

Answer: No. The cotton cloth underpads are not cloth diapers within the common or ordinary meaning of that term. Therefore, the gross receipts from the sale of the cotton cloth underpads are not exempt under sec. 77.54(40), Wis. Stats., as created by 1989 Wisconsin Act 335.

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2. Court Ordered Bankruptcy Sales

Statutes: Sections 77.51(9) and 77.54(1) and (7), Wis. Stats. (1987-88).

Wisconsin Administrative Code: Section Tax 11.50(4)(c), December 1987 Register.

Background: Recently, the U.S. Supreme Court in the case of *California State Board of Equalization v. Sierra Summit, Inc.* 104 L.Ed2d 910 (1989) overruled a 1951 U.S. Court of Appeals decision and held that both the sales and use tax do not discriminate against bankruptcy trustees or those with whom they deal because a purchaser at a judicial bankruptcy sale is required to pay only the same tax as if the property had been purchased from someone else. As a result of this decision, individual estates and trustees may now need to obtain seller's permits and collect and remit tax on such transactions.

The *Sierra Summit, Inc.* decision states the trustee in bankruptcy is not an arm of the federal government, but is instead a representative of the debtor's estate. The court concluded that a liquidation sale by the trustee in bankruptcy is a taxable sale for sales and use tax purposes.

Depending on the facts and circumstances involved the bankruptcy trustee's sales may qualify as exempt occasional sales under secs. 77.51(9)(a) or (am) and 77.54(7), Wis. Stats. (1987-88).

The occasional sale exemption generally excludes sales of motor vehicles, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semitrailers, all-terrain vehicles or aircraft registered or titled, or required to be registered or titled in this state, and boats registered or titled or required to be registered or titled, in this state or under the laws of the United States.

Facts and Question: The Bankruptcy Court appoints a trustee to liquidate a debtor-retailer's assets. The assets to be liquidated include the tangible personal property that the debtor-retailer used to conduct its trade or business, the remaining inventory on hand, and several delivery vehicles.

The trustee advertises the vehicles in several large city newspapers to solicit offers. These vehicles are sold to the person making the highest offer.

The trustee hires an auction company to conduct an auction sale of the property previously used by the debtor-retailer in conducting its trade or business (other than the vehicles) and the inventory.

The bankruptcy trustee does not hold and is not required to hold a seller's permit and the debtor-retailer has properly surrendered its permit. Which of these sales are subject to sales and use tax?

Answer: 1. The purchasers of the vehicles must pay the sales or use tax prior to registering or titling the vehicles in this state.

2. Items of inventory which were purchased by other retailers, to be placed into inventory, may be purchased without tax as property for resale.

3. The auction company's receipts from the liquidation sales of the insolvent debtor's tangible personal property that was used to conduct its trade or business and inventory items not sold for resale are subject to tax. The auction company collects and remits the sales tax to the state.

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3. Customer May File Claims for Refund of Sales and Use Taxes

I. Background

The Court of Appeals, District IV, in its decision in *Dairyland Harvestore Inc. vs. Wisconsin Department of Revenue; Badgerland Harvestore Systems, Inc., f.k.a. Badgerland Harvestore Products vs. Wisconsin Department of Revenue*, dated August 17, 1989, concluded "that the legislature intended by its amendment to sec. 77.59(4), Stats., that all persons who have paid an excess sales tax, whether to a retailer or to the department, may file a claim for refund. We specifically infer that the legislature intended through its amendment to permit customers who paid excess sales taxes to retailers to claim tax refunds from the department."

The court also stated "We recognize that sec. 77.59(4), Stats., can cause administrative difficulties. Refund claims may be filed both by the customer who paid the tax to the retailer and by the retailer who paid it to the department, but presumably the legislature was aware of this problem. Section 77.59(8m) provides a partial solution. It permits retailers to file claims 'if the applicant's customers have filed valid claims for refunds with the applicant and if the refund is passed along to those customers.' The assumption is that those customers will not file claims with the department. The department should be able to develop a procedure by which the customer who files a claim with the department must show that the retailer will not also file a claim."

On November 7, 1989, the Wisconsin Supreme Court denied the Department of Revenue's petition to review the *Dairyland Harvestore, Inc.* case. The result of this Supreme Court action is

that the Court of Appeals decision dated August 17, 1989 is binding upon the Department of Revenue.

