minnesota would have taxed the federal investment credit. This is negated in that Minnesota allows this credit as a subtraction. If, in fact, the Minnesota income has been reduced to zero by the federal net operating loss deduction so that this net operating loss deduction must now be carried forward or carried back, there would of course be no possibility that Minnesota would have taxed

this investment credit so, therefore, the purpose of this subtraction would have already been accomplished.

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13 MCAR Section 1.6004 - Minnesota Gross Income For Individuals Who Are Part Year Residents or Nonresidents of Minnesota. (Federal Adjusted Gross Income.)

A.1. This sentence states that a part year resident or nonresident is to use federal adjusted gross income as provided in federal law as the beginning point to determine Minnesota gross income. This is the same requirement that is imposed on resident individual taxpayers, and this requirement is contained in Section 290.01, subd. 20 when it says that "the term 'gross income' in its application to individuals, estates, and trusts shall mean the adjusted gross income as computed for federal income tax purposes as defined in the Internal Revenue Code of 1954, as amended through the date specified herein for the applicable taxable year, with the modifications specified in this section." The reason the rule says that the taxpayers are to use the appropriate federal adjusted gross income is for the same reason as in the previous rule that the taxpayers would use the current definition of federal adjusted gross income and then would need to make modifications for the law changes that have been used to determine federal adjusted gross income which Minnesota has not yet adopted.

A.2. The rule in this part provides that nonresident or part year taxpayers are then to remove as a subtraction the income that is attributable to personal or professional services performed outside of Minnesota, other income from tangible assets or other income which they received or earned while they were a nonresident. This is based on the provisions of Section 290.17, subd. 2(1), (2) and

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(3) which provides for the assignability of income. These provisions concerning the assignability of income have also been recognized by the Minnesota legislature when it added clause (a)(18) and clause (b)(17) to the provisions of Section 290.01, subd. 20 (see Laws 1980, Chapter 607, Article I, Section 1). Basically, these two new clauses added to Section 290.01, subd. 20 require that any loss from outside of Minnesota be added to federal adjusted gross income of a nonresident or part year resident, and any income or gain from outside of Minnesota would be subtracted from the federal adjusted gross income of a nonresident or part year resident. This provision concerning modifications was put in this rule in this place to prevent confusion on the part of a part year resident or nonresident who might read this rule and would mistakenly have an incorrect assumption as to the fact that Minnesota was taxing all of that taxpayer's income, whether it was earned in Minnesota or outside of Minnesota.

This rule also makes it clear that payments from a pension which are received by a nonresident of Minnesota are not assignable to Minnesota and would be allowed as a subtraction. This is based on the provisions of Section 290.17, subd. 2(6) (1979 Supplement). This subtraction also has been recognized by the addition of a new subtraction modification numbered as (b)(17) to Section 290.01, sub.d 20. See Laws 1980, Chapter 607, Article I, Section 1.

A.3. This part of the rule now clarifies what type of income received by a nonresident will be included in that person's Minnesota gross income and will be taxed in Minnesota. Basically, this is the amount of income that should remain after the modifications contained in part A.2. have been made. This part deals only with the

income of a nonresident because for a part-year resident the income that was earned while a resident of Minnesota would, of course, be governed by the rule concerning full year residents. The part of the income that was earned while a nonresident would now be governed by this part.

A.3.a. The basis for the assignability of wage income or income from personal or professional services is contained in Section 290.17, subd. 2(1) which states that the income of a nonresident taxpayer from personal or professional services is to be assigned to Minnesota if and to the extent that the labor or services are performed within Minnesota. The rule provides several different terms which have been used to define personal or professional service income, but which basically mean the same thing. To provide some definition as to exactly what personal or professional service income is, the rule then defines it as being an activity that produces income which was the result of a personal or professional service and, second, that the taxpayer must personally do that service. The rule provides that it is not personal or professional service income if someone else does that service for the taxpayer. This third person who is providing the service would, of course, be rendering their own personal or professional services. This definition of personal service income is contained in Ness v. Commissioner of Taxation, 270 N.W. 2d 258 at 263 (1978). The rule then defines some examples of personal or professional services. The examples, such as an accountant, an attorney, doctor, dentist, architect, engineer, insurance agent, are based on the definitions contained in Bechert v. Commissioner of Taxation, 221 Minnesota 65 (1945),

and Charles W. Sexton Company v. Hatfield, 263 Minnesota 187 (1962). The example that simply owning and managing a shopping center or hotel which furnishes business space is not personal service income is based on the Ness case that was previously cited. In order to expand on these definitions and provide additional clarity, the rule also provides that a carpenter, plumber, bricklayer, repairman, barber, beautician also do provide a personal or professional service and that this would be personal or professional service income. These professions or the providing of personal services also comply with the two definitions that are contained earlier in this part.

A.3.b. Income from tangible property located in Minnesota is assignable to Minnesota for a nonresident. This income could be things such as rents or rayalties. This provision is based on Section 290.17, subd. 2(2) which says, "Income and gains received from tangible property . . . shall be assigned to this state if such property has a situs within it . . . ." Clause c. is similar except that now the rule is talking about the actual gain or loss from the sale or the disposition of tangible property located in Minnesota. The legal justification is really the same as that for clause b.

A.3.d. The assignability of income and losses from a business and a farm is contained in the provisions of Section 290.17, subd. 2(2) and (3). When reading these two parts, it must be read in connection with the last qualification of this part that says what is being talked about is income or losses which are derived from the operation of a business in Minnesota or tangible property located in Minnesota and which income or loss is assignable to Minnesota. The assignability of the distributive share of a partnership is

also based on the provisions of Section 290.17, subd. 2(2) and (3). Also involved are the provisions of Section 290.311, subd. 1(b) which says that the character of the income received from a partnership is the same as if the partner had received it directly. Subd. 27 of Section 290.31 provides that the income from a partnership is to be assigned to Minnesota under the provisions of Sections 290.17 to 290.20. An electing small business corporation, as provided under Section 290.975, is to be taxed and treated just as if it was a partnership so, therefore, the same assignability of income or loss that is provided for a partnership would also apply to an electing small business corporation.

A.3.d. (2) This part of the rule deals with the assignability of business income to Minnesota for nonresidents of Minnesota. Income or losses from sales made within Minnesota would be assignable to Minnesota under the provisions of Section 290.17, subd. 2(2) which says, "Income and gains received from tangible property . . . employed in the business of such recipient if such business consists principally of the holding of such property and the collection of the income and gains therefrom, shall be assigned to this state if such property has a situs within it . . ." Income from a business dealing in personal or professional services where those services are performed within Minnesota is assignable to Minnesota under the provisions of Section 290.17, subd. 2(1). The provisions of clause 3 of Section 290.17, subd. 2 also provide for the assignability of income when the trade or business is conducted wholly within this state. Clause 4 of Section 290.17, subd. 2 provides that when a trade or business is conducted partly within and partly without Minnesota, the entire income from that trade or business shall be governed by the three factor apportionment formula contained in Section 290.19. However, it should be noted that this three factor formula does not apply to business income from personal or professional services. The three factor formula provided in 290.19, subd. 1 provides that the trade or business income is to be apportioned to Minnesota using the three factors of sales, property and payrolls. It should also be noted that subd. 3 of Section 290.19 provides that the three factor formula does not apply to trade or business income which is not carried on partly within and partly without Minnesota. In other

words, there is no three factor formula if all the business is carried on wholly within Minnesota. The rule provides that this three factor formula would apply to business income from a proprietorship or partnership. Of course, the main use of the three factor formula is by corporations; however, that is not the subject of this rule. A proprietorship and a partnership is, of course, a trade or business and so qualifies for the three factor formula. The rule also provides that construction business cannot use the three factor formula. While this rule really is not the place to clarify the application of the three factor formula, still this provision concerning construction companies was placed in here to avoid confusion for a person who read these rules. Construction companies are not allowed to use the three factor formula because it would really be a distoriion of income to allow them to use this formula. What is provided here is that the income is being assigned based on the situs of the construction project as provided in clause 2 of Section 290.17, subd. 2. Income from tangible property is assigned to the state where the property is located, and in a construction business you have fixed tangible property which is being constructed. It is felt that because you have a separate situs the income should be assigned to the situs of that property. There is a separate bid and separate construction projects involved with construction on this tangible property. It is current administrative practice to not allow construction businesses to use the three factor formula. It could, of course, be argued using Section 290.19, subd. 1 and clause 4 of Section 290.17, subd. 2 that in a

construction business the trade or business is carried on wholly within Minnesota because the trade or business involved is the construction of that project and, therefore, the three factor formula would not apply because the business is not carried on without Minnesota and the provisions of clause 2 or 3 would apply. This position is also consistent with the provisions of the current Income Tax Rules contained in the last paragraph of Section 2017(3).

The last sentence of this part also carries out the previous definitions mentioned earlier in this part. A person operating a farm is conducting a business. If that person operates the farm and has farm income from both within Minnesota and without Minnesota, that person may use the three factor formula to apportion their total farm income to Minnesota. This provision, of course, would not apply to a resident individual who had farm income because there the normal provisions of Section 290.17, subd. 1 would govern providing that the entire amount of federal adjusted gross income would apply, and so there could be no allocation of their farm business income to Minnesota. The statute has already provided that for resident individuals all of the farm income, even though part of the farm business was conducted without Minnesota, is assignable to Minnesota.

B. This part incorporates the beginning point for the determination of Minnesota gross income for nonresidents. As is provided in the previous part and in Section 290.01, subd. 20, nonresidents must use federal adjusted gross income as the beginning point. This definition of federal adjusted gross income is the one that

is defined by the legislature by adopting the reference to the Internal Revenue Code for a certain year. This was explained in more depth in the rule on resident individuals. Again, the authority for this provision would be the Wallace Minnesota Supreme Court decision.

C. Clause 1 of Section 290.17, subd. 2 provides that "The entire income . . . from a business consisting principally of the performance of personal or professional services, shall be assigned to this state . . . if, and to the extent that, the labor or services are performed within it . . ." A partnership is a form of doing business. Under Section 290.311, subd. 2, a nonresident partner must include as income that portion of the partner's distributive share of partnership income which is from Minnesota. As is provided again in clause 1 of Section 290.17, subd. 2, this income from personal or professional services is assignable to Minnesota for that nonresident partner because it is business income that is assignable to Minnesota even though the nonresident partner performed no personal or professional services in Minnesota. This is business income that the partner received, not personal or professional service income.

D. A nonresident of Minnesota who is in the military and who is stationed within Minnesota does not include in Minnesota gross income the compensation that person has received for being in the military. This is based on the provisions of the federal law contained in 50 App. U.S.C. Section 574(1) which states that "For the purposes of taxation in respect of . . . income or gross income of any such person by any state . . . of which such person is not a resident or in which he is not domiciled, compensation for military or naval

Service shall not be deemed income for services performed within, or from sources within, such state . . . ."

E. The part concerning tax treaties incorporates current administrative practice which follows the reasoning that since there is no federal adjusted gross income for federal purposes, there can be none for Minnesota purposes. An example of a typical tax treaty is contained in the treaty with Canada, which was proclaimed by the President of the United States on June 17, 1942. Article VII states that a resident of Canada is exempt from United States tax upon compensation for personal and professional services if that person is present in the United States for not more than 183 days during a taxable year and either (a) he is employed by a Canada business, or (b) his compensation does not exceed $5,000. This part is limited to nonresident aliens which would be the same terminology as a nonimmigrant alien. A nonimmigrant alien is a person who is in the United States based on a visa from the United States and does not intend to become a resident in the United States and so does not have immigrant status. Again, the principle is basically this that Section 290.01, subd. 20 states that Minnesota gross income is based on federal adjusted gross income. Because this income is exempted from being included in federal income, it would not be included in Minnesota's definition of gross income. The last sentence of the rule does caution people that each tax treaty must be examined on its own to see what is involved. This is why no specific guidelines are included in this rule to allow for flexibility between the different tax treaties. This also allows the rule to be flexible enough so that it does not have to be amended every time a different tax treaty is negotiated with another nation.

F. This part deals with the subject of reciprocity exclusion with North Dakota and Wisconsin. This is contained in Section 290.081(a). Pursuant to the Notice of Intention to Solicit Outside Opinion that was published in the January 29, 1979 edition of the State Register, the Department of Revenue solicited comments concerning this part of the proposed rule from the tax officials in North Dakota and Wisconsin. The correspondence that was received from them is contained in the material received under the Notice of Intent. As can be determined by reading the correspondence, the three states of Minnesota, North Dakota and Wisconsin now appear to be in conformity on their interpretation of the application of the reciprocity exclusion provisions. If income is earned which is not subject to the reciprocity exclusion, clause c. of Section 290.081 would provide a credit for income that was taxed by both North Dakota and Minnesota. Clause c. also applies to income that was taxed by both Minnesota and Wisconsin. However, if there was personal or professional service income earned in Wisconsin by a Minnesota resident who did not return to Minnesota at least once a month, the provisions of the normal reciprocity exclusion provision in clause a. would not apply. However, both Minnesota and Wisconsin have reciprocal provisions contained in clause b. of Section 290.081 which provides that a nonresident taxpayer who earns personal or professional service income in another state is to receive a credit in the nonresident state and pay their tax in the state of residence. Therefore, a Minnesota resident who worked in Wisconsin and who did not customarily return at least once a month to Minnesota would be covered by the provisions of clause b. and not clause a. This would provide that the person

would receive a Wisconsin credit for the entire amount of income that was earned in Wisconsin and would pay the tax to Minnesota.

A copy of the income tax reciprocity agreement between Wisconsin and Minnesota which was signed on November 14, 1967 has been attached as an addendum to this part of the Statement of Need. A copy of the income tax and withholding tax reciprocal agreement between North Dakota and Minnesota which was signed on June 24, 1969 is also attached to this part of the Statement of Need. The provision of these agreements must also be examined to determine the application of the reciprocity provisions.

The first sentence of this part is a restatement of the statute. It is important to put in the rule the basic provisions so that the rule is clear as to exactly what it is providing. The rule contains the fact that Wisconsin and North Dakota are the only two states that have these agreements with Minnesota. This is a statement of fact and not an interpretation of the law, but still it is important to put this in the rule to prevent confusion and to clearly state exactly what this part of the rule applies to. As provided under clause d. of Section 290.081, the Commissioner can determine which clause of Section 290.081 applies to gross income earned within a state.

The rule then makes it clear that the reciprocity exclusion only applies to personal or professional service income which the taxpayer personally renders. This exclusion does not apply to income from the performance of personal or professional services earned by another person. The first sentence of clause a. of Section

290.081 states, "The compensation received for the performance of personal or professional services" is what this reciprocity exclusion provision applies to. The clause ends with the provision "provided that such state allows a similar exclusion of compensation received by residents of Minnesota for services performed therein," The confusion that must be avoided comes about when a person examines the assignability of income provision contained in Section 290.17, subd. 2(l) which states that "The entire income . . . from a business consisting principally of the performance of personal or professional services shall be assigned to this state . . . if and to the extent that, the labor or services are performed within it . . . ." The distinction must be drawn between these two statutes. Income from a business which involves personal or professional services and which was performed within Minnesota is assignable to Minnesota; however, the reciprocity exclusion does not apply to business income. It only applies to personal or professional service income which is actually paid for the performance of those services. This distinction must be kept in mind. When the statute is examined, it can also be determined why the legislature would do this. The legislature is stating that, yes, business income such as income from a partnership which employs several people to do personal services is taxable in Minnesota. However, the purpose of the reciprocity exclusion is for simplification, namely, the reciprocity exclusion allows a person who works in another state to pay their income taxes in the state in which they live. This eliminates the requirement of filing two states income tax returns as long as they do not have other income in the state in which they work. This interpretation is

also consistent with the provisions of the reciprocity agreement. Paragraph numbered 2 of the Minnesota-Wisconsin reciprocity agreement states, "For purposes of this agreement, income from 'personal services' shall be deemed to include income from 'professions' and 'compensation' shall be deemed to include fees of independent professional persons not engaged in business, i.e., doctors, attorneys, accountants, engineers." This agreement clearly states that it does not apply to business income. Paragraph 2 of the North Dakota-Minnesota reciprocity agreement is similar. Also, reference should be made to the definition of personal or professional service income that was provided earlier in part A.3. of this rule. The definition in that part was based on the decision of the Minnesota Supreme Court in Ness v. Commissioner of Taxation, 270 N.W. 2d 258 at 263 (1978).