II. Policy as a Result of Court of Appeals Decision

Note: This policy applies retroactively to all years open under the statute of limitations as well as prospectively. This policy applies to both Wisconsin sales and use taxes and county sales and use taxes.

A. Statute of Limitations for a Customer Filing a Claim for Refund of Sales and Use Taxes

1. *Four Years:* A customer has 4 years from the unextended due date of the customer's franchise or income tax return to file a refund (or if exempt, within 4 years of the 15th day of the 4th month of the year following the close of the calendar or fiscal year). Sec. 77.59(4), Wis. Stats. (1987-88).

Example: The customer erroneously paid \$100 of sales tax to the seller in January 1989. The customer files its corporate franchise tax return on a calendar year basis.

Since the \$100 of sales tax was paid in the 1989 calendar year, the customer has 4 years from March 15, 1990 (unextended due date of 1989 return) to file a claim for refund with the department.

If the customer paid for the transaction by his or her credit card, the sales tax is considered paid on the date the seller accepts the credit card as a method of payment from the customer; not when the customer remits payment to the credit card company for the purchase. If the sale is an installment sale between the customer and the seller, a prorata portion of the sales or use tax is considered paid with each installment.

2. *Claims Filed During Extension Period to Audit:* If the time for issuing an audit determination is extended by agreement between the taxpayer (customer) and the Department of Revenue, the customer may, during the extended time period, file a claim for refund of sales and use taxes erroneously paid to a seller.
3. *What if Seller Did Not Remit Tax to the Department of Revenue?* The customer may file a claim for refund with the Department of Revenue for tax erroneously paid to a seller registered to collect Wisconsin sales or use tax, regardless of whether the seller remitted such tax to the Department. If a customer erroneously paid tax to an unregistered seller who did not remit the tax to the Department, a claim for refund may not be filed with the department.
4. *What if a Field Audit Determination Has Been Made Prior to the Customer's Claim For Refund?* If a sales or use tax field audit determination has been issued to the customer covering the period in which the customer erroneously paid

sales tax to a seller, the customer may not file a claim for refund, after the date of the audit determination, for sales tax erroneously paid to the seller.

Sections 77.59(4)(a) and (8m), Wis. Stats. (1987-88), do not apply with respect to claims for refund by customers.

Example: A customer is field audited for sales and use tax for years 1985-1988 and an audit determination for \$1,000 was received by the customer on June 10, 1989. An appeal (petition for redetermination) was not filed with the department's Appellate Bureau. Customer erroneously paid sales tax of \$200 to a seller in 1986, however, this overpayment was not addressed in the determination dated June 10, 1989.

The customer may not file a claim for refund for the \$200 with the department (1) under sec. 71.59(4), Wis. Stats. (1987-88), because a field audit determination has been made, or (2) within 2 years of June 10, 1989; under sec. 77.59(4)(a), Wis. Stats. (1987-88), because the \$200 tax paid by the customer to the seller was not included in the field audit determination received on June 10, 1989.

5. *What if an Office Audit Determination Has Been Made Prior to the Customer's Claim For Refund?* If a sales or use tax office audit determination has been issued to the customer covering the period in which the customer erroneously paid sales tax to a seller, the customer may file a claim for refund for sales tax erroneously paid to the seller, provided the transaction on which sales/use tax is being claimed for refund was not adjusted in the office audit determination.

Example: An office audit determination covering the January, 1989 monthly sales and use tax return was received by a customer on July 1, 1989 for failing to report use tax of \$50 on a desk purchased from an Ohio retailer. An appeal (petition for determination) was not filed with the department's Appellate Bureau. Customer erroneously paid sales tax of \$100 to a seller in January 1989 on the purchase of a manufacturing machine.

The customer may file a claim for refund of the \$100 of tax paid to the seller within 4 years of the unextended due date of the customer's Wisconsin income or franchise tax return, under sec. 77.59(4), because this item was not adjusted in the office audit determination.

B. Rate of Interest and Date For Computing Interest

Interest on refunds will be computed at 9% per annum, from the last day of the month following the month in which the tax was paid by the customer to the seller.

Example: If a customer paid \$50 tax to the seller in January, 1990, interest at 9% per annum will be computed from February 28, 1990.

C. Customer and Seller May Not Both Obtain Refunds of Sales Tax

Refunds will not be allowed to both the customer and seller for the same tax.

Example: Customer erroneously paid \$100 of sales tax to the seller when purchasing a machine, which qualifies for the manufacturing exemption. Customer files a timely claim for refund on July 1, 1990 for the \$100 of tax. Seller files a claim for refund on August 1, 1990 for this same \$100 of tax on the sale of this manufacturing machine to the customer.

Since the customer's claim was filed before the seller's claim, only the customer's claim will be allowed.

D. Effect of Retailer's Discount on Customer's Claim for Refund

A "retailer's discount" allowed to a seller under sec. 77.61(4)(c), Wis. Stats. (1987-88), does not affect the amount of refund a customer is entitled to receive from the Department of Revenue for tax erroneously paid to a seller.

E. Offsetting Customer's Refund Against Any Other Taxes Owing the Department

The Department of Revenue has authority to apply any sales or use tax that was incorrectly paid by a customer to a seller, against a customer's other taxes that the customer owes the department. Sec. 77.59(5), Wis. Stats. (1987-88).

F. Customer Overpayments Discovered in Audits

If a Department of Revenue audit of a customer determines that the customer erroneously overpaid tax to a seller, the auditor will include this overpayment in the audit determination.

Example: Assume \$1,000 of sales tax was incorrectly paid in 1987 by Customer A to a seller on tax-exempt custom software. A field audit of Customer A is being conducted for 1985-1988. The adjustments result in additional tax of \$2,500 for each of the 4 years (exclusive of \$1,000 overpayment to seller).

The \$1,000 tax incorrectly paid to the seller in 1987 will reduce the additional tax due from Customer A for 1987 from \$2,500 to \$1,500 (\$2500 - \$1000).

G. Recoupment Principle

In its June 28, 1974 decision in *American Motors Corporation vs. Department of Revenue* the Wisconsin Supreme Court ruled that either the state or the taxpayer may counter a timely claim for refund or assessment with a "stale" claim, meaning one barred by the statute of limitations, so long as the same year or period is involved. This is called the recoupment principle. The recoupment principle does apply to customer claims for refund.

Example: A sales tax field audit involves the years 1982 through 1988. All of the years are open to assessment because the taxpayer has not filed sales tax returns due. The years 1982 through 1985 are closed to claims for refund under sec. 77.59(4)(intro.), Wis. Stats. (1987-88). The audit determines that taxes were underpaid and overpaid as set forth below. The overpayments are due to sales tax incorrectly paid to sellers on items which qualified for exemptions.

	Underpaid	Overpaid	Offset Allowed	Net Tax Due or (Refund)
1982	\$1,000	\$(4,000)	\$(1,000)	\$ -0-
1983	1,000	(3,000)	(1,000)	-0-
1984	1,000	-0-	(1,000)	-0-
1985	1,000	-0-	(1,000)	-0-
1986	2,000	(8,000)	(8,000)	(6,000)
1987	3,000	-0-	-0-	3,000
1988	4,000	-0-	-0-	4,000

In this situation, for the closed years of 1982 through 1985, the overpayments are allowed only as offsets against any underpayments. Thus, the additional assessment of \$4,000 for 1982 through 1985 would be offset by the \$7,000 of overpayments, resulting in no tax due for those years closed to refund under sec. 77.59(4)(intro.), Wis. Stats. (1987-88). The net cumulative overpayment of \$3,000 (\$7,000 less \$4,000) for 1982 through 1985 would not be refunded.

For 1986 through 1988, the actual net underpayment or overpayment would be computed on a year-by-year basis. Interest would be computed on each year's net over/underpayment.

(Note: For the years 1982 through 1985, if the total underpayment exceeded the total overpayment, interest would be computed for each year on the net underpayment.)

III. Form to Use

The "Claim for Refund of Wisconsin State and County Sales Taxes" form (Form S-220) should be used by a customer to claim a refund. The customer must attach to this form a Schedule of Purchases form for each seller to whom tax was incorrectly paid and is being claimed for refund. The seller must sign this schedule unless the seller is no longer in business.

A copy of the claim form is on pages 55 and 56 of this Bulletin.