F.1. The examples used in this provision have been suggested by the State of North Dakota and they have been approved by the State of Wisconsin. As was stated earlier, the reciprocity exclusion does not apply to personal and professional income which is part of a business. However, the rule does allow a provision where the reciprocity exclusion could apply to business income if the employees or the sale or goods in that business were only an incidental part of that business. Incidental is defined later on in this part. This is simply a reasonable de minimis rule to provide convenience to a taxpayer whose main source of income is from personal or professional services but who has a very small amount of income from the sale of goods or perhaps pays someone to simply do an odd job or so around the business. To require that person to file an income tax return on that income and allocate the business expenses to that income is not reasonable.

This is why as long as it is incidental, the states have provided that they would forego this revenue and allow the person to be taxed on that income in the state where that individual resides. However, if the business income which is earned from the sale of goods or from the personal or professional services of another person is more than an incidental part of the income of that business, then the reciprocity exclusion applies only to the personal or professional service income of that individual and does not apply to the business income. The example that is given in the rule involves a partnership. The reciprocity exclusion as contained in the statute applies to the partner's salary, namely, his personal or professional service income. The reciprocity exclusion does not apply to the distributive shares of the partnership business. As provided later in the rule, the distributive shares, or otherwise called a partnership draw, is not a salary. It is the partner's share in the equity in the partnership and so it would be based on the personal or professional services of other partners in the partnership, employees of the partnership, or goods that are sold by the partnership. This, again, is business income not subject to the reciprocity exclusion but it is assignable to the state in which it is earned. In order to prevent abuse in the assignment of a large amount of income to salaries and these salaries including business income of the partner, the rule provides that the salaries must be reasonable and that a provision for the salaries must be part of the partnership agreement. In other words, the partners must have decided how much each partner will receive in payment for that partner's personal service. The rule then provides that if there is no written agreement or if there is

no written agreement on salaries, the payment to the partners is going to be a distribution of the business income of the partnership and would not be subject to reciprocity exclusion. This will mean that the burden of proof will be placed on the partners. If they want to agree what each person's personal service is valued at, they will provide for it in a written agreement; however, if they don't provide for it, then what they are saying is they will each take a part of the income from that partnership business. This would include the income earned by the personal services of the other partners. It would not be fair for the Department to not presume this. If this presumption was not in the rule, those partners who were careful to provide a salary amount to each partner would be penalized because their income that was attributable to the partnership business income would not be subject to reciprocity exclusion. However, if a partnership decided to not make this provision, then the entire amount would be under reciprocity. This simply would not be fair, and the burden of proof to show what is personal service income and what is business income must be placed on the partners. If they cannot decide, then it will all be business income, it will all be assignable to the state in which it is earned, taxed there, and the state in which that person is a resident will grant a credit for the taxes paid to the state in which it was earned. However, the rule does provide an exception that if all the partners are performing personal services and if the sale of goods and the employees' services are incidental, the reciprocity exclusion will apply to the entire amount of the salary and the distributive share. The reasoning, of course, behind this is the assumption that in a small

partnership where two people may have banded together and where things may not be in writing, each person will be deemed to have rendered personal services equal to one-half of the income so, therefore, it could be argued that each partner's share is really in payment of personal services. If the partners decide that one partner's personal service is more valuable than the other's or if one partner works longer hours or does more difficult work than the other and wants to be rewarded above and beyond the other, they would, of course, provide a salary agreement in a written form and the previous provision of this rule would apply. This part of the rule, then, concludes with the statement that imputed income of a shareholder of a Subchapter S corporation is not subject to reciprocity exclusion. This income is in the form of a distribution or a dividend from the corporation. It is a share of the corporation's income. The reason, of course, here is that what is involved is a corporation, which is a separate person under state law. The shareholder must be paid a salary for his services that are rendered to that corporate person and the shareholder would also receive part of the income from that corporation.

F.2. As is previously provided earlier in this part, if the income from the sale of goods or from the services of employees is incidental, then the reciprocity exclusion would apply not only to the salary that was paid to the partner for his services but also to the business income from the business. A definition of the term "incidental" is necessary and the rule provides that it be only a minor or secondary contribution to the personal service income of the individual or the partnership. Now, a further definition of this term is necessary and the rule states that the sale of the goods or the

services of the employees is incidental if it is less than $20,000 or 10 percent of the gross profit of the business, whichever is greater. In other words, anything less than 10 percent is deemed to be incidental. A minimum dollar amount is included of $20,000 to provide a floor on the interpretation of "incidental." This is also good administrative practice to eliminate complex calculations for small business people who have a small amount of income from the sale of these goods. However, where the business income gets larger, more than $20,000 or more than 10 percent, then the amounts are sufficient enough to influence the tax revenues that apply to the different states and the amounts are also large enough to assume a greater sophistication involved in the business. There is nothing really magical about these two numbers; they simply were agreed to by the states--North Dakota, Wisconsin and Minnesota. The rule also provides that to determine whether or not something is incidental, the amount paid to the employees and the profit from the sale of goods must be totaled. In other words, these two types of income are, of course, totaled in the determination of the amount of income that is received by the business and so they must also be totaled when a person is trying to determine whether or not these items are incidental to the business.

F.3. This part of the rule clarifies the mechanics involved with the reciprocity exclusion when an individual is completing a Minnesota income tax return. If all of the person's income which can be taxed by Minnesota is subject to the reciprocity exclusion, there would be no tax in Minnesota and so, therefore, there would be no need to require that individual to complete the paperwork of filing a Minnesota income tax return. The rule does remind

people affected, however, that is some of their income which is assignable to Minnesota is subject to reciprocity exclusion and so not taxable, and if some of it is not subject to the reciprocity exclusion and, therefore, taxable, a return must be filed if the filing requirements contained in Section 290.37, subd. 1 are met. Examples of income not subject to the reciprocity exclusion would be business income and income from the sale of real estate. If the filing requirements are exceeded on income which is not subject to the reciprocity exclusion, there would, of course, be a tax due in Minnesota and a return would be necessary. In order to determine how much income would be taxable in Minnesota, the individual must again use the appropriate federal adjusted gross income for that taxable year. The definition of federal adjusted gross income would be the one provided by the Minnesota legislature and there may be modifications needed to remove those items that would be different from Minnesota than from the federal law. The rule then provides that the appropriate place for removing the reciprocity exclusion income would be in the subtraction modification area. The remaining income would be the income assignable to Minnesota which is not subject to reciprocity exclusion.

The Department of Revenue has provided for a form on which the individual may claim the reciprocity exclusion. This form is called Form M-115, and a copy of this form is attached to this Statement of Need. The form is an affidavit which shows the person's claim that their compensation is exempt under the reciprocity exclusion. Under the provisions of Section 290.53, subd. 4, this form is structured in the nature of an affidavit to protect

the state against a person who makes a false statement. This statement, if it is false, would be punishable as perjury because of the material matter that is involved, namely, that this personal service income was granted an exemption from Minnesota income tax when it properly should have been taxed in Minnesota. The following information will be required on the form: (a) Name, address and social security number are to identify the individual involved; (b) the year that the affidavit is being submitted is important because this determines what tax return is involved; (c) the amount of income that was received will reflect what income should be excluded and so subtracted from the person's federal adjusted gross income; (d) a statement whether or not Minnesota income tax was withheld would be important so that the proper amount of refund could be granted; (e) the name and address of the employer--this again would be verification information to allow the Department to check with the employer to make sure that the individual really did have income tax withheld; (f) the type of services performed in Minnesota would allow the Department to determine whether or not this is personal or professional service income and how much is subject to the reciprocity exclusion; (g) the state in which the individual maintains a residence would, of course, be important to prevent a person who is a resident of a state other than North Dakota or Wisconsin from claiming this exclusion; (h) the year that the individual became a resident of that state is needed to determine whether or not the person is claiming this exclusion only to get out of paying Minnesota income tax; (i) a statement determining whether or not the

individual customarily returns to his residence in the other state at least once a month conforms with the statute which requires that the reciprocity exclusion only applies to individuals who meet these restrictions; (j) a statement whether or not the individual filed an income tax return with that state and whether or not the income subject to reciprocity exclusion was declared on that return is important because it reminds this individual that this income would be taxable in the state of residence, and it also can then be used to check with the state that the taxpayer claims he is a resident of to determine whether or not that income was included; (k) a statement declaring if the individual ever was a resident of Minnesota and, if so, when was the date of last residence would be important to determine whether or not the person left Minnesota. It should be noted that these items currently are contained on the Form M-115.

The rule provides as a reminder to individuals that have this type of income that it is possible for them to stop the withholding on their income by filing a withholding exemption Form MW-6. A copy of this form is attached to this Statement of Need. This would allow the individual to stop their Minnesota withholding on their personal or professional service income and then remove the necessity of filing a Minnesota return purely to receive a refund of Minnesota income tax withheld on this income. Section 290.92, subd. 17 also provides additional authority for the Commissioner to enter into reciprocal agreements with other states to cover withholding of the income tax to provide fair administration and to eliminate duplicate withholding. This would also cover

where income is exempt from withholding in one state because of the reciprocity exclusion.

G. This part of the rule deals with the amount of the federal adjusted gross income of a nonresident athlete that must be assigned to Minnesota for that person's athletic performance. Minn. Stat. Section 290.17, subd. 2(1) states that "The entire income of all resident or domestic taxpayers from compensation for labor or personal services . . . and the income of nonresident taxpayers from such sources shall be assigned to this atate if, and to the extent that, the labor or services are performed within it . . . ." Clearly, a nonresident athlete who makes an athletic performance in Minnesota and who is paid for that performance has personal service income which is assignable to Minnesota. The controversy is over how to determine the amount of income that must be assigned to Minnesota. This rule states that the income for an athlete will be assigned using the games played formula. This formula counts the number of games that are played in Minnesota as the numerator and the total number of games in the season as the denominator and applies that fraction to the amount of the federal adjusted gross income of the nonresident athlete that is attributable to payment for athletic performance. It should be remembered that for a resident athlete, all income, of course, would be assignable to Minnesota. Now, in using the games played formula, pre-season games do not constitute games played during a season because that is not the reason why the athlete and the athletic club have contracted together. The reason they have contracted together is for the purposes of providing athletic performance in regular season games. Now, each level of post-season playoff games would constitute a

season; therefore, if a playoff consists of only one game, the income that is directly earned by the player for that one game would be assigned to where the game was played. However, if there were two games or five games or seven games involved before one team can move on to a new level of playoffs, then that level would constitute the number of games. If there were seven games in the playoff series and all seven games were played and four of those were played in Minnesota, then 4/7ths of the income from those games would be assignable to Minnesota.

The rule then provides that if a nonresident athlete wants to use any other method other than games played, the burden of proof is on the athlete. The athlete must then demonstrate that his or her income is a product of other services in addition to being an athlete. The rule provides examples of these types of athletes, such as managers, coachers, trainers, which are hired for duty on an annual basis and they have additional duties imposed on them in addition to their performance in an athletic contest. Also, if an athlete is hired for a specific duty after the end of the normal playing season, the athlete may be allowed to use the duty days formula. This cannot be a vague duty to put the league in the best light, but it must be specific duties prescribing specific days the athlete must work and appearances that the athlete must make. An athlete who can show that his or her income consists of other substantial services beyond that in an athletic contest may use the duty days formula, and this formula has as the denominator the total number of days which the individual is under a duty to perform for an employer and the numerator is the total of those days that were spent in

Minnesota.

In this way the rule recognizes that a professional athlete is actually and primarily paid for his or her services in regular season games. This is the purpose of the existence of the athletic leagues and teams, and this is how they sell their tickets and their television and radio rights. This is their reason for existence. The very essence of the team is that they will play games of athletic competition against other teams. The real worth of the team is in the playing of the games. The practice and the pre-season games are incidental to their regular season performance. The games that are played is the point of all the publicity and the training. Without those regular season games, there would be no need for either practice or publicity. It is perfectly reasonable to conclude that professional sports teams do not pay large amounts of money to athletes simply for their services during practice sessions, pre-season games, publicity events or otherwise. The athlete's only real worth to his team is in terms of his ability to play in the regular season's schedule of games. This will be the presumption as contained in the rule; however, again, it must be remembered that for those players who can show that the club has contracted with them for other substantial services beyond playing in the games, that the duty days formula may be used by them. It should also be noted that this rule does not deal with the withholding of income taxes from the pay or the proper withholding rate. It simply deals with how this income is to be assigned to Minnesota for purposes of determining the taxpayer's federal adjusted gross income.

In Hughes v. Spaeth, 207 Minn. 577, 292 N.W. 194 (1940) the Minnesota Supreme Court was asked to rule in a case that involved a Minnesota nonresident. This taxpayer lived in Wisconsin and was employed as a land commissioner of the Northern Pacific Railway Company in St. Paul. The taxpayer commuted daily from Hudson, Wisconsin to his place of employment in St. Paul. The question was whether income received from his employer while he was on a vacation outside of Minnesota was subject to the Minnesota income tax. The Supreme Court answered that it was. "The income tax law contemplates taxation of a nonresident's actual income received for personal services performed within this state irrespective of where that individual may be at the time of the payment. The tax is not on a per diem basis but on the income for such services as a unit. The law is concerned with totals and not with the per diem return. This is the only realistic approach. Obviously, plaintiff's worth to his employer was only in terms of a long-term employment which had continuity in performance. The law seeks to tax on a realistic basis, and the most practical method is to treat the employment the same as the contracting parties do. We cannot concur on the contention that the income tax law is a per diem law as to nonresidents. The whole system of taxation is geared to a tax on income received for services performed within this state . . . .

"While it may be that some of the income from his employment was paid the plaintiff while he was outside the state, nevertheless the actual basis for that income was the services he performed as land commissioner and not the vacations that he took elsewhere.

As stated by the trial court, people are paid for working and not for taking vacations. When payment was made is not material, but for what it was made is. Consequently it is not controlling that payment occurred while plaintiff was on a vacation. While he might have been paid for this period, that payment can only be justified in terms of the actual services he rendered in Minnesota. The vacation was a mere incident of the relationship of the contracting parties. The controlling factor is whether the income received during this time was actually the product of the employment and services in this state. For purposes of taxation, plaintiff's entire salary, whether paid during a vacation period or while in his office in St. Paul, must be regarded as a unitary return for services rendered in this state." Pp 578 to 579.

It must be noted what the court makes as the central point, namely, why was the taxpayer paid. For a nonresident athlete it is clear that the taxpayer is paid because he is a skilled athlete and his skill is desired in an athletic contest. These are the services that are being rendered and if they are rendered in Minnesota, Minnesota can tax them. It is, of course, true that the taxpayer may be taxed on this same income in Minnesota and also in the state in which he is a resident, but it is for that purpose that states allow a credit for income tax paid to another state to prevent this type of double taxation by the state of residence. The court also states that the income tax is not on a per diem basis. In other words, the income tax is imposed on the income for the personal services that are rendered and it is not imposed based on a certain amount for each day. If the income tax were imposed on a per diem basis,

the taxpayer would, of course, argue that on weekends he was receiving income in Wisconsin and had never been in Minnesota. The court rejects this argument and states again that the tax is for the service and for the work that was performed. The court is saying that it is improper to attribute so much income to each day involved; however, the proper method is to look at the service that was provided.

The Minnesota Supreme Court in the Hughes case also stated that the most practical method to treat the employment is to look at it in the same way the contracting parties do. According to the NFL player contract, No. 2 of this contract states, "Club employs player as a skilled football player." The player is not hired for publicity purposes or any other reasons other than being able to play football for the club. In Part 6 of this contract, the terms of payment are contained as follows: "Unless this contract or any collective bargaining agreement in existence during the term of this contract specifically provides otherwise, player will be paid as follows: If player has not previously reported to any NFL club's official pre-season training camp in any year, he will be paid 100 percent of his yearly salary under this contract in equal weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by club. If player has previously reported to any NFL club's official pre-season training camp in any year, he will be paid 10 percent of his yearly salary under this contract in equal weekly installments over the course of the pre-season period, commencing with the end of the first week of club's official pre-season

training camp as designated for player and ending one week prior to the first regular season game played by club, and 90 percent of his yearly salary in equal weekly or bi-weekly installments over the course of the regular season period, commencing with the first regular season game played by club." The National Hockey League standard player's contract provides much the same. In Part 1 of this contract, it says, "The club hereby employs the player as a skilled hockey player . . . ." "Payment of such salary shall be in consecutive semi-monthly installments following the commencement of the regular league championship schedule of games or following the dates of reporting, whichever is later . . . ." The basis of the agreement between the two parties in these two cases provides that a player is paid for his skills as a player in games and is also paid during the regular season. Payment is not made during the pre-season or training camp. As the court has stated, this is the most practical method to treat the employment by treating it the same way that the contracting parties do.

However, it must also be noted that in tax matters the courts are not bound by form. In Midwest Federal Savings and Loan Association v. Commissioner of Revenue, 259 N.W. 2d 596 at 599 (1977) the Minnesota Supreme Court said, "We agree that on tax questions the court is free to look to the substance, not just the form, of a transaction." The point is that a player is hired for his play during regular season games. This is the substance of the contract and this is the reason for the contract.

In the petition of Bobby R. Murcer and Kay Murcer, New York State Tax Commission, CCH New York State Reporter, Section 99-992x, (September 22, 1977) it was decided that a nonresident of New York who is a professional baseball player for the New York Yankees must allocate income by multiplying his salary by a fraction, the numerator of which is the number of regular season games played in New York and the denominator of which is the number of regular season games played everywhere. The Tax Commission decided that the Murcers could not include as days worked outside the state days spent during the exhibition season and in spring training. In other words, the New York State Tax Commission has decided to use the games played formula instead of the duty days method.

In appeal of Philip and Diane Krake, et al, CCH California State Reporter, Section 205-540 (October 6, 1976) the California State Board of Equalization was asked to rule on the assignability of income for several players who were nonresidents of California and who were employed by the Los Angeles Kings professional hockey team. The players were contending that their hockey contract required them to perform services for the team during off-season, such as keeping in good physical condition and refraining from playing hockey for other teams, so therefore a portion of their salary should represent compensation for such services. Since they lived outside the state during the off-season, they contended that these services were outside of California and, therefore, they should use a duty days formula to apportion their salary to off-season and regular season. The California State Board of Equalization rejected this contention, stating that the "appellants

were hired by the Kings primarily for the services they would render during the regular season, and that any 'services' they were required to perform during the off-season were merely incidental. Therefore any portion of their salaries which represented compensation for off-season activities was de minimis." It should be noted, however, that the players did use the games played formula to apportion their income during the season by allocating their salary based on the number of regular season games played in California as the numerator of the fraction and the total regular season games played as the denominator of the fraction. The result was their California source income. The California Board of Tax Appeals accepted this formula. It should be noted that California recognized that the main reason why these players were hired was for their performance during the season and not for the other conditions that were contained in the contract.

In appeal of Dennis F. and Nancy Partee, CCH California State Reporter, Section 205-539 (October 6, 1976) the California State Board of Equalization ruled that it was reasonable for California to use the duty days formula when applied to the income of a non-resident who was employed by a California professional football team, namely, the San Diego Chargers. The California State Board of Equalization tried to explain the difference between using the games played formula for one sport and the duty days formula for another sport by citing the difference in the number of games that are played and the number of working days that were involved between the games. It is the position of the Minnesota Department

of Revenue that this is not a good distinction to make. The more important and the more crucial distinction is based on the type of service that is provided to the club. If the service that is provided is for the athletic performance and that performance is realized in a game, then the games played formula should be applied. However, the rule does provide flexibility so that if the athlete provides performances in other ways, such as a manager or a coach, then the duty days formula can be used.

This proposed rule fairly apportions a nonresident athlete's income to Minnesota based on the services that are provided by that athlete.

H. Personal service income earned by a nonresident taxpayer for services that that taxpayer performed in Minnesota are assignable to Minnesota under Section 290.17, subd. 2(1). This part of the rule expands on the assignability of personal service income to explain that it also includes other types of income which are associated with personal service income if the underlying services that gave rise to the payment were performed in Minnesota. The authority for taxing a bonus that was received is based on Alonzo D. Peterson v. Commissioner of Taxation, Minnesota Tax Court Docket No. 1384 (May 27, 1968). Commissions, especially those received by an individual insurance agent, are described as personal service income and subject to taxation in Charles W. Sexton Company v. Hatfield, 263 Minn. 187 (1962). Vacation pay received by a nonresident individual who was employed in Minnesota was determined to be subject to taxation in Minnesota in Hughes v. Spaeth, 207 Minn. 577 (1940). In order to avoid confusion, the rule does also provide an

exception for qualified pension payments which are received by a nonresident. These payments no longer are assignable to Minnesota even though the payments were attributable to services that had been performed in Minnesota. This exemption of these pension payments is contained in Section 290.17, subd. 2(6) (1979 Supplement). This has also been recognized as a subtraction modification in the reduction of federal adjusted gross income by the addition of clause (b)(17) to Section 290.01, subd. 20 by Laws 1980, Chapter 607, Article I, Section 1.

I. This part of the rule deals with the provisions concerning the net operating loss carryforward and carryback for nonresidents. The initial statement that this net operating loss carryforward or carryback must be the same dollar amount allowed in the determination of a federal adjusted gross income is the same statement that was made with regard to residents. Prior to 1961, Minnesota income tax law used its own definition of gross income. In Laws 1961, Chapter 213, Article IV, Section 1, and Extra Session Laws 1961, Chapter 51, Section 1, the Minnesota income tax used as a starting point the provisions of federal adjusted gross income. These two provisions amended Section 290.01, subd. 20 which defined gross income for Minnesota. The purpose of the legislation was to provide that beginning with 1961, Minnesota would use federal adjusted gross income as the beginning and make certain addition and subtraction modifications to this. The legislature was trying to tie Minnesota's income tax law in more closely to the federal law. By adopting federal adjusted gross income, the legislature provided that a taxpayer's business deductions would have already been calculated because they are included in the determination of

federal adjusted gross income. The provisions defining a net operating loss are contained in Section 290.095. Prior to 1962, an individual was allowed to compute a net operating loss for Minnesota. This meant that an individual may not have a net operating loss on the federal return but could have a net operating loss on the Minnesota return. However, in Laws 1963, Chapter 355, Sections 5 to 7, the Minnesota legislature decided to change this. The legislature provided in Section 290.095, subd. 1(b) that "a net operating loss deduction shall be available under this section only to corporate taxpayers except as provided in subdivision 6 hereof . . . ." Subd. 6 of Section 290.095 clearly provided the limitation on the deductions of losses and provided the phaseout of this provision. The fact that net operating losses are now available only to a corporation is consistent with what the legislature had earlier done in changing Section 290.01, subd. 20. The 1963 legislature was saying that they no longer wanted to have a separate Minnesota net operating loss deduction; they wanted to conform more closely with the federal law. They wanted to allow a net operating loss deduction only when there was a business net operating loss deduction and it was allowable in the determination of federal adjusted gross income. The net operating loss deduction only exists because it was a business loss deduction which was used to determine federal adjusted gross income, which Minnesota uses as a starting point of Minnesota gross income.

As has been previously explained in this rule, not all income of a nonresident may be assignable to Minnesota. The nonresident may have earned personal services in a state other than in Minnesota

or may have income from the sale of real estate in a state other than Minnesota or the nonresident may also have income from intangible assets which would not be assignable to Minnesota. Because of this, adjustments must be made in the net operating loss to recognize the fact that some of the income or some of the losses which are a part of the federal net operating loss may not be assignable to Minnesota. Therefore, the net operating loss needs to be changed from what the amount was that was used on the federal return. This is, of course, based on the assignability of income principles contained in Section 290.17, subd. 2(1), (2) and (3). This also has been recognized by the addition of clause (a)(18) and clause (b)(17) to Section 290.01, subd. 20 in Laws 1980, Chapter 607, Article I, Section 1. The addition modification requires that any loss which is not assignable to Minnesota including a net operating loss carryforward or carryback be added to the taxpayer's federal adjusted gross income, and the subtraction modification requires that any income which is not assignable to Minnesota may be subtracted from the taxpayer's federal adjusted gross income. This is also consistent with the decision of the Minnesota Supreme Court in Schoenfelder v. Commissioner of Taxation, 294 Minn. 547 (1972) in which the court said, "The definition of individual gross income for Minnesota income tax purposes stated in Minn. Stat. 290.01, subd. 20, may not be read in isolation from Sections 290.095, 290.09, 290.17, and 290.18. So considered, we think the legislature manifested its intent that a net operating loss carryback was to be available to an individual taxpayer only to the extent of losses connected with his income-producing activities attributable to Minnesota." P. 548

Adjustments must also be made to the net operating loss for provisions contained in federal adjusted gross income which has been adopted by the Congress but which has not yet been adopted by the Minnesota legislature in adopting an updated reference to federal adjusted gross income. This is consistent with the treatment of resident individuals concerning their net operating losses and it is also consistent with the Wallace case previously cited.

(7)

The employer of any employee domiciled in North Dakota, which employee performs personal services in Minnesota, need not withhold for Minnesota income tax purposes from wages paid to such employee after July 1, 1969, for personal services performed in Minnesota.

B. Additions and changes, including definitions, in the provisions of this agreement may be made by mutual consent of the Commissioners of Minnesota and North Dakota and shall become an attachment to this agreement.

Dated this 2nd day of June, 1969.

Rufus T. Logan
RUFUS T. LOGAN
Commissioner of Taxation
State of Minnesota

Byron L. Dahlgaard
BYRON L. DAHLGAARD
Tax Commissioner
State of North Dakota

INCOME TAX AND WITHHOLDING TAX
RECIPROCAL AGREEMENT

NORTH DAKOTA - MINNESOTA

1. This agreement shall be applicable with respect to the taxation of net income for taxable years beginning on or after January 1, 1969, and with respect to the withholding tax, effective July 1, 1969.

2. For purposes of this agreement income from "personal services" shall be deemed to include income from "professions" and "compensation" shall be deemed to include fees of independent professional persons not engaged in business.

3. This agreement relates only to net income taxation of natural persons and the terms "natural persons" and "individuals" are to be deemed synonymous.

4. This agreement does not relate to any tax levied on any individual by either state for the privilege of doing business in such state

5. This agreement shall not be interpreted as preventing the taxing authorities of either state from requiring any individual to file such returns as are required by the law of the state even though some or all of the income reported in such returns is not subject to income tax by the state because of the reciprocity provisions of its income tax law.

6. Pursuant to this agreement North Dakota will forego taxation of compensation, from personal services performed in North Dakota, by natural persons domiciled in Minnesota who customarily return to their place of abode in Minnesota at least once a month; and Minnesota will forego taxation of compensation, from personal services performed in Minnesota, by natural persons domiciled in North Dakota who customarily return to their place of abode in North Dakota at least once a month.

7. The employer of any employee domiciled in Minnesota, which employee performs personal services in North Dakota, need not withhold for North Dakota income tax purposes from wages paid to such employee after July 1, 1969, for personal services performed in North Dakota.

1. To establish reciprocity affecting the filing of nonresident returns and the assessment of state income tax on nonresidents on income from personal services, including salaries, wages, and commissions received on and after October 1, 1967:

a. With respect to residents of the State of Wisconsin who are not residents of Michigan on or after October 1, 1967, and who are employed or otherwise derive income from personal services in Michigan and whose only income from Michigan sources on and after such date is in the form of income from personal services, including salaries, wages, and commissions, and Michigan Department of Revenue will not assess such nonresidents or require such individuals to file a nonresident Michigan income tax return.

b. With respect to residents of Michigan who are not residents of Wisconsin at any time during the taxable year and who are employed or otherwise derive income from personal services in Wisconsin and whose only income from Wisconsin is for personal services, including salaries, wages, or commissions, the Wisconsin Department of Revenue will require such individuals to file a nonresident return and be assessed on such income received prior to the above date of October 1, 1967, but not on such income received on or after such date.

2. To establish a mutual policy with respect to employers in the withholding of state income tax from employees, effective October 1, 1967:

a. With respect to employers located in the State of Wisconsin who employ Michigan residents, who are not residents of Wisconsin at any time during the taxable year, the Wisconsin Department of Revenue will not require such employers to withhold Wisconsin income taxes from the wages or salaries of such Michigan residents paid on or after October 1, 1967 provided such persons file with their employers certificates of nonresidence, unless and until the employer is advised that any such certificate was improperly filed.

b. With respect to employers located in the State of Michigan who employ Wisconsin residents, who are not residents of Michigan at any time during the taxable year, the Michigan Department of Revenue will not require such employers to withhold Michigan income taxes from the wages or salaries of such Wisconsin residents who file with their employers certificates of nonresidence, unless and until such employer is advised that any such certificate was improperly filed.

3. To establish a mutual policy with respect to taxpayers filing nonresident returns for the taxable year beginning on or after January 1, 1968, it is agreed as follows:

a. With respect to residents of the State of Wisconsin who are not residents of Michigan at any time during the taxable year and who are employed or otherwise derive income from personal services in Michigan, and whose only income from Michigan sources is for personal services, including salaries, wages, or commissions, the Michigan Department of Revenue will not require such individuals to file a nonresident Michigan income tax return.

b. With respect to the residents of the State of Michigan, who are not residents of the State of Wisconsin at any time during the taxable year and who are employed or otherwise derive income from personal services in the State of Wisconsin, and whose only income from Wisconsin sources is for personal services, including salaries, wages, or commissions, the Wisconsin Department of Revenue will not require such individuals to file a nonresident Wisconsin income tax return.

4. It is not the intent of this agreement that persons, resident of Michigan, who derive income from business transacted or property located in Wisconsin be excused from filing Wisconsin returns and paying Wisconsin income taxes, by declaration or otherwise, in conformity with the Wisconsin income tax law, with respect to such income, or that persons, resident of Wisconsin, who derive income from business transacted or property located in Michigan be excused from filing Michigan returns and paying Michigan income taxes, by declaration or otherwise, in conformity with the Michigan income tax law, with respect to such income.

5. For purposes of this agreement the terms "residence" or "resident" are to be deemed synonomous with "domicile" or "domiciled."

6. This agreement has application to income taxation of only natural persons.

7. It is the intent of this agreement that the employer, if within the jurisdiction of the state of residence of the employee, shall not be relieved from withholding on behalf of the state of residence of the employee on all wages or salaries of the employee whether earned in either state. To the extent the employee may earn wages or salary from such employer in a third state, the employer shall withhold on such wages or salary for the state of residence of the employee in the absence of a separate agreement concerning such withholding with the state of residence of the employee. Executed September 28, 1967.

To eliminate possible misunderstanding of the reciprocity agreement of September 28, 1967 the following paragraph 8 is added thereto and incorporated therein.

8. Paragraph 2a of this agreement is not related to and has no bearing upon the administration by the Wisconsin Department of Revenue of the provision of the Wisconsin Income Tax Law which provides for withholding of *delinquent* Wisconsin income taxes, penalties, interest and costs. (Section 71.135, Wis. Stats.) Such provision will be administered by the Wisconsin Department of Revenue without regard to this reciprocity agreement. Dated October 4, 1967.

.74 Income tax reciprocity agreement between Wisconsin and Minnesota.—1. This agreement shall be applicable with respect to the taxation of net income for taxable years beginning after December 31, 1967.

2. For purposes of this agreement income from "personal services" shall be deemed to include income from "professions" and "compensation" shall be deemed to include fees of independent professional persons not engaged in business, i.e. doctors, attorneys, accountants, engineers.