IV. Any Questions

You may call or visit any department office or write to:

Wisconsin Department of Revenue
 P.O. Box 8902
 Madison, WI 53708



4. Effect of Discounts, Coupons, and Rebates on Gross Receipts

Statutes: Sections 77.51(4)(a) and (b) and 77.52(1), Wis. Stats. (1987-88).

Background: Section 77.52(1), Wis. Stats. (1987-88), imposes a sales tax upon all retailers at the rate of 5% of the gross receipts from the sale, lease, or rental of tangible personal property sold, leased, or rented at retail in this state.

Section 77.51(4)(a), Wis. Stats. (1987-88), defines gross receipts as the total amount of the sale, lease, or rental price from sales at retail of tangible personal property valued in money, whether received in money or otherwise. Section 77.51(4)(b), Wis. Stats. (1987-88), provides that gross receipts does not include cash or term discounts allowed and taken on sales.

Question 1: Does a discount given by a retailer on the purchase of tangible personal property reduce the retailer's gross receipts for purposes of computing Wisconsin sales tax?

Answer 1: Yes. A discount is a reduction in the price of tangible personal property from the full or standard amount and reduces the retailer's gross receipts for purposes of computing Wisconsin sales tax.

Example 1: A store liquidates inventory and offers a 20% discount on all merchandise sold. Customer A purchases an item with an original price of \$100. Wisconsin sales tax and amount due from Customer A are computed as follows:

Original price of item	\$100
Less: 20% discount	(20)
Gross receipts received by retailer	80
Sales tax (5% x \$80)	4
Total due from Customer A	\$ 84

Example 2: Customer B purchases a vehicle with a sticker price of \$10,000. Customer B and the dealer negotiate a lower price of \$9,700. Wisconsin sales tax and the total due from Customer B are computed as follows:

Original price of vehicle	\$10,000
Less: Dealer discount	(300)
Gross receipts received by retailer	9,700
Sales tax (5% x \$9,700)	485
Total due from Customer B	\$10,185

Question 2: Does a coupon, such as a certificate, ticket, voucher, or other document presented to a retailer by a customer at the time of sale to reduce the purchase price of a particular item, reduce the retailer's gross receipts for purposes of computing Wisconsin sales tax?

Answer 2: A coupon amount may or may not reduce a retailer's gross receipts subject to Wisconsin sales tax, depending on the type of coupon that is being redeemed. The question is whether the coupon represents a cash discount offer by the seller or an offer by the manufacturer of the item to share in a portion, or all, of the purchase price.

A "store coupon" distributed by a retailer, which may or may not have value at another store, is considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. The retailer is not reimbursed for the reduction in price because of the coupon.

A "manufacturer's coupon" distributed by the manufacturer of the item through newspapers and circulars, etc., which may be used at any retail store that accepts coupons, is not considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. A manufacturer's coupon is, in effect, a sharing of the purchase price with the purchaser. Therefore, the retailer's gross receipts from the sale are not reduced by the coupon amount because the retailer receives the full purchase price for the item (i.e., a portion from the purchaser and the remainder from the manufacturer).

However, when a retailer offers double value on a manufacturer's coupon, the amount of the retailer's additional discount is considered to be a reduction of the retailer's gross receipts used in computing Wisconsin sales tax. The amount representing the manufacturer's portion of the coupon remains subject to tax as discussed above.

Note: See the Tax Release titled "Retailer's Receipts for Handling Manufacturers' Coupons" for more information regarding a manufacturer's reimbursement to retailers for handling coupons (*Wisconsin Tax Bulletin 50*, page 20).

Example 3: Customer C purchases a box of laundry soap for \$3.50. Customer C presents a "store coupon" redeemable for 50 cents off the purchase price of the laundry soap. The gross receipts subject to sales tax, the amount of tax, and the total amount due from Customer C are computed as follows:

Original price of laundry soap	\$3.50
Less: Store coupon	(.50)
Gross receipts received by the retailer	3.00
Sales tax (\$3.00 x 5%)	.15
Total due from Customer C	\$3.15

Example 4: Customer D purchases a box of laundry soap for \$3.50. Customer D presents a "manufacturer's coupon" redeemable for 50 cents off the purchase price. The amount of gross receipts subject

to Wisconsin sales tax, the amount of tax, and the total amount due from Customer D are computed as follows:

Original price of laundry soap	\$3.50
Less: Manufacturer's coupon	(.50)
Manufacturer's rebate to retailer	.50
Gross receipts received by retailer	3.50
Sales tax (\$3.50 x 5%)	.18
Less: Manufacturer's contribution	(.50)
Total due from Customer D	<u>\$3.18</u>

Example 5: Customer E purchases a box of laundry soap for \$3.50. The customer presents a "manufacturer's coupon" redeemable for 50 cents off the purchase price. The retailer is offering double the value on manufacturer's coupons. The amount of gross receipts that are subject to Wisconsin sales tax, the amount of tax, and the total amount due from Customer E are computed as follows:

Original price of laundry soap	\$3.50
Less: Manufacturer's coupon	(.50)
Less: Retailer's additional discount	(.50)
Manufacturer's rebate to retailer	.50
Gross receipts received by retailer	\$3.00
Sales tax (\$3.00 x 5%)	.15
Less: Manufacturer's contribution	(.50)
Total due from Customer E	<u>\$2.65</u>

Question 3: If a customer receives a rebate from a manufacturer for property purchased from a retailer, does that rebate reduce the retailer's gross receipts in computing Wisconsin sales tax?

Answer 3: No. A manufacturer's rebate does not reduce the retailer's gross receipts in computing Wisconsin sales tax. This is true whether the customer receives the rebate in cash or applies it against the amount paid to the retailer.

Example 6: Customer F purchases an automobile for \$10,000 from a dealer. The manufacturer offers a \$1,000 rebate on this automobile. Customer F elects to have the \$1,000 rebate applied to his purchase of the automobile. Wisconsin gross receipts, sales tax, and the total due from Customer F are computed as follows:

Original price of vehicle	\$10,000
Less: Manufacturer's rebate	(1,000)
Manufacturer's rebate to retailer	1,000
Gross receipts received by retailer	10,000
Sales tax (\$10,000 x 5%)	500
Less: Manufacturer's contribution	(1,000)
Total due from Customer F	<u>\$ 9,500</u>

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5. Registering for Seller's Permits by Cable Television Companies

Statutes: Section 77.52(7) and (9), Wis. Stats. (1987-88).

Background: Section 77.52(7) and (9), Wis. Stats. (1987-88), provides that persons desiring to operate as a seller in Wisconsin shall have a separate seller's permit for each place of operations.

If a person has more than one place of operation and applies for a seller's permit for each operation, the department generally will issue a single seller's permit number to each place of operation. The permit for each place of operation will contain that number plus a letter suffix unique to that place of operation.

The gross receipts from all places of operation for that person are reported on a consolidated Wisconsin sales and use tax return.

Cable companies are generally regulated at a local level by municipal authorities. A cable television system or portion of a cable television system that operates or will operate within a separate and distinct community or municipal entity is called a "system community unit".

Facts and Question: A cable company operates 20 cable systems in Wisconsin. Is the cable company required to register for a Wisconsin seller's permit for each of the 20 cable system operations?

Answer: Yes. Each "system community unit" owned by a cable television company constitutes a "place of operation" within the meaning and intent of sec. 77.52(7) and (9), Wis. Stats. (1987-88). Therefore, the cable television company should hold a separate seller's permit for each system community unit it operates.

The cable company would receive 20 seller's permits with a common 6 or 7 digit number, but each permit would have a different letter suffix. The cable company would file a consolidated Wisconsin sales and use tax return for the 20 system community units reporting the gross receipts of all the units on the one return.

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6. Sales of Sundry Items to Hospitals and Nursing Homes

Statutes: Sections 77.52(1), 77.53(1) and 77.54(9a), (14) and (14g), Wis. Stats. (1987-88).

Wis. Adm. Code: Section Tax 11.17, August 1985 Register

Background: Hospitals, clinics and members of the medical profession do consume certain sundry items in the rendering of medical services to their patients. These sundry items, including tissue, lotion, soap and toothpaste sold to hospitals, clinics and members of the medical profession are taxable unless the hospital or clinic

qualifies as a charitable organization under sec. 77.54(9a), Wis. Stats. (1987-88).