3. This agreement relates only to net income taxation of natural persons and the terms "natural persons" and "individuals" are to be deemed synonymous.

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4. Pursuant to this agreement Wisconsin will forego taxation of compensation, from personal services performed in Wisconsin, by natural persons domiciled in Minnesota, and Minnesota, (a) will forego taxation of compensation, from personal services performed in Minnesota, by natural persons who reside or have their place of abode and place to which they customarily return at least once a month in Wisconsin; and (b) with respect to compensation from personal services performed in Minnesota by natural persons domiciled in Wisconsin but who either did not maintain a place of abode in Wisconsin or having such a place of abode in Wisconsin did not customarily return to it at least once a month while such income was earned in Minnesota, Minnesota will allow a credit against the Minnesota tax otherwise payable of that portion of the tax paid to Wisconsin as the gross income subject to Minnesota taxation bears to the entire gross income upon which the tax paid to Wisconsin was imposed.

5. The employer of any employee domiciled in Minnesota, which employee performs personal services in Wisconsin and reports his income on the calendar year need not withhold for Wisconsin income tax purposes from wages paid to such employee in 1968 and thereafter for personal services performed in Wisconsin. The employer of any employee domiciled in Wisconsin, which employee performs personal services in Minnesota and reports his income on the calendar year basis for purposes of state income taxation, need not withhold for Minnesota income tax purposes from wages paid to such employee in 1968 and thereafter for personal services performed in Minnesota. In either case, if the employee reports on a fiscal year other than the calendar year, such withholding shall terminate only with respect to wages paid (for personal services performed in the nondomiciliary state) on and after the first day of the employee's fiscal year beginning in 1968.

6. (a) The provisions relative to withholding contained in paragraph 5 have no relation to and are intended to have no effect upon the administration by the State of Wisconsin of Section 71.135 of the Wisconsin Statutes concerning withholding of delinquent Wisconsin taxes, interest, penalties and costs. (b) Nothing herein shall be deemed to prohibit the State of Minnesota from requiring employers to withhold delinquent Minnesota income taxes, interest, penalty and costs from the compensation of Wisconsin residents employed in Minnesota.

Dated this 14th day of November, 1967.

Rufus T. Logan, Commissioner of
Taxation, State of Minnesota;

James R. Morgan
State of Wisconsin,
Secretary of Revenue.

.75 Reciprocal income tax agreement cancelled—North Carolina.—By reason of amendments to the income tax law of North Carolina, Wisconsin has ceased to have income tax reciprocity with North Carolina with respect to income years beginning on or after January 1, 1964. Wisconsin Commissioner of Revenue, June 15, 1965.

[¶ 12-405a] Rule Sec. Tax 2.02. **Reciprocity.**—(Section 71.03(2)(e), Wis. Stats.) (1) General. (a) In this rule, "residence" and "resident" are synonymous with "domicile" and "domiciliary", respectively, except when referring to the reciprocity agreement with Illinois. A person may be a resident of Illinois while domiciled in Wisconsin or a person may be domiciled in Illinois but not be a resident of Illinois. The Illinois Income Tax Act defines a resident as "an individual (i) who is in this state for other than a temporary or transitory purpose during the taxable year; or (ii) who is domiciled in this state but is absent from the state for a temporary or transitory purpose during the taxable year".

(b) Income earned by a nonresident individual for performing personal services in Wisconsin shall be excluded from Wisconsin gross income to the extent the individual's state of residence imposes an income tax on such personal service income if that state allows:

1. A similar exclusion for personal service income earned by individuals domiciled in Wisconsin while working in that state; or

2. A credit against the tax imposed by that state on the personal service income equal to the Wisconsin tax on such income.

(c) A Wisconsin employer of a nonresident individual residing in a state with which Wisconsin has a reciprocity agreement need not withhold Wisconsin income tax from personal service income earned in Wisconsin by such nonresidents.

(2) Personal Service Income Defined. Income from personal services includes all salaries, wages, commissions and fees earned by an employe and all commissions and fees earned by a self-employed person in the conduct of a profession or vocation. Income from personal services does not include income derived from activities involving the substantial use of capital or labor of others.

Form
M-115
(Rev. 12/79)

Minnesota Department of Revenue
Income Tax Division
Centennial Office Building
St. Paul, Minnesota 55145

See Instructions
On Other Side

Affidavit for Wisconsin and North Dakota Residents — Exemption from Minnesota Income Taxes

Complete the following information: (Please print or type)

First Name and Initial (if joint affidavit, use first names and middle initials of both)	Last Name(s)			Your Social Security Number
Address (number and street or rural route)	City, Town or Post Office	State	Zip Code	Spouse's Social Security Number

Important: **If Minnesota Income Taxes Were Withheld On The Amount Of Income For Which You Claim Exemption, See The Instructions On The Other Side On How To Obtain A Refund.**

1 Fill in the year for which this affidavit is being sent in _____

2 Fill in the amount of income received for work done in Minnesota for which you claim exemption $ _____
(If you are filing a Minnesota Income Tax Return, Form M-1, show this amount as a subtraction on line 5 of the return.)

3 Was Minnesota income tax withheld on the income shown on line 2? Yes ☐ No ☐
(If "yes," see the instructions on the other side on how to obtain a refund of the Minnesota income tax withheld.)

4 Fill in the name and address of the individual, partnership, or corporation from whom you received this income. If you need additional space, attach a separate sheet.

Name of Individual, Partnership, or Corporation			
Address (number and street or rural route)	City, Town or Post Office	State	Zip Code

5 What type of work did you do in Minnesota for this income? _____

6 In what state do you maintain your residence? _____

7 In what year did you become a resident of that state? _____

8 List the address of your residence if it is different from the heading of this form.

Address (number and street or rural route)	City, Town or Post Office	State	Zip Code

9 Did you customarily return to your residence at least once a month? Yes ☐ No ☐ If no, explain fully. _____

10 Did you or will you file an income tax return with your state of residence for the year shown on line 1 above? Yes ☐ No ☐

If no, explain the reason for not filing. _____

11 Did you include the income on line 2 above in the return? Yes ☐ No ☐ If no, explain. _____

12 Where was your last residence before that mentioned on line 6 above? If none, fill in "None." _____

13 Were you ever a resident of Minnesota? Yes ☐ No ☐ If yes, fill in the date of your last residence. _____

I swear (or affirm) that the above information concerning my residence is true and complete and made in good faith.

Sign Here ➧

Your signature	Spouse's signature (if filing a joint affidavit)	Date	Area code & tel. no.

A Separate Form M-115 Must Be Sent In For Each Year That This Exemption Is Claimed

Instructions

General — If you're a resident of North Dakota or Wisconsin, you don't have to pay Minnesota income tax on the money you earned for work you did in Minnesota. However, you must file this form with the Minnesota Department of Revenue each year.

Do not use this form if you are a resident of any other state.

Joint Affidavit — If you're married and both of you work in Minnesota, you may file a joint affidavit. If you need more space, attach a separate sheet to Form M-115.

Minnesota Income Tax Withheld — If your employer withheld Minnesota income tax from your wages, you must file a Minnesota Income Tax Return, Form M-1, to get a refund. Attach Form M-115 and the state copy of your W-2 forms to your Form M-1. List the amount of income you received for work you did in Minnesota on line 5 — Subtractions from your federal adjusted gross income — of your Form M-1. List the amount your employer withheld for Minnesota income taxes on line 32 of your form.

If you don't want Minnesota income taxes withheld from your wages, get Form MW-6 from the Department of Revenue and file it with your employer.

Minnesota Income Tax Not Withheld — If Minnesota income tax was not withheld by your employer and you are a Wisconsin or North Dakota resident, you do not have to file Form M-1, unless you have other income which is taxed by Minnesota.

Where To Get Forms

Mail requests for forms and instructions to: Minnesota Income Tax Forms, Room B-20, Centennial Office Building, St. Paul, Minnesota 55145, or call (612) 296-3781. You may pick up forms and instructions at our offices listed below; also at most banks and post offices in Minnesota.

Information And Assistance

If you need help or additional information to complete your return, you may call 296-3781 in the Metropolitan Twin City area or 723-4617 in the Duluth area. Elsewhere in Minnesota, you may call our St. Paul office toll free. This toll free service is provided Monday through Friday, 8:00 a.m. to 4:30 p.m. during the filing season. The toll free number is (800) 652-9094.

If you need help or additional information, you may stop into our St. Paul office or our nearest field office. Our offices, addresses, and hours and days of assistance are listed below.

Office	Address	Hours And Days Of Assistance
Twin Cities Area	St. Paul — 395 North Robert Street, Corner of 6th & Robert Minneapolis — Minneapolis Grain Exchange Bldg., 400 South 4th St., Rm. 220	8:00 to 4:30 Mon. through Fri.
Duluth	412 Lonsdale Building, 300 West Superior Street	8:00 to 4:30 Mon. through Fri.
Austin	301 So. Main Street	8:00 to 4:30 Monday
Brainerd	108 South Sixth Street	8:00 to 4:30 Mon. through Fri.
Mankato	1120 South Avenue, North Mankato	8:00 to 4:30 Mon. through Fri.
Marshall	Towns Edge Plaza, 1301 East College Drive	8:00 to 4:30 Monday
Moorhead	8th Street & 4th Avenue South — Townsite Center	8:00 to 4:30 Mon. through Fri.
Rochester	316 Elton Hills Drive	8:00 to 4:30 Mon. through Fri.
St. Cloud	2700 First Street North, Suite 103	8:00 to 4:30 Mon. through Fri.
Willmar	706 So. First Street	8:00 to 4:30 Monday

All Income Tax Returns And Correspondence Must Be Mailed Or Delivered To The St. Paul Office

RV-00046 06

MW-6 (Rev. 2/78)

MINNESOTA DEPARTMENT OF REVENUE
Residence Affidavit – For Nonresident Employee

COPY B — FOR COMMISSIONER OF REVENUE

I, _____, hereby make the following statement concerning my place of employment in Minnesota and my legal residence to which I customarily return at least once a month. (If you do not customarily return to your legal residence at least once a month, you are not eligible to complete this exemption certificate.)

I am a legal resident of the state of _____

and my home address is _____ (STREET ADDRESS) (CITY) (STATE) (ZIP CODE)

The name of my employer in Minnesota is _____

My employer's Minnesota address is _____ (STREET ADDRESS) (CITY) (ZIP CODE)

My employer's home office address is _____ (STREET ADDRESS) (CITY) (STATE) (ZIP CODE)

I am employed at the following address in Minnesota: _____ (STREET ADDRESS) (CITY) (ZIP CODE)

I declare under the penalties of perjury and criminal liability for making a false statement, that the above statements as to my legal residence and place of employment are to the best of my knowledge and belief, true and correct. I will notify my employer immediately if there is a change in my legal residence or place of employment. I will complete Form M-115 at the close of each calendar year this certificate is in effect.

_____ (EMPLOYEE'S SIGNATURE) _____ (DATE) _____ (SOCIAL SECURITY NUMBER)

INSTRUCTIONS

Minnesota employers with nonresident employees whose state of residence allows income tax reciprocity need not withhold Minnesota income tax from the wages earned in Minnesota by such nonresidents if the employer has in his possession a properly completed Residence Affidavit, Form MW-6, from the employee stating his residency. Once you have the Form MW-6 on file, it does not have to be reissued again. If an employee changes his legal residence, such employee must notify his employer of the change.

The reciprocity provisions have been in effect since January 1, 1968 for the State of Wisconsin and January 1, 1969 for the State of North Dakota. For information regarding other states, contact the Minnesota Department of Revenue.

PENALTIES– Any person who willfully fails to supply information which would require an increase in the tax to be withheld, will be guilty of a misdemeanor.

The employer should retain the original copy of this form for his records and mail the duplicate copy within 30 days to: Minnesota Department of Revenue, Income Tax Division, Centennial Office Building, St. Paul, Minnesota 55145.

If additional copies of Form MW-6 are needed, Call (612) 296-3781, or Write to: Minnesota Income Tax Forms, Room B-20, Centennial Office Building, St. Paul, Minnesota 55145.

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SEP 5 1980
OFFICE OF HEARING EXAMINERS

Amendments to Rule 13 MCAR Section 1.6020 - Energy Credit.

Statement of Need and Reasonableness

A.2. This rule has been promulgated and has been in effect since March 25, 1980; therefore, not all of this rule has been reproduced. Only those parts that are being amended are reprinted here. This part is being amended because of some confusion that had arisen in this area. The current rule states that if the taxpayer receives a refund from the seller or manufacturer of the equipment on which the taxpayer claimed an energy credit, that the amount of the expenditures that were allowable to claim this energy credit must be reduced by the amount of the refund. However, the rule did not really cover what happens when a manufacturer or seller of energy equipment makes a payment to the taxpayer. An example of a payment could be one that is made for field testing of an energy credit system by the taxpayer. Also, another way of doing this would be asking the taxpayer to complete quarterly reports on the operation of the system. The purpose of these various reports or field testing would be to provide information that can be used to show future purchasers of the equipment what the equipment did, how much energy was saved, and how much lower a certain fuel bill was. These payments that are received would be considered as a payment for a service that was rendered because the taxpayer is rendering a service to that maker of energy equipment. Payment for services is included in federal gross income under the provisions of Section 61(a)(1) of the Internal Revenue Code. Because these payments would be included in gross income for federal purposes, they would also be included in gross income for Minnesota purposes because

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File No. DR-81-003-JL
Date 10-2-80

Minnesota is based on federal adjusted gross income. The Minnesota definition for gross income is provided in Section 290.01, subd. 20. Because this payment for services has been included in gross income, there would be no need for the taxpayer then to reduce the amount of his expenditures that were allowable to claim the credit. This is consistent with the position that the Internal Revenue Service has taken in the treatment of payment for services provided to a seller of energy credit equipment.

The last change in this part of the rule is really a technical change. It simply recognizes the fact that it is possible that local governments in the State of Minnesota may be making grants that can be used to purchase energy credit equipment.

A.7. The purpose of this change can probably be best explained by using an example. If each owner of a side by side duplex decided to go together with the other owner of that duplex and purchase a solar collector that could be used to provide heat to their duplex, the current state rule would limit the two joint owners to no more than one $2,000 energy credit. This $2,000 credit would need to be divided between the two owners in proportion to the expenditures that each of them had made. In other words, if each had contributed $7,000 to the purchase of a $14,000 solar collection unit for their duplex, each joint owner would be entitled only to claim $1,000 worth of energy credit because they would need to split the $2,000 between them. This was also the rule that was required under the previous federal law. However, in Section 201(a) of the Crude Oil Windfall Profit Tax Act of 1980 (P.L. 96-223, April 2, 1980) the federal law was changed to provide in this situation that each

owner of a side by side duplex would qualify for the energy credit on his own; therefore, in the example previously given, each owner would be able to claim a $1,400 Minnesota energy credit because they had each paid $7,000 to purchase that solar equipment. This is the purpose of the change that was made in this part. It is consistent with the new federal law. Joint owners who live in the same principal residence would not qualify under this new provision but would continue to be limited under the old provision of the rule.

It is reasonable for this provision to be adopted in a rule because it does not expand the energy credit to new items; it merely explains the functioning of the credit for joint owners and it eliminates a concern that had been expressed. It is in conformance with the new federal provision. This is the purpose of the rules that the Commissioner can explain the application of the law to particular taxpayers. The energy credit law itself contained in Section 290.06, subd. 14 gives the Commissioner the authority to "promulgate rules establishing additional qualifications and definitions for the credits provided in this subdivision." This provision is defining the application of the law to joint owners and is within the authority of the Commissioner. The law also does provide that certain sections of the federal energy credit law are adopted by reference in the Minnesota energy credit. However, this does not restrict the ability of the Commissioner to adopt additional definitions for the credit.

A.9. The old low income credit for Minnesota was changed by the 1980

session of the legislature to be a low income alternative tax. This alternative tax now is a tax on gross income. If the taxpayer has income below a certain amount, there is no tax. If the taxpayer's income is in excess of that amount, there is a tax at the rate of 15 percent. This alternative tax is in lieu of the normal income tax and it is also in lieu of all other nonrefundable credits. In the law that changed this low income alternative tax (Laws 1980, Chapter 607, Article I, Section 5) the low income tax is specifically made in lieu of the pollution control credit, feedlot pollution control credit and the energy credit. Therefore, it is reasonable to provide in this rule that if the taxpayer used the low income alternative tax, he would have received no tax benefit at all from claiming the energy credit, pollution control credit or feedlot pollution control credit. Therefore, the rule provides that the taxpayer can carry forward the entire amount of the energy credit, pollution control and feedlot pollution control credits to the future year.

It should be noted that this rule is also consistent with the federal treatment of the jobs credit, WIN credit, investment credit, and now the energy credit when the alternative minimum tax is computed, namely, the federal law will require that a taxpayer use only the amount of the credit that is necessary to reduce the normal tax down to that which is required under the alternative minimum tax. The excess may be carried forward. This is provided in Section 55(c)(3) of the Internal Revenue Code. The energy credit was added to this treatment in Section 104(a)(4)(G) of the Technical Corrections Act of 1979 (P.L. 96-222, April 1, 1980). It should

be noted that for Minnesota purposes only the energy credit, pollution control credit and feedlot pollution control credit are the nonrefundable credits that have a carryforward feature. That is why none of the other nonrefundable credits are provided for in this manner.

B. This part of the rule deals with the piggybacked federal renewable energy source credit. The provision was added stating that after December 31, 1980 any active solar collector which qualified for the federal energy credit must now be certified by the Minnesota Energy Agency before it can qualify for the state piggybacked federal renewable energy source credit. This provision was added to prevent confusion when someone read the rule and did not read the law. This is to remind them of the law change that was made in Laws 1980, Chapter 607, Article I, Section 7 to the residential energy credit requiring this type of certification.

The second change made in this part states that a solar panel which is installed as a roof will still qualify for this credit even though it is a structural component of the dwelling. This is consistent with the provision that was added to the federal energy credit in Section 202(d) of the Crude Oil Windfall Profit Tax Act of 1980. The Minnesota legislature has already indicated its intention to foster the use of solar energy equipment by providing an energy credit which is the same as the federal energy credit and also by providing a passive solar energy credit. The passive solar energy went beyond what the federal government had done in their energy credit. The passive solar credit was provided because of the concern that the federal credit did not allow a credit for

energy systems that were part of the structure of the building. Therefore, it is consistent to allow these solar units to qualify. As stated earlier in a previous part, it is also permissible for the Commissioner to establish additional qualifications and definitions for this energy credit. This expansion of the credit to define solar panels which are a part of the structure to qualify for the energy credit is within the Commissioner's authority to promulgate rules. It does not expand the credit to new energy items; it merely removes a restriction that previously had existed on the qualification of an already approved item. It is important that, where possible, the Minnesota legislature remain consistent with the federal application of the energy credit. Again, this rule does not expand to new items such as was done in the Crude Oil Windfall Profit Tax Act when items which produced electricity from solar energy were included. It merely changes a definition that had been provided.

C. This is a technical change which eliminates unnecessary words. There had been an error in the law as it was passed in 1979. In order to provide clarity to the rules back then, the law had been cited as it should have read with an asterisk and a comment denoting the problem. This problem has been removed when the legislature amended the law to change the word "wall" to "roof" as it properly should have read in clause (b)(1) of the energy credit law (see Laws 1980, Chapter 607, Article I, Section 7, and Laws 1980, Chapter 509, Section 114).

E.6. The change here merely removes the words "if the taxpayer consents,". The purpose of this sentence is to remind the taxpayer that the Commissioner can consult with the Energy Agency to determine

whether or not certain equipment would qualify for the energy credit. The old law did not contain an exemption to the income tax secrecy provision and so, therefore, the words had to be added if the taxpayer consents to indicate that it was up to the taxpayer whether or not the Department could talk to someone outside to review information on his application for the energy credit. However, this problem has been changed when the 1980 legislature amended the energy credit law by providing that notwithstanding the income tax secrecy provision, the Commissioner could now request the Energy Agency for assistance. The Energy Agency would be covered by the provisions of the income tax secrecy law concerning information that they had received from a taxpayer for purposes of claiming the credit (see Laws 1980, Chapter 607, Article I, Section 7). These words are being deleted simply because they are no longer needed, they could be misleading, and they are no longer applicable.

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SEP 5 1980
OFFICE OF HEARING EXAMINERS

Rule 13 MCAR Section 1.6030 - Nongame Wildlife Checkoff.

Statement of Need and Reasonableness

The Nongame Wildlife Checkoff is a new item on the income tax returns. It was provided by the 1980 legislature in Laws 1980, Chapter 607, Article I, Section 24. It becomes effective for the 1980 income tax return. It allows a person to give all or part of their income tax refund or property tax refund to the Nongame Wildlife Fund in the Department of Natural Resources.

A. This part of the rule is to remind taxpayers that a designation of part of their refund to the Nongame Wildlife Management Fund does qualify as a charitable contribution deduction in the year that the designation was made. It qualifies as a charitable contribution deduction because the contribution was made to the State of Minnesota for public purposes as provided under Section 290.21, subd. 3(a). As provided in Section 290.21, subd. 3, a charitable contribution deduction is allowed in the year that the contribution is made. In this case, the contribution would be made in the year that the designation of the refund was made. In other words, when a taxpayer files his 1980 Minnesota income tax return in 1981 and designates part of his refund to the Nongame Wildlife Fund, the taxpayer has made a charitable contribution to the State of Minnesota in 1981 and will be able to reflect this as a charitable contribution when itemizing his deductions on his 1981 return.

B.1. This part of the rule allows a taxpayer to change his designation to the Nongame Wildlife Fund at any time that the taxpayer may file an amended return. Amended returns are allowed under Section 290.391. The designation to give part of the taxpayer's refund

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to the Nongame Wildlife Fund was an election by the taxpayer. Generally, these types of elections can be reversed at any time during which the statute of limitations is still open. Of course, if a taxpayer reverses a previous designation that was made, the taxpayer would need to also remember that if a charitable contribution deduction was claimed as an itemized deduction, this would now also have to be reversed because there no longer was a charitable contribution made and so an amended return would need to be filed for the year in which the charitable contribution was claimed. The rule also provides that since a taxpayer may make a designation on his original return, he also must be allowed to make a designation of his refund that he would be entitled to on an amended return. In other words, if a taxpayer filed an amended return claiming a refund, the taxpayer could designate part or all of that refund to nongame wildlife. This is because there really is no difference between the right of a taxpayer to make a designation on an original return and the right to make a designation on an amended return.

B.2. The law provides that this designation may be made by any person. Section 290.01, subd. 2 defines person to include "individuals, fiduciaries, estates, and trusts, and partnerships not included in the definition of corporations and may, where the context requires, include corporations as herein defined." This is the basis for including fiduciaries, trusts, and estates in this designation. A partnership may not make this designation because a partnership simply files an information return. There is no tax due on a partnership return and, therefore, there could be no refund and so no designation could be made. A corporation is not allowed to

make this designation because it does not appear that the context would require or include corporations. The context of the law is that a person may make this designation on an income tax return or on a property tax refund return. A corporation cannot make a property tax refund return. Also, it does not seem consistent really that a corporation would be making this designation. It would appear that there would be a difference in corporate structure between the tax department that completed the corporate tax return and the department that decides whether or not to make a certain charitable contribution to a worthy cause. Corporations are not included in making this definition because it does not appear that it was the intention of the legislature to include them. Corporations are, of course, always free to make a contribution to the State of Minnesota for nongame wildlife.

B.3. The rule provides that for those people who are renters or homeowners who are senior citizens or disabled and file their property tax refund as a credit on their income tax return, that they may designate an amount to the Nongame Wildlife Fund only on their income tax return. This is consistent because when they have filed their two returns as one, they really have only one refund coming. Also, it is possible to conceive of an instance where a person would have a property tax refund coming, designate the entire amount of that refund to nongame wildlife, and file this property tax refund return with their income tax return. On their income tax return they may have a balance due for income tax liability which could have been cancelled out by their property tax refund. In this way, this rule will allow the Department to require that the taxpayer pay his Minnesota income tax liability first before

making a designation to nongame wildlife.

B.4. The rule provides for priority between various conflicting claims. When a taxpayer completes his Minnesota income tax return and shows that a refund is due, there are four different ways that this refund may go. The rule gives the priority that each item has. This will be needed for purposes of administering these different programs. Once a taxpayer has computed his liability and shows that a refund is due, the first payment of any refund must be made to satisfy other unpaid Minnesota tax liabilities that are owed to the Commissioner of Revenue. This is to make sure that the taxpayer has satisfied his other tax liabilities with the Commissioner before the Commissioner grants him a refund. This authority for the Commissioner is provided in Section 290.50, subd. 5(b) and Section 290A.15 and Section 270.07, subd. 5. The next priority would be provided for a debt that the taxpayer owes to another state agency or to a county welfare agency. The Department would have been notified of the existence of this debt under the provisions contained in the Revenue Recapture Act in Laws 1980, Chapter 607, Article XII. Section 10 of the Revenue Recapture Act also provides that if two or more debts are submitted for setoff against a debtor's refund, the priority goes to any delinquent tax obligations which are owed to the Department of Revenue. Therefore, the statute already provides that between debts owed to another state agency and a debt owed to the Department that the priority will go to the Department of Revenue. It is reasonable to provide a high priority for debts owed to other state agencies to make sure that state debts get paid before the individual receives a refund. These two debts are paid before

the taxpayer can make a designation to nongame wildlife so that the taxpayer's debts are paid before the taxpayer may make a gift. The rule also provides that if a taxpayer designates some of his funds to be used to pay his estimated income tax liability for a future year and also makes a designation to the nongame wildlife that a conflict between the two designations will be resolved in favor of crediting the taxpayer's estimated tax liability. This credit is provided in Section 290.50, subd. 5(b). It is reasonable to provide a priority for estimated taxes to insure that the taxpayer will put aside funds to pay his future year's liability first before making a gift. The taxpayer may be assuming that this will be done and may be considering this when calculating the amount of income tax that he must pay. This would also avoid any penalties that may be assessed against the taxpayer for underpaying his estimated tax. Again, it is reasonable to provide that the taxpayer first pay his debts to the State of Minnesota before making a gift to the State.

B.5. This part of the rule provides what will happen administratively when adjustments are made to a taxpayer's return. A definition is provided for the term "machine audit." Basically, machine audit means adjustments that are made when the return is first processed from when it is filed until the date the refund is granted or an order assessing additional tax is issued. Machine audit means that audit that is done to catch routine errors, and this audit is conducted either by individuals or by the computer. Machine audit is defined to differentiate between an actual audit which may be done at a later time anytime within the period the statute

of limitations is open. If there is a machine audit and a taxpayer's overpayment is reduced, the rule provides a priority that shall be used to calculate how the reduction will be made. This is important so that both the taxpayer and the Department know what procedures will be used. First, the reduction will be made in the amount of the refund that was requested to be paid to the taxpayer and then the amount of the overpayment that the taxpayer had designated to the Nongame Wildlife Fund will be reduced. This priority was established because it was assumed that the taxpayer had desired to make a contribution to the Nongame Wildlife Fund and this desire should be honored. If the taxpayer decided after receiving the machine audit notice that he no longer desired to make this contribution, he could, of course, change his mind as provided earlier in these rules. A couple of examples may indicate how this would work if a taxpayer had a $50 overpayment on his return and decided to receive $10 as refund and to give $40 to nongame wildlife. Upon machine audit, it was discovered that the taxpayer had only a $45 overpayment. The taxpayer would still be allowed to make the $40 designation to nongame wildlife and would receive a $5 refund check. The taxpayer would, of course, be notified of this change. If the machine audit reduced the taxpayer's overpayment to $30, the taxpayer would be allowed to make only a designation of $30 to the nongame wildlife fund and receive no refund check. The alternatives to doing this are to bill the taxpayer for the difference in the designation between the amount that was designated to nongame wildlife and the amount of the overpayment that was allowed. In the example that was given when

the machine audit reduced his overpayment to $30, the taxpayer would receive a $10 bill. It is not felt that this is appropriate because what the taxpayer has done is give part of his refund as a gift and it does not seem appropriate to send the taxpayer a bill for this amount. It does seem wiser to merely inform the taxpayer of the change in the amount of the gift that was allowed. Another approach would be to simply state that the moment the amount of the overpayment was changed, that the designation to the Nongame Wildlife Fund was cancelled and so return the entire amount of the overpayment that was allowed to the taxpayer. This is justified on the basis that because the amount of the overpayment was changed, the taxpayer may also decide to change the amount that he contributed to nongame wildlife. However, this does not seem correct because the taxpayer has made a designation to nongame wildlife and this designation should be honored to the extent possible. Again, if a taxpayer decides to change his mind, he may do so. The final provision of this part of the rule provides that if machine audit eliminates the taxpayer's overpayment and assesses a balance due, the designation to nongame wildlife is cancelled. An example of this would be where the taxpayer claimed a $50 overpayment and decided to give $40 of this overpayment to nongame wildlife. If, upon machine audit, it was discovered that the taxpayer had made some errors and now owed the State of Minnesota $50 instead of receiving a $50 refund, the taxpayer would receive a bill for this $50 balance of tax that was due. The rule provides that in these cases the entire amount of the nongame wildlife designation would be cancelled and that the taxpayer would simply receive a bill for the additional tax that was due. An

alternative to this would be to send the taxpayer a bill for the tax that was due and also a bill for the nongame wildlife. However, it was felt that this would not be appropriate because the taxpayer had made this designation anticipating to receive a refund. If instead the taxpayer had to come up with funds to pay a balance of tax due and also a nongame wildlife designation, the taxpayer would simply decide to use his election and cancel his designation to nongame wildlife. This would simply provoke additional bookkeeping records for the Department of Revenue and also irritate the taxpayer by receiving a bill for what he thought was a gift to nongame wildlife.

B.6. The law provides that the taxpayer may designate all or part of his refund to nongame wildlife. The law does not anticipate a situation where a taxpayer may have a balance due to the State of Minnesota but may still desire to make a designation of some funds to nongame wildlife. The taxpayer in this situation would desire to make this designation on his income tax return instead of sending in a check to the Department of Natural Resources. What the rule here provides is basically that if a taxpayer has a balance due and he pays that balance due plus also his desired contribution to nongame wildlife, that the Department of Revenue will honor this designation. What the taxpayer in essence has done is overpay his tax liability creating a refund, which the taxpayer has already indicated he wants to be contributed to nongame wildlife. The rule provides that the taxpayer's manifest intent in this situation should be honored in that the taxpayer should not have his designation disallowed; however, the rule does provide that all of the tax balance due must be paid first, including any

penalty or interest. If a taxpayer had a $100 tax balance due and decided to contribute $20 to nongame wildlife, the taxpayer would need to enclose a check for $120 with his income tax return and the Department of Revenue would honor his designation. If, however, this taxpayer enclosed a check for only $110, the rule then provides that the tax balance due would be paid first and then the balance would be used to satisfy the amount designated to nongame wildlife. This, again, is based on the theory that the taxpayer should pay his debts to the state first before making a gift to the state. The final example would be if the taxpayer enclosed only a check for $90. The tax balance due was not paid in full; therefore, the Department would need to bill the taxpayer for the $10 of remaining tax that has not been paid. Based on the reasons that were given earlier, the Department would cancel the designation to nongame wildlife. It is reasonable, again, to presume that if the taxpayer wanted to make a gift to nongame wildlife, he would have fully paid that. Again, the taxpayer should fully pay his debts to the state first.

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OFFICE OF HEARING EXAMINERS

Rule 13 MCAR Section 1.6225 - Targeting.

Statement of Need and Reasonableness

Targeting was added to the property tax refund by Laws 1980, Chapter 607, Article III, Section 2.