At other times, hospitals, clinics and members of the medical profession do sell certain sundry items to their patients. Those sundry items, including tissue, lotion, soap and toothpaste sold to hospitals, clinics and members of the medical profession may be purchased without tax for resale, if a properly completed resale certificate is given to the supplier. The hospitals, clinics and members of the medical profession are then required to charge Wisconsin sales tax on its sale of these items to its patients.

Example 1: A hospital patient received soap, lotion, and Kleenex from the hospital during his hospital stay for a broken leg. These items are charged to the patient on the patient's bill for the hospital stay. The soap, lotion, and Kleenex are considered to be provided in the rendering of medical services, and the hospital would be required to pay Wisconsin sales or use tax on its purchase of these items, unless the hospital qualifies as a charitable organization. This is true regardless of whether the soap, lotion, and Kleenex are separately itemized on the patient's bill.

Example 2: A hospital patient goes to the hospital gift shop or commissary and purchases soap, lotion, and Kleenex. The hospital is required to charge Wisconsin sales tax on the sale of these items to the patient. The hospital may purchase these items without tax if it gives its supplier a properly completed resale certificate.

Question: Are sundry items sold to nursing homes and provided to nursing home patients subject to Wisconsin sales or use tax in the same manner as hospitals, clinics, and members of the medical profession?

Answer: Yes. Sundry items, such as Kleenex, lotion, soap, and toothpaste, sold to a nursing home and provided to nursing home patients in rendering medical services are subject to Wisconsin sales and use tax at the time such items are sold to the nursing home, unless the nursing home qualifies as a charitable organization under sec. 77.54(9a), Wis. Stats. (1987-88).

If such items are not provided in rendering medical services, they are sales for resale and may be sold to the nursing home without tax, if a properly completed resale certificate is given to the supplier. The nursing home is then required to charge Wisconsin sales tax on its sales of these items to patients.

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ALL TAXES

1. Wisconsin Taxation of Indians

Introduction: State taxation involving Indians is complex. The law is not set forth in state statutes or rules (except cigarette taxation).

An Indian tribe possesses all the attributes of sovereignty of any political community, except as granted away by treaty, taken away by Congress, or inconsistent with domestic dependent status. Tribal sovereignty is dependent and subordinate to the federal government, not the states. State jurisdiction to tax may be preempted by the United States Constitution, federal treaty, or statute, explicitly or implicitly.

Recent court decisions have relied upon federal preemption with tribal sovereignty as a backdrop in deciding whether a state has jurisdiction to tax. If there is no federal preemption, and the state imposition of tax does not interfere with the rights of the reservation Indians to make their own laws and be ruled by them, a state tax may validly be imposed.

The Department of Revenue is issuing this Tax Release to cover most transactions. These are general guidelines. Questions regarding specific situations may be addressed by writing to Wisconsin Department of Revenue, P.O. Box 8933, Madison, WI 53708.

I. Taxation of Indians - Wisconsin Individual Income Tax

Statutes: Section 71.09(7m), Wis. Stats. (1985-86), and secs. 71.02, 71.04(1)(a), 71.05(3), 71.07(6) and 71.83(1)(a)6, Wis. Stats. (1987-88).

Background: The following definitions apply:

“Indians” means all persons of Indian descent who are enrolled members of any federally recognized tribe.

“Reservation” means all land within the boundaries of the Bad River, Forest County Potawatomi, Lac Courte Oreilles, Lac du Flambeau, Menominee, Mole Lake, Oneida, Red Cliff, St. Croix, and Stockbridge-Munsee reservations as well as any Winnebago Indian communities.

“Tribal reservation” means the reservation of the tribe of which an Indian is an enrolled member (e.g., the tribal reservation for an enrolled member of the Oneida tribe is the Oneida reservation).

Policy: Following is the department's policy in taxing Indians for Wisconsin income tax purposes:

- A. Law applicable to Indians living on their tribal reservation:
1. Taxable income includes:
 - a. Wages from working off their tribal reservation.
 - b. Income from business or real estate located off their tribal reservation.
 - c. Winnings from the Wisconsin lottery.
 - d. Winnings from a multistate lottery (if the winning ticket was purchased in Wisconsin).
 - e. Wager winnings from pari-mutuel race tracks in Wisconsin.
 - f. Prizes or awards relating to employment off their tribal reservation.