A. The first sentence of this rule merely is an introduction to what targeting is. It explains that this refund is codified in Minn. Stat. Section 290A.04, subd. 2c. Targeting provides up to $300 of property tax relief in 1981 to homeowners whose property taxes have increased by more than 10 percent from 1980 after reduction is made for improvements and other state paid credits. This is simply a summary of what the law does. It is important to have this here to make sure that all people clearly understand what targeting is. The law states that targeting will apply "if the net property taxes payable on a homestead in 1981 increase more than 10 percent over the net property taxes in 1980 on the same property." This is the basis for the provision in this part that states that the claimant must have owned and occupied the property as the claimant's homestead on January 2, 1980 and on January 2, 1981. The definition of a homestead is provided in Section 290A.03, subd. 6 and it means the dwelling occupied by the claimant. Section 290A.03, subd. 13 defines property taxes payable as those which are on a home which the claimant owned and occupied on January 2 of the year in which the tax is payable. Using these definitions that are used in the law, it is reasonable to conclude that the same person must have lived in the same property and this property must have been that person's homestead for 1981 purposes and also for 1980 purposes. To provide otherwise would not allow

Agency Exh. No. 15
File No. DR-81-003-JL
Date 10-2-80

a sensible means to calculate a 10 percent increase. Targeting is contained in the property tax refund law and, therefore, it must use the same definitions as are used for the normal property tax refund. Section 290A.03, subd. 13 states that when a homestead is owned by two or more people as joint tenants or tenants in common, they may determine between them who will claim the property taxes payable. The rule incorporates this provision and provides that the tenants may also determine who will claim targeting. The rule does provide that the tenant who claimed the property tax refund in 1981 is the only one who can qualify for targeting. This is because joint owners have already decided between them who will receive the property tax relief. To not have this restriction would provide confusion and administrative difficulties because one joint tenant would have claimed the property tax refund and another joint tenant would have claimed targeting. Targeting also requires that the property tax refund credit reduce the property taxes that can be used to claim targeting on. Therefore, two different returns would need to be combined to determine if targeting was or was not applicable. To eliminate these difficulties and to make the system more functional, the rule does provide that since the tenants have made an election as to who will claim the property tax refund, this also applies to the tenant who claimed targeting. However, the rule does provide that between joint owners who decide that one will claim the refund in one year and the next will claim it in another year, that they will not be restricted. Therefore, the rule provides that a joint owner who claimed the property tax refund and targeting in 1981 need not be the same joint owner who claimed it in 1980. This is consistent with the provisions of the law which leave this election

up to the tenants. However, for a joint owner to claim targeting in 1981, the joint owner must have occupied that residence as his homestead on January 2, 1980. In other words, the rule provides that for a joint owner to claim targeting, the joint owner must qualify on his own for targeting. This provides consistency between homeowners who would claim targeting and other joint owners. The rule treats both of them alike.

B. New construction. The law provides that targeting "shall not apply to any increase in the net property taxes payable attributable to improvements made to the homestead." This rule attempts to provide workable methods for this legal provision. The rule provides any easy formula that can be used by the Department to audit a taxpayer's targeting claim and the rule also provides an easy method that the taxpayer may use to determine how much of his property taxes he cannot use because it is attributable to new construction. The first sentence of the rule simply restates that which is already provided in the law, namely, that the amount of the property tax attributable to improvements may not be claimed for targeting. The rule then provides the formula that is to be used to determine how much of the taxpayer's property taxes are attributable to improvements. In order to determine how much can apply, the rule provides that the property taxes be reduced by the state paid homestead credit and all other state paid credits. The property tax refund is not subtracted because it is based on income and it isn't shown as a direct reduction on the property tax statement. This is to make sure that what is being compared in the 1981 property taxes is the same as what is used for the 1980 property taxes. The 1980 property taxes that are used to determine whether or not a person qualifies for targeting have already been reduced

by the state paid homestead credit and other state paid credits which were paid in 1980. The ratio that is used is simply the assessor's estimated market value of the improvements is the numerator of the fraction and the assessor's estimated market value of the entire homestead including land is the denominator of the fraction. This will provide a fraction which can be used to determine how much of the net property taxes payable will qualify for targeting. The 1981 property tax statements have been modified to allow a place on these statements for the assessor to indicate how much market value is attributable to improvements. Rather than requiring the taxpayer to place a market value on these improvements, the rule provides that the burden is on the assessor to place a market value on these improvements. The reason for this is that the assessor is the one who has placed a market value on the entire property, and it is this valuation that is used for the property tax determination. Therefore, the same person who has valued the property for property taxes should value it for purposes of these improvements. This ratio, of course, is not quite precise but it is the simplest one that can be devised and it is the easiest one that can be used. The property tax law which provides for the assessment of homes in a city is contained in Section 273.13, subd. 7. This law provides that for property taxes payable in 1981 the first $25,000 of assessor's estimated market value shall be assessed at 16 percent. The next $25,000 shall be assessed at 22 percent, and the remainder of the market value shall be assessed at 28 percent. These three assessment ratios are applied to the assessor's estimated market value of the property to determine the total assessed value of the property. The county auditor will

then apply the mill rate for that area against the assessed value to determine what the property taxes payable on that property are to be. Because there are three different assessment ratios, a precise computation as to the exact amount of the property taxes that are attributable to the improvements may be difficult because three different ratios may need to be used. In order for the process to be as simple as possible for both the Department and the taxpayer, this rough calculation method is contained in the rule. The last sentence of this rule provides that the adjustment must be made for improvements if those improvements are first included in the calculation of the property taxes in 1981 even though the improvements were made in a prior year. What the rule is saying is that even though the improvements may have been made several years ago, if the first year that the assessor added these improvements in to the determination of his estimated market value of that property, this is the first year that they are subject to property taxes. Because this is the first year they are subject to property taxes, it is consistent with the law to provide that they not be included in determining whether or not a person is subject to targeting. They must be eliminated from the property taxes payable. The taxpayer has not had to pay property taxes on these improvements from the prior year and so, therefore, the increase in property taxes should not reflect improvements that the assessor has first detected even though these improvements may have been made some time previously.

C. The law already provides for an apportionment of the property taxes payable when part of the homestead was used for business purposes or was rented to another. Section 290A.03, subd. 13 provides that

no apportionment need to be made of the property taxes payable if part of the claimant's homestead is used for a business purpose if the claimant does not deduct any business depreciation expenses for that for the use of a portion of the homestead in the determination of federal adjusted gross income. Section 290A.05 provides that, "If a person occupies a homestead with another person or persons not related as husband and wife or as dependents, the property tax payable . . . shall be reduced as follows: If the other person or persons are residing at the homestead under rental or lease agreement, the amount of property tax payable . . . shall be that portion not covered by the rental agreement." Section 290A.03, subd. 6 defines homestead as "the dwelling occupied by a claimant as a place of residence and so much of the land surrounding it, not exceeding ten acres, as is reasonably necessary for use of the dwelling as a home . . . ." Therefore, the rule provides that a person who must make these allocations because part of the home was used for business or for rent must make the similar allocations for targeting. This, again, is to provide consistency in the amount of the property taxes payable that are being claimed. The same percentage reduction must be applied to net property taxes payable in 1980 and 1981. The rule also provides that the largest reduction that was made, whether it be 1980 or 1981, will be used. Again, the purpose of this is to make sure that what is being compared is the correct property taxes payable. It is not fair to allow a targeting credit for an increase in property taxes payable when the increase occurred simply because the owner decided not to rent out part of his home. The purpose of the law is to allow a targeting credit to people whose property taxes went up by more

than ten percent. The desire behind the legislation was to cushion the impact on the increase in estimated market valuation which would result because of the lifting of the limited market value. This was dictated by the Tax Court decision early in 1979 which declared the limited market value concept as unconstitutional. This part of the rule provides consistency to this and removes a distortion that could occur because of a change in the homeowner's use of his dwelling, not a change in the property taxes that have been assessed against the dwelling.

C.2. The rule here states that the property taxes that can be claimed are only those that were attributable to the claimant's homestead. This is a restatement of the earlier part of the rule and it also is based on the law which says that the property taxes payable must be based on the homestead. The rule then clarifies a possible problem by stating that on a duplex the property taxes payable are those that are attributable only to the homestead portion of the taxpayer. The portion of the property taxes that would be attributable to that part of the duplex that was rented out or that part of the duplex that was owned by another taxpayer cannot be claimed except by the person who actually lived in that part of the duplex.

C.3. The law provides that targeting is to be based on net property taxes payable. In other words, targeting will not be concerned with the gross amount of the property taxes that are involved. Targeting will not give a credit on top of other state credits. Targeting exists only after the other state credits have been deducted. This is why the law provides for the deduction of the

state paid homestead credit, the state paid wetlands credit, and the state paid native prairies credit. The state paid agricultural school credit and the taconite homestead credit are deductions that are made prior to the calculation of the state paid homestead credit. These two credits would already have been removed, along with the state paid homestead credit. The law also provides that the property tax refund credit that the taxpayer qualified for also be removed. However, the law does not specifically contain a provision for the 3CC credit that was provided under Laws 1980, Chapter 607, Article IV, Sections 3, 6 and 7. It is, of course, entirely possible that because this credit was also contained in the Omnibus Tax Bill along with the targeting provision that it was a legislative oversight. This rule clarifies the fact that this credit also is to be deducted. The essence of the law is that targeting is to be used only after all other state credits have been deducted. Then, the property taxes payable are to be compared. If the property tax payable in 1981 increases by more than ten percent over that in 1980, then targeting would apply. Based on these provisions, it is reasonable to assume that the legislature did intend that this state paid credit also be removed.

C.4. This provision is based on the situation where a taxpayer may have rented in 1979 and purchased a home at the end of 1979. The taxpayer would have qualified for a property tax refund credit on the home because he owned and occupied it on January 2, 1980. The 1979 property tax refund claim would also have included his rent that was paid in 1979. Therefore, the taxpayer might have received a larger property tax refund claim in 1980 because the claim

included both the property taxes payable and the rent that was paid. In order to remove this problem, the rule provides that the net property taxes payable in 1980 are to be reduced only by the amount of the property tax refund that is attributable to property taxes payable. In other words, the targeting credit is to apply only to an increase in property taxes on the home. It is, therefore, only proper that the property tax refund that reduces these property taxes be the property tax refund that is attributable only to the property taxes on the home. If the person was able to use the rent that was used for determining the property tax refund, it may be possible that the taxpayer received a larger property tax refund. This larger property tax refund would reflect as a larger reduction in his 1980 property taxes. This might mean that the taxpayer could qualify for targeting because of the rent that was paid instead of the increase in the property taxes on the home. The rule provides that the taxpayer's property tax refund is to be recomputed based on property taxes payable only. It is, of course, possible that the maximum amount of the property tax refund credit was received based on property taxes only and that the rent that was paid did not increase the taxpayer's refund. In that situation, there would need to be no reduction in the amount of the property tax refund that is to be deducted. However, the best way to determine this is to simply require the taxpayer to recompute the property tax refund. Again, the basic theory behind this part of the rule is that the other state credits that reduce the property taxes payable are attributable only to those property taxes payable. Therefore, the property tax refund that

is used to reduce the property taxes payable should be only that which is attributable to the homestead. It can be argued that to do anything else is to not follow the law when it says that the property taxes payable must be on the same property in these two years.

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED AMENDMENTS AND NEW RULES RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001-1.6004, 1.6020, 1.6030 AND 1.6225	STATEMENT OF COMPLIANCE WITH RULEMAKING PROCEDURES

I, Dale H. Busacker, do hereby declare that I have examined the rules and all related documents and that, based on my examination and my personal familiarity with the applicable procedures, the Administrative Procedure Act, the rules of the Office of Administrative Hearings, and the rules of the Attorney General have been followed. Any exceptions are noted below.

Dale H. Busacker

Division Attorney
Income Tox Division
296-3437

Dated 15 May 1981

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED AMENDMENTS AND NEW RULES RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001-1.6004, 1.6020, 1.6030 AND 1.6225)

AFFIDAVIT OF MAILING NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

STATE OF MINNESOTA)
) ss.
COUNTY OF RAMSEY)

Mary Lacho, being first duly sworn, deposes and says:

That on the 15th day of May, 1981, in the City of St. Paul, County of Ramsey, State of Minnesota, she served the attached Notice of Submission to the Attorney General by depositing in the United States mail at said City of St. Paul, a copy thereof, properly enveloped, with postage prepaid, on all persons and associations who requested notice that the rules in the above-entitled matter have been submitted to the Attorney General.

Mary Lacho

Subscribed and sworn to before me
this 15th day of May, 1981.

Kathleen D. Franssen

KATHLEEN D. FRANSSEN
NOTARY PUBLIC—MINNESOTA
RAMSEY COUNTY
My Commission Expires Nov. 9, 1984.

Notice of Submission to the Attorney General and Findings of Fact and Order Adopting Rules for 13 MCAR Sections 1.6001-1.6004, 1.6020, 1.6030 and 1.6225 were sent to the following on May 15, 1981:

Mr. Richard A. Berthelsen
Staff Counsel
National Football League Players Association
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STATE OF MINNESOTA

DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION OF PROPOSED AMENDMENTS AND NEW RULES RELATING TO INDIVIDUAL INCOME TAX AND PROPERTY TAX REFUND (13 MCAR SECTIONS 1.6001-1.6004, 1.6020, 1.6030 AND 1.6225	NOTICE OF SUBMISSION TO THE ATTORNEY GENERAL

Pursuant to your request and in accordance with Minnesota Statutes, section 15.0412:

PLEASE TAKE NOTICE that the above-captioned rules have been submitted to the Office of the Attorney General on this date, May 15th, 1981, for review as to form and legality. Pursuant to 1 MCAR Section 1.206 B., the Attorney General will not approve the rules for at least 10 calendar days after receipt to allow any person or association time to comment on the legality of the rules, after which that Office will complete its review. If you desire to comment on the legality of the above-captioned rules, you should direct your comments to the Office of the Attorney General, G-25 State Administration Building, 50 Sherburne Avenue, Saint Paul, Minnesota 55155, telephone (612) 296-7030. Please note that the above-cited rule of the Attorney General also provides that a copy of any written comments submitted to the Attorney General must be submitted simultaneously to this agency.

If you are interested in determining what changes, if any, were made in the proposed rules after the hearing and before submission to the Attorney General, you may contact Dale H. Busacker, Division Attorney, Income Tax Division, Centennial Office Building, Saint Paul, Minnesota 55145, telephone (612) 296-3439.

Attached please find a copy of the order adopting these proposed rules and approving their submission to the Attorney General.

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ADMINISTRATIVE
HEARINGS

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION
OF AMENDED RULES AND NEW RULES OF THE
DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL
INCOME TAX AND PROPERTY TAX REFUND
(13 MCAR SECTIONS 1.6001 TO 1.6004, 1.6020,
1.6030, AND 1.6225)
(HEARING EXAMINER'S DOCKET NO. DR-81-003-JL)

PETITION FOR
RECONSIDERATION

The Minnesota Department of Revenue petitions the Chief Hearing Examiner, Duane Harves, to reconsider his opinion of November 18, 1980 in this matter and to find that the rules proposed by the Department of Revenue are reasonable and authorized by Minnesota statute. Further, the Department of Revenue petitions the Hearing Examiner in this matter, Jon L. Lunde, to reconsider his conclusions and recommendations and to find that the Department has demonstrated the need and reasonableness of these proposed rules and that they are authorized by Minnesota statutes. Specifically, the Department requests that the Hearing Examiner reconsider and remove from Conclusion No. 3 exceptions A, B, and C, amend Conclusions 4, 6, and 7 and the recommendation accordingly based on the justifications contained in the attached memorandum.

At a minimum, the Department feels that the Hearing Examiner must reconsider his opinion and find that the Department does have a statutory basis for its actions.

Dated this 19th day of December, 1980.

Dale H. Busacker

Dale H. Busacker
Division Attorney
Income Tax Division

STATE OF MINNESOTA

DEPARTMENT OF REVENUE

IN THE MATTER OF THE PROPOSED ADOPTION
OF AMENDED RULES AND NEW RULES OF THE
DEPARTMENT OF REVENUE RELATING TO INDIVIDUAL
INCOME TAX AND PROPERTY TAX REFUND
(13 MCAR SECTIONS 1.6001 TO 1.6004, 1.6020,
1.6030, AND 1.6225)
(HEARING EXAMINER'S DOCKET NO. DR-81-003-JL)

PETITION FOR
RECONSIDERATION

Memorandum

In his report of November 14, 1980, the Hearing Examiner, Jon L. Lunde, found that the Department did not have statutory authority to promulgate rules in four areas. These four areas are as follows:

1. Nonresident athletes, see findings 30 to 37, conclusion 3(a).
2. Nongame Wildlife designation--allowing the taxpayer to reverse the designation, see finding 42 and conclusion 3(b).
3. Nongame Wildlife designation--allowing corporations to make the designation, see findings 43 to 45 and conclusion 3(b).
4. Targeting--3cc credit, see finding 50 and conclusion 3(c).

The Department of Revenue specifically objects to each conclusion and requests that the Hearing Examiner reconsider this matter and find that the Department has demonstrated the need and reasonableness for its proposed rules in this area and that the Department's position is based on Minnesota Statutes. The legal authority to request a reconsideration by the Chief Hearing Examiner is based on Minnesota Statutes Section 15.0412, subd. 4d as amended by Laws 1980, Chapter 615, Section 6.

Nonresident Athletes

This memorandum is intended to supplement and be in addition to the original Statement of Need and Reasonableness that was timely filed with the Hearing Examiner. This memorandum will not duplicate the original Statement of Need. The justification for the Department's proposed rule concerning nonresident athletes is contained on pages 75 to 84 of the original Statement of Need.

The Department does not object to findings 30 to 33.

In finding 34 the Hearing Examiner cites the California State Board of Equalization case titled Appeal of Dennis F. and Nancy Partee. The Department cannot agree with the logic contained in this case which states that California can use a games played formula for baseball, hockey and basketball players, but must use a duty days formula for football players. The important test to consider is what is the underlying service that is being provided. The Hearing Examiner in finding 31 quotes from the Statement of Need in which the Department stated the service is the athlete's personal service in the game. This is the very essence of the service. It makes no sense to say that one sport can count the training and preparation time that another sport may not. All sports should be treated equally and taxed on the basis of the service that is performed during the games. It also appears that the California court misapplied the mathematical principles when it stated, "Any discrepancies between the number of games and working days, therefore, appear in both the numerator and denominator of the apportionment formula and cancel each other out." If an athlete spent one day in California and was under a contract for a total of two days, the fraction would be one-half. If one day was added to both the numerator and the denominator, the fraction would now be two-thirds. What the court said does not work when a number is added to both the numerator

and the denominator of the apportionment formula. The mathematical principle allowing cancellation can occur only when a number is multiplied in both the numerator and the denominator. This is not the situation here.

It is interesting that even California will argue that the taxable event for football players is the game that is played in California. The game is the taxable nexus to California. In Appeal of New York Football Giants, Inc., California State Board of Equalization, February 3, 1977, paragraph 205-600 C.C.H. California Tax Reports on pages 14,897-34 and 14,897-35 the court said, "Appellant [New York Giants] contends that the compensation it paid to its employees should be attributed entirely to New York, and that the number of its payroll factor should therefore be zero. Respondent [California] argues that since appellant's team played one game in this state during the appeal year, a portion of the compensation paid by appellant should be attributed to California based on the number of working days its employees spent in this state. We agree with respondent." The issue in this case was the computation of the New York Football Giants' corporate income tax for California. The California court examined the three factors--sales, property and payroll. This quote is from the payroll factor analysis. California was not arguing that payroll should be attributed to California because the players were in California for two days and may have practiced there but, rather, California was arguing that since the Giants played a football game in California, California was entitled to allocate part of its payroll to that state.

The California court concludes, "Computing appellant's payroll factor in the manner prescribed in the Uniform Act would assign its entire payroll to New York. This would clearly not reflect the fact that appellant's team plays a number of games outside New York, including occasional games in California. Respondent's approach, on the other hand, is based on the

reasonable premise that compensation should be partially attributed to each state where the taxpayer's employees have rendered services."

In finding 35 the Hearing Examiner states that the nongame activities of professional athletes are a substantial part of their employment and an integral part of their job duties. Based on this finding by the Hearing Examiner, it would seem to necessitate that the Examiner would use the duty days formula for all athletes. However, this directly contradicts the statement contained in finding 37 in which the Hearing Examiner states that the games played formula may be used for all athletes with the exception of football players. What is the legal basis to argue that the nongame activities such as practice sessions and travel are a substantial part of a baseball player's employment, yet cannot be used to assign the baseball player's income? This, again, requires the Department to restate that the correct basis for assigning any professional athlete's income is based on the games that are played. The training and practice sessions of one athlete should not be assigned preferential treatment over those sessions for another athlete. This is also consistent with the New York State Tax Commission titled Bobby R. Murcer and Kay Murcer, C.C.H. New York State Reporter, Section 99-992X, (September 22, 1977) in which it was decided that a nonresident of New York who was a professional baseball player for the New York Yankees must use the games played formula to allocate his income to the State of New York.

The Hearing Examiner then states that in the Partee matter a California court found that practice sessions and travel were an important part of a football player's duties and required a duty days formula for apportionment in spite of contractual provisions to the contrary that then existed. The Hearing Examiner fails to explain how this California case can be squared with the Minnesota Supreme Court decision in Hughes v.

Spaeth, 207 Minn. 577, 292 N.W. 194 (1940), in which the court stated that "The law seeks to tax on a realistic basis, and the most practical method is to treat the employment the same as the contracting parties do." Page 578. Our own Minnesota Supreme Court has told us that we need to examine the contract. What, then, is the legal basis to disregard the contractual provisions?

The Hearing Examiner further concludes that travel and practice are in fact an integral part of the professional athlete's employment and are indispensable for the successful operation to which he was hired. In the original Statement of Need the Department argued in favor of a games played formula by saying that in this way the rule recognizes that a professional athlete is actually and primarily paid for his or her services in regular season games. This is the purpose of the existence of the athletic leagues and teams. The very essence of the team is that they will play games of athletic competition against other teams. The real worth of the team is in the playing of the games. The practice and pre-season games are incidental to their regular season performance. The games that are played is the point of all the publicity and training. Without these regular season games, there would be no need for either practice or publicity. It is perfectly reasonable to conclude that professional sports teams do not pay large amounts of money to athletes simply for their services during practice sessions, pre-season games, publicity events or otherwise. The athlete's only real worth to his team is in terms of his ability to play in the regular season's regular games.

In finding 36 the Hearing Examiner states that if Minnesota were to use a games played formula, it would result in double taxation of the

same income, especially the income of an athlete from California. The Examiner states as the reason that California grants a credit to athletes who reside there against taxes paid to other states based only on a duty days formula. The Hearing Examiner has incorrectly applied the law in this matter.

In his memorandum entitled "Income Tax Treatment of Nonresident Athletes" dated September 29, 1980, Thomas H. Borman on pages 11 to 13 of his memo states that there would be a substantial risk of double taxation if Minnesota adopted the games played formula. Mr. Borman bases his allegations on the fact that California limits their credit for taxes paid to other states to income which California determines is earned without the state. Mr. Borman cites the case of Christman v. Franchise Tax Board, 134 Cal. Rptr. 725 (1977). This case dealt with a California resident who was a shareholder in a Georgia Subchapter S corporation. Georgia law stated that nonresident shareholders of a Subchapter S corporation had their income from a Subchapter S corporation treated as personal service income and so taxed in Georgia. However, California stated that Subchapter S income is intangible income under California law and so not out of state income; therefore, California did not allow the tax credit for Georgia taxes that were paid.

The problem with using the Christman case is that this law does not apply in this situation. In the situation of a California resident athlete performing personal services in Minnesota, Minnesota law will apply. Under Minnesota Statutes Section 290.081(b), Minnesota will give a credit for California taxes paid on personal or professional services performed within Minnesota by a California resident taxpayer. Minnesota does reserve the right to levy taxes on this income where Minnesota's rates would be in excess of those imposed by California. Under Section

18002 of California law, California will give Minnesota residents who perform personal services within California a credit for taxes paid to Minnesota based on those personal services performed within California. The California and Minnesota laws are conditioned on the reciprocal provisions of the two states' laws. Basically, what the states have said is that they will allow this personal service income to be taxed in the state of residence, not in the state where it was actually earned.

The California reciprocal credit is broader than Minnesota's reciprocal credit. California's credit applies to any income earned in California by a Minnesota resident. However, the Minnesota credit only applies to personal service income earned in Minnesota by a California resident; therefore, the reciprocal provisions of the law would only apply to personal service income.

This clause contained in Minnesota law was enacted in Laws 1967, Chapter 42, and has been in effect since that time. Attached as Appendix No. 1 to this memorandum is a Schedule M-1CR, Credit For Taxes Paid To Another State Or Province. This schedule is the 1979 schedule to be used when filing a Minnesota income tax return. It shows the computations that are prescribed for computing the credit for a California resident.

Minnesota grants this reciprocal credit for personal service income earned in Minnesota to residents of Arizona, Indiana, Maryland, Michigan, New Mexico, Virginia and West Virginia. A resident of North Dakota or Wisconsin is subject to reciprocity and is not subject to Minnesota income tax on any personal or professional service income earned in Minnesota. A prior provision of this rule, Part F, explains in more detail the reciprocity provisions as they apply to residents of Wisconsin or North Dakota. It should be noted that the states that have gone to the duty days formula, namely, California, Michigan and Wisconsin, are either subject to

the reciprocal tax credit provision or to reciprocity.

The Hearing Examiner has applied the incorrect law, and finding 36 should be reversed. In this case, the law that would be applied would be the Minnesota law because Minnesota is the state that is granting the credit. California will tax the entire income of its resident, and Minnesota would grant the credit to the California resident for Minnesota taxes based on the amount of California taxes that were paid on the income taxed in Minnesota. There is no danger of double taxation in this situation.

In finding 37 the Hearing Examiner states that to tax football players on the basis of the games played formula is unreasonable and unauthorized by statute and should not be adopted. The Department of Revenue feels that this is an arbitrary interpretation of Section 290.17, subd. 2(1). Nowhere in that statute does the law state that a games played formula cannot be used for professional football players. The law simply states that income from nonresident taxpayers shall be assigned to this state to the extent that they perform services within Minnesota. The Department has decided on a reasonable method to apportion this income to Minnesota. The Hearing Examiner should find that the Department has made a reasonable interpretation of the law and has exercised its informed discretion in this matter. The Hearing Examiner ignores the fact that the Hughes case stated that the contract was to be examined to determine how the parties had treated their employment relationship. According to the NFL player contract, in part 6 the terms of payment are that the player will be paid his salary in equal weekly or bi-weekly installments over the course of the regular season period commencing with the first regular season game played by the club. If the player had previously reported to any NFL club's official pre-season training camp, he would be

paid 10 percent of his yearly salary under this contract in equal weekly installments over the course of the pre-season period, and 90 percent of his yearly salary over the course of the regular season games. The National Hockey League standard player's contract provides that the player's salary shall be paid in consecutive semi-monthly installments following the commencement of the regular season championship scheduled games. The Department requests the Hearing Examiner to apply the Hughes case to the contracts of the NFL and the NHL and determine that the games played formula of apportioning the income is a reasonable method for apportioning the income and is also authorized by the statute.

The Hearing Examiner states that the Department could use the games played formula for all professional athletes but must use the duty days formula for football players. The Hearing Examiner fails to give his statutory basis for a games played formula for baseball, hockey or soccer players. On the one hand, the Hearing Examiner has stated that the games played formula is unreasonable and unauthorized by statute and, on the other hand, the Hearing Examiner states that the Department could find that the games played formula is reasonable and authorized. The Department suggests to the Hearing Examiner that the more proper and consistent method would be to find that the games played formula is reasonable and is authorized by the statute. To use a hybrid method would subject the Department to arguments of discrimination from the athletes for which the Department is using the games played formula. The Hearing Examiner also fails to explain why the training and practice time and travel time of baseball, hockey and soccer players is not an important part of their contract but why this time is such an important part of a football player's contract. Again, it is more reasonable to view what the essence of the teams is, namely, that the teams are there to engage in professional

sporting events in competitive games against each other.

Towards the end of the finding the Hearing Examiner states that a duty days formula is consistent with known state regulations. Because these regulations are not cited, it must be assumed that the Hearing Examiner is citing regulations of other states. However, the Hearing Examiner does not explain why he has not cited the Murcer case from New York, which was cited on page 82 of the original Statement of Need and Reasonableness. In this case, the New York Tax Commission decided to use the games played formula for allocating income to the State of New York for a nonresident of New York who was a professional baseball player.

The Hearing Examiner cites Revenue Ruling 76-66 and states that if the Department uses a duty days formula, the Department will be consistent with this Revenue Ruling. Revenue Ruling 76-66 deals with a Canadian citizen who is also a resident of Canada who plays hockey for a professional team based in the United States. The professional team does play some games in Canada. The IRS decided that the proper way to allocate the income within the United States and outside the United States was based on a duty days formula for the regular season. The IRS stated that the taxpayer was to count all days during the regular season, including those days between games, to determine the number of days that the taxpayer was on a duty to perform for the team. The IRS did not count the days spent in the training camp. The Hearing Examiner failed to explain the inconsistencies between stating that, on the one hand, the Department should follow the Revenue Ruling of the Internal Revenue Service which stated that they would use duty days for a Canadian hockey player and, on the other hand, stating that the Department could use a games played formula for professional hockey players. The Examiner also fails to explain the inconsistency between requiring the Department to follow the Revenue

Ruling from the Internal Revenue Service which did not count time spent in pre-season training camps while, at the same time, determining that time spent in pre-season and in training was a substantial part of the professional player's employment and dictated the necessity to use the duty days formula for football players.

In conclusion, the Department submits that the games played formula is in accordance with Minnesota Statutes and is a reasonable method to apportion to Minnesota the salary that an athlete is paid for his performance in the athletic games. The players' performance in games is the very reason and essence of their contract with the teams. The Department requests that the Hearing Examiner reconsider his decision and allow the Department to adopt the proposed rule as printed in the State Register and as amended (see finding 30).

Nongame Wildlife Designation - Allowing the Taxpayer to Reverse the Designation

In finding 42 and conclusion 3(b), the Hearing Examiner found that the provision of the rule that allowed a taxpayer to revoke his designation of his refund to the Nongame Wildlife Fund in DNR was not authorized by the statute. The Hearing Examiner found that these designations should be irrevocable. The Department of Revenue requests that the Hearing Examiner reconsider his decision and find that the rule as proposed by the Department is authorized by statute and is reasonable. Justification for the Department's proposed rule is contained on pages 96 and 97 of the original Statement of Need.

In the first paragraph of finding 42, the Hearing Examiner states that the nongame wildlife designation statute does not provide for a revocation of the designation. There was no reason for the legislature to place this in the law concerning nongame wildlife. The nongame wildlife section was codified as part of Chapter 290, which is the income tax chapter. The other provisions of the income tax law would naturally apply unless they were specifically made to be nonapplicable. The designation is to be made directly on the income tax or property tax refund return. The provisions providing for the computation of a refund and the statute of limitations on receiving a refund are applicable because they are also contained as general statutes in Chapter 290. The general provision contained in Section 290.391 allowing amended returns is also applicable as the nongame wildlife designation statute was added as one statute in the entire body of law contained in Chapter 290. The legislature did not clearly provide that amended returns were not to be allowed in the area of nongame wildlife designation. The legislature has not spoken on this matter so it is reasonable to assume that the legislature

intended that the entire body of law in Chapter 290 would apply to these designations.

The Hearing Examiner also states that the concept of a revocable gift is inconsistent with existing law. In Section 1 of the gifts topic of Volume 8A of Dunnel's Minnesota Digest, it is stated that the legal elements of a gift are as follows: (1) delivery, (2) the donor intends to make a gift, and (3) that there is an absolute disposition to the donee of the property. The critical issue in this matter is the donor's intention to make a gift. It is clear that if the donor makes a mistake and incorrectly reads the information on the income tax form or instructions and places his refund amount on the wrong line, he would have made a designation to the Nongame Wildlife Fund; however, he did not intend to make this designation. The rule allows the taxpayer to receive his money back because he made a mistake. The fact that he made a mistake negates the element of intention which is necessary to prove a gift; however, the Hearing Examiner does not allow a gift to be revoked in these situations. The Hearing Examiner states that the designations are irrevocable without considering the effect of mistake of fact on the necessary donative intention. The Department's proposed rule is a common sense approach to determine whether or not the taxpayer has made a gift. Rather than fighting with the taxpayer over whether there has been the necessary donative intent, the Department would simply honor the taxpayer's request to amend the designation.

The Department is also concerned that many taxpayers may confuse this designation with the designation of $2 to the State Election Campaign Fund. Taxpayers are used to this designation on their state and federal returns. These amounts do not reduce their refund.

The Hearing Examiner also states that another reason the nongame wildlife designation cannot be reversed is because the money has been appropriated to the Department of Natural Resources. The statute states that the amounts collected from the nongame wildlife designation are to be annually appropriated from the general fund to the Commissioner of Natural Resources for the Nongame Wildlife Management Fund. The statute does not provide how this money is paid to the general fund. This is because the nongame wildlife designation is part of Chapter 290, and the money would be paid to the general fund under the provisions of Section 290.62. The Department is proposing that when the taxpayer reverses his designation that the Department would simply apply a setoff against future monies that would be given to the Department of Natural Resources. This is consistent with the treatment of the payment of refunds through the gas tax credit on the income tax return by applying a setoff against other gas tax receipts as required under Section 296.18, subd. 8, and also the payment of refunds on the Minneapolis stadium liquor sales tax contained in Laws 1979, Chapter 203, Section 11. No special provision for the payment of these refunds is contained in the statute because the ordinary provisions relating to the payment of a claim for refund contained in Section 290.50 would apply, and the setoff against the funds that would be transferred to the Department of Natural Resources would also apply. It appears that the Hearing Examiner may be advocating a dangerous principle in stating that the Department has no authority to pay a claim for refund because the funds have already been appropriated. The inconsistency is that a taxpayer can file a claim for refund on his 1977 individual income tax return. Presumably that money was appropriated to the various state agencies. Also, this claim for refund based on 1977 is several fiscal years removed from the current fiscal year. Neverthe-

less, the Department does have the authority to pay these refunds and an amount sufficient is appropriated under Section 290.50, subd. 1(g). The same logic should apply to the nongame wildlife designation and allow the taxpayer to pay these claims for refund.

The Hearing Examiner states that a mere change of mind regarding a gift is not in any sense of the word an error and does not allow the taxpayer to file an amended return because the error does not affect one's tax liability. Section 290.391 which allows amended returns states that the taxpayer can file an amended return any time he finds that the return "as originally filed is in error." The law continues by saying that the taxpayer can correct that error by filing an amended return. Nowhere does the law say that the error must be an error that affects the taxpayer's tax liability. The law would allow a taxpayer to file an amended return if their address is changed since the date the return was filed and they would desire to have a more up-to-date address for their refund check to be mailed or for any further correspondence. The statute would also allow a taxpayer to file an amended return to claim the $2 state election campaign checkoff. The Hearing Examiner has too tightly restricted the interpretation of Section 290.391.

In conclusion, the Department of Revenue requests that the Hearing Examiner reconsider the findings contained in Section 42 and find that the rule as proposed by the Department of Revenue is reasonable and is authorized by the statute. It should be noted that as the Hearing Examiner mentions in finding 41, this rule regarding the nongame wildlife designation was not the subject of any adverse public comments.

Nongame Wildlife Designation
Allowing Corporations to Make the Designation

In findings 43, 44 and 45 and conclusion 3(b) the Hearing Examiner found that there was no statutory authority to support the proposed rule that would prevent a corporation from using the nongame wildlife designation. The Department's justification for this provision is contained on pages 97 and 98 of the original Statement of Need.

The Department's request for a reconsideration by the Hearing Examiner is based on two points: (1) The statute simply is not that clear and the Department feels that it has made a reasonable decision in this area. The Department requests that the Hearing Examiner follow and accept the Department's informed discretion in making this decision. (2) The Department feels that it is very important for the Hearing Examiner to remember that there was no adverse public comment by anyone--corporation, individual or otherwise--concerning this section.

In finding 43 the Hearing Examiner states that the proposed rule preventing corporations from making the election is at variance with the plain language of the 1980 law. The Department must respectfully dissent. The language of the Nongame Wildlife Checkoff contained in Section 290.41 states that every person who files an income tax return or property tax return may make the designation. The language does not say that every individual, estate, trust and corporation may make the designation. By using the word person, the legislature did not make the requirement as clear as it could have been. The definition for person is contained in Section 290.01, subd. 2. The plain language of this statute includes individuals, fiduciaries, estates and trusts within the definition of a person, and the Department has followed this by making the necessary changes on these forms. However, the statute state that the definition of the term person "may, where the context requires, include corporations

. . . ." How can the Hearing Examiner say that the language is so plain when the statute itself gives the Department discretion because it says that the term person only includes corporation when the context requires. This is clearly an area in which the Department should be allowed to make a reasonable decision and exercise its discretion.

It must be remembered that corporations are always free to make a contribution to the State of Minnesota for nongame wildlife whether or not this designation is on their income tax return. The nongame wildlife designation gives a person the opportunity to donate part of the refund to the Department of Natural Resources. Most income tax refunds are generated because of overwithholding and rent credit refunds. Corporations are not subject to withholding. Corporations pay an estimated income tax during the year; therefore, the amount of refunds paid to corporations is far less than the percentage of refunds that are paid to individuals. Corporations do not receive rent credit refunds. In finding 44 the Hearing Examiner concludes that the obvious purpose of the legislation is to require that corporations be included in the definition of person and be allowed to make the designations. For the reasons already stated, the Department objects to this conclusion because the purpose is simply not that obvious. If the legislature had wanted to make it that obvious, why didn't they use the words individuals, fiduciaries, estates, trusts and corporations instead of the word person? Instead of using the word person, why didn't the legislature use the word taxpayer? If the legislature had used the word taxpayer, this would have made it clear that the legislature had intended to include corporations.

In finding 45 the Department requests that the Hearing Examiner strike the first sentence, based on the arguments that have already been submitted for reconsideration. The Department accepts the Hearing Examiner's suggestion for change contained in the second sentence of this finding.

Targeting - 3cc Credit

In finding 50 and conclusion 3(c) the Hearing Examiner finds this statute does not authorize the Department to require that the 3cc credit be a reduction when computing the net property taxes payable for purposes of the targeting credit. The Department's justification for the proposed rule is contained on pages 111 and 112 of the original Statement of Need.

In this matter the Department again requests that the Hearing Examiner reconsider his decision and allow the Department to proceed with the provision of the proposed rule. The Department feels that requiring the subtraction of the 3cc credit is reasonable and is consistent with the law. The Department requests that the Hearing Examiner allow the Department in this area to exercise its informed discretion. The Department feels quite strongly that because both the targeting and the 3cc credit provisions were contained in the Omnibus Tax Bill that the matter is a problem of legislative oversight due to the long hours and the late nights that were involved when the Omnibus Tax Bill was drafted.

The Department's position requiring the deduction of the 3cc credit is consistent with the law that requires all other state paid credits to be deducted. The targeting law itself specifically says that it will pay a refund based on the net property taxes payable. The only reasonable definition for net property taxes payable would be after other state paid credits have been deducted. It is not reasonable to assume that the state will grant the targeting credit based on the net property taxes payable including another state paid credit. What purpose would it serve for the state to pay an additional credit to a taxpayer that can be calculated by using the amount of another state paid credit? This is an absurd result. This result would occur if the 3cc credit is not subtracted

because the net property taxes payable in 1981 would exceed the net property taxes payable in 1980. If the 1981 taxes are more than 10 percent higher than the 1980 net taxes, the targeting program will pay 50 percent of the difference up to $300. If the real net property taxes payable have stayed the same, it can then be clearly seen that the targeting credit would be based on the 3cc credit.

An example of what would happen if the Department followed the Hearing Examiner's interpretation is as follows:

Assume: Disabled 3cc qualifier living in a city:

Home - Market value for property taxes payable in 1980		$50,000
property taxes payable in 1981		55,000
Income - $5,000		

1980 Tax Computation

Market value	$50,000
Assessed value (5% of first $28,000, 30% on the balance)	8,000
Gross tax (assumed mill rate of 100)	800
Homestead credit (50% up to $550)	400
Net Tax	$ 400
Property Tax refund	371
Out of pocket expenditure	$ 29

1981 Tax Computation

Market value		$55,000
Assessed value for normal city homeowner (1st $25,000 at 16%, 2nd $25,000 at 22%, excess at 28%)		10,900
Gross tax (100 mills)		1,090
3cc assessed value (1st $33,000 at 5%, next $17,000 at 22%, excess at 28%)	$6,790	
3cc gross tax (100 mills)	679	
3cc credit ($1,090 - $679)		411
Net after 3cc credit		$ 679
Homestead credit (58% up to $650)		393.82
Net property tax payable		$ 285.18
Property tax refund		252.18
Out of pocket expenditure		$ 33

Targeting credit according to Hearing Examiner's finding:

1981 Gross property tax without 3cc credit	$1,090	
1981 Homestead credit	393.82	
1981 Property tax refund	252.18	
1981 Net property tax		$ 444

1980 Gross property tax	$ 800	
1980 Homestead credit	400	
1980 Property tax refund	371	
1980 Net property tax	$ 29	
Multiply 1980 net property tax by 1.1		$ 32
Subtract $32 from $444		412
Targeting is 50% of $412 up to $300		$ 206

Result
Targeting credit of $206 less out of pocket amount of $33 equals a NET PROFIT of $ 173

Can anyone be serious in advocating that result? When two laws are passed simultaneously, they must be reconciled if possible (Sections 645.17 and 645.33). The definition of net property taxes payable, if given a reasonable interpretation, would accomplish what was intended, namely, compensation for substantial net increases in out of pocket expenditures for property taxes.

The Department contends that the correct Targeting credit is 50¢. Under the Department's proposed rule, there would be no net profit.

The 3cc credit provided under Laws 1980, Chapter 607, Article IV, Sections 3, 6 and 7, was enacted into law to shift the burden of the reduced property tax classification granted to blind and disabled people from the neighbors of that disabled person to the state at large. Under the prior law, the fact that a blind or disabled person received a lower property tax classification reduced the property tax that that person needed to pay. Because that blind or disabled person's assessed valuation was less, this reduced the total assessed valuation in the locality and the difference was made up by increasing the mill rate. This has the effect of shifting the property tax burden from the blind or disabled person to the other people in the locality. In the 1980 law the legislature said that this was not fair. The legislature said that the State of Minnesota has provided for this property tax classification and so all the taxpayers of the State of Minnesota should bear the burden of the lower property taxes for that blind or disabled person. This is the philosophy

behind the enactment of this law.

The Department wishes to submit an additional argument that would require the reduction of the 3cc credit when computing net property taxes payable. The statute itself contained in Section 290A.04, subd. 2c states that net property taxes payable means property taxes payable after reduction is made pursuant to Section 273.13, subd. 7. The 3cc law providing for the reduced assessment classification for property tax purposes is contained in Section 273.13, subd. 7. This reference in the targeting law to subd. 7 must be given two meanings. The first meaning is that it requires that net property taxes payable be calculated after subtracting the state paid homestead credit which is computed for city homeowners under the provisions of subd. 7. The second meaning that must be given to this reference of subd. 7 is that the 3cc credit is to be included. In order to understand this clearly, you must refer back to the previous paragraph. The 1980 law did not increase the taxes that are actually paid by a blind or disabled person. The blind or disabled person pays the taxes that are calculated under subd. 7 after the reduction for other credits that are specifically listed in the targeting law. However, the county is told to calculate the property taxes payable as if that blind or disabled person were a normal homeowner. The county will be reimbursed the difference from the state. In order to clearly reflect what is happening, the county will show the reduction as the 3cc state paid credit. The result is the same for the homeowner. The Department submits that it can use this provision to argue that for a blind or disabled person, the net property taxes must be those property taxes that are computed under subd. 7. This would remove the 3cc credit from the computation of the property taxes. The Department feels that the reference to subd. 7 contained in the targeting law in fact requires that the Department

reduce the property taxes payable by the 3cc credit. This would be the only way that the Department could comply with the legislative mandate that property taxes be reduced by those reductions contained in subd. 7.

The Department requests that the Hearing Examiner reconsider his decision in this matter and find that the Department's proposed rule requiring the reduction of the property taxes by the 3cc credit in order to compute the targeting credit is reasonable and is authorized by the statute.

Appendix No. 1

Credit For Taxes Paid To Another State Or Province

Schedule M-1CR

Last Name | Your Social Security Number

Tax Year 19__

Resident

1	Income taxed both in Minnesota and another state or province	1
2	Minnesota gross income (line 6 of Form M-1)	2
3	Divide line 2 by line 1	3 %
4	Minnesota tax (line 12 of Form M-1)	4
5	Personal and dependent credits (line 24 of Form M-1)	5
6	Subtract line 5 from line 4	6
7	Multiply line 6 by the percentage on line 3	7
8	Tax owed to the other state or province	8
9	Credit for taxes paid to another state or province (fill in the amount from line 7 or 8, whichever is smaller. Also fill in on line 25 of Form M-1)	9

Nonresident

10	Income earned in Minnesota	10
11	Total income on the return of your state of residence	11
12	Divide line 10 by line 11	12 %
13	Tax owed to the other state	13
14	Multiply line 13 by the percentage on line 12	14
15	Tax owed to Minnesota (subtract line 24 of Form M-1 from line 12 of Form M-1)	15
16	Credit for taxes paid to another state (fill in the amount from line 14 or 15, whichever is smaller. Also fill in on line 25 of Form M-1)	16

Instructions

Who is Eligible for This Credit — If you pay taxes both in Minnesota and another state or Canadian province, you may be eligible for this credit. No credit is allowed for income taxes paid to any city, the federal government, or foreign countries (except Canadian province taxes).

If you are a Minnesota resident who pays taxes in Minnesota and another state or province, you are eligible unless the income being taxed is for wages you earned in Arizona, California, Indiana, Maryland, Michigan, New Mexico, Virginia, or West Virginia. North Dakota and Wisconsin do not tax wages of Minnesota residents.

Residents of Arizona, California, Indiana, Maryland, Michigan, New Mexico, Virginia, and West Virginia may be eligible if that state taxes wages earned in Minnesota. Residents of any other state or province cannot get this credit. Residents of North Dakota and Wisconsin can subtract Minnesota wages on line 5 of the M-1 return. For more information on North Dakota and Wisconsin residents, see page 2 of the M-1 instructions.

Change of Residence — If you changed residence during the year, fill out a separate schedule for each state you lived in. Each schedule should contain the income and tax that apply to the part of the year you lived in that state.

Filing Status — If you are married you must figure the amount of credit for each spouse using a separate Schedule M-1CR for each of you. If you are filing separate returns, fill in your credit on line 25 of your M-1 return, and your spouse's credit on line 25 on the spouse's M-1 return. If you are filing a combined or joint return add your credit to your spouse's credit and fill in the total on line 25 of Form M-1.

Attachments — Attach this schedule to Form M-1, along with a copy of the return from the other state or province, when you file your Form M-1.

Computation of Credit

Line 1 — Include both wages and non-wage income.

Lines 8 and 13 — Fill in the amount owed to the other state before any withholding or estimated tax.

Line 11 — Total income is the income amount that comes before the deduction for federal tax and itemized deductions.