as the trucks of the sole proprietorship."

"12. Neither the partnership, nor the sole proprietorship furnish the drivers. The drivers are the employees of the corporation."

"13. There are instances in which the partnership and sole proprietorship charge still other parties for the use of these vehicles, and in those situations the corporation again furnishes the driver, but the corporation is paid by the partnership for the driver's wages, and the other party in turn pays the partnership one payment which includes the charge for the driver."

Section 77.52 (1), Wis. Stats., imposes a tax on the gross receipts from the sale, lease or rental of tangible personal property as the term lease is defined in s. 77.51 (23), Wis. Stats., to include "rental, hire and license". No further definition is provided in Chapter 77, nor are any examples or guidelines given.

The Court indicated that in the law, a lease of tangible personal property usually means a contract by which one owning such property grants to another the right to possess, use and enjoy it for a specified period of time in exchange for a periodic payment of a stipulated price or amount, referred to as rent.

Given the stipulated set of facts, it appears clear that the partnership and the sole proprietorship furnish trucks for the use of the corporation and in turn are compensated for such use (Stipulations 10-12). Further, it was stipulated that, on occasion, the partnership and sole proprietorship furnish for compensation trucks to still other parties (Stipulation 13).

In comparing these facts with the applicable statute, s. 77.52 (1), Wis. Stats., and the obvious, ordinary, and accepted meaning of the term "lease", the Court said the activities in question appear to fall clearly within the statute and thus would be taxable.

The taxpayer argued that the statute is essentially defective in that no specific definition of a truck-type lease is provided, and based upon this alleged omission, reviewed the motor vehicle code and the definitions included therein. The Court found that the Legislature in enacting statutes of this nature is not required to list or itemize every possible specific object of taxation, nor to otherwise specifically define the parameters of each and every taxing enterprise. The alleged failure of s. 77.52 (1), Wis. Stats., to further define "lease" or its application to motor vehicle leasing arrangements is not fatal. This is particularly so when the term "lease" has a common and well understood meaning amongst the general populace.

Therefore, the Court found that the statute is legally sufficient for the purposes of imposing a tax on leasing operations, including motor vehicle leasing operations.

The taxpayer claimed that the situation is muddied, however, by the interjection of Wis. Adm. Code Tax 11.29 (4) (c) which provides:

"Charges for the rental of motor trucks shall be taxable. However, if drivers are provided by the truck's owner to operate the trucks and the Public Service Commission and the Department of Transportation's Division of Motor Vehicles consider the arrangement a transportation service under statute or under rules adopted by either or both of those state agencies, the charges shall not be taxable."

This administrative regulation appears to follow the provisions of s. 194.01 (15), Wis. Stats., which states:

". . . The lease or rental of a motor vehicle to a person for transportation of the person's property which lease or rental directly or indirectly includes the lessor's services as a driver shall be presumed to be transportation for hire and not private carriage, except under arrangements approved by the commission and the department . . ."

The taxpayer claimed that under this provision its common carrier services are not "leases". By implication they are not taxable under the sales tax statutes. However, the Court found there was a flaw in this argument because neither the Legislature nor the Department of Transportation, nor the Public Service Commission have determined that such transportation services are or are not leases. What has been determined, and codified is that for regulatory purposes when a driver is supplied by the lessor the service is a transportation service and regulated as a common carrier rather than as a private carrier. According to Ch. 194, the service is still designated and considered to be a leasing arrangement, but for motor vehicle regulatory purposes, when a driver is provided it falls under the purview of the common carrier regulations and not private carriage.

The Court indicated the administrative decision codified in Wis. Adm. Code rule Tax 11.29 (4) (c) is based on s. 194.01 (15), Wis. Stats. The administrative code section creates a distinction between transportation services in which a driver is provided and those in which a driver is not provided. The former is not subject to sales tax while the latter is. Such a distinction does not by its existence create an ambiguity. Further, the distinction appears to have a rational basis.

When a driver is furnished more than mere "tangible personal property" is being furnished—a human being is also being furnished. Although there can be instances in which a human being can be "rented", such an arrangement seems more in the nature of a "hiring" than a rental. No such distinction occurs when the only item being rented is a piece of mechanical equipment.

Secondly, the taxpayer's argument about the degree of control over the property being a determining factor in a lease vs. nonlease question is support for the proposition that this is a leasing situation. Certainly the providing of a human driver provides the lessor with a greater degree of control over the ultimate use and care afforded equipment than when such a driver is not provided. A human driver, ultimately responsible to the lessor for his or her job, is more likely to be concerned about the continued welfare and well being of the vehicles being used than would a driver employed by the lessee. The lessor's driver would be more inclined to ensure that the vehicle is used in a manner commensurate with the interest of the employer and not in a manner adverse to the best interests of the lessor. When the vehicle is turned over to a lessee without a driver the vehicle is far more vulnerable to being used in a manner unknown or unforeseen by the lessor.

Finally, the effect of the administrative regulation on this question is misdirected. Even assuming that the regulation is somehow illegal - which the taxpayer has not contended - it would not insulate the taxpayer from the payment of sales taxes.

Based on the foregoing, the Court finds that there is no ambiguity in the taxing statutes and that the leasing arrangement described in the stipulated facts is taxable under Chapter 77, Wis. Stats.

The taxpayer has not appealed this decision to Circuit Court.

HOMESTEAD CREDIT

Kurt M. Stege vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 16, 1980). During the entire calendar year 1977, taxpayer, Kurt M. Stege, was a legal resident of Wisconsin. Mr. Stege timely filed a Wisconsin combined individual income tax return for 1977 and attached a 1977 Wisconsin homestead credit claim (Schedule H) to that return. On his 1977 Wisconsin income tax return, Mr. Stege reported net taxable income of $0 and showed $18.52 of Wisconsin tax withheld from his wages for 1977. The taxpayer claimed a $136.52 refund, comprised of his homestead credit claim of $118 for 1977, together with the excess Wisconsin withholding tax of $18.52.

The department disallowed the taxpayer's claim of $118 for homestead credit stating as its reason that at the time of filing such claim, the taxpayer was residing in a homestead which was not subject to real estate taxes. The department did allow, however, a refund of $18.52 claimed as excess income tax withheld.

During the entire calendar year 1977, the taxpayer and his spouse resided at 812-D Eagle Heights Apartments, Madison, Wisconsin, which were and are owned by the University of Wisconsin and operated under the authority of the University of Wisconsin Board of Regents. Such apartments were available to married students attending the University of Wisconsin-Madison. Mr. Stege and his wife continued to reside at the Eagle Heights address at the time of filing the homestead credit claim on or about February 27, 1978.

As residential property for married students at the Madison campus, the University of Wisconsin-Madison pays a school tax under s. 70.114, Wis. Stats., to the City of Madison (for the Madison school district) for the property comprising Eagle Heights Apartments. The department and the taxpayer were not aware of any other taxes under Chapter 70, Wis. Stats., which the University pays or is legally obligated to pay with respect to such property.

The level of rents charged by the University of Wisconsin-Madison to the residents of Eagle Heights Apartments reflects the school tax which the University is required to pay on behalf of those residents. For the 1977 calendar year, the taxpayer paid rent totaling $1,479, of which $705.98 represented rent for occupancy only, to the University Housing Office, 625 Babcock Drive, Madison, Wisconsin, which collected the rent on behalf of the University of Wisconsin-Madison.

The sole issue involved was whether the taxpayer at the time of filing his 1977 homestead credit claim resided in housing that was exempt from taxation under Chapter 70, within the meaning of s. 71.09 (7) (t), Wis. Stats. Taxpayer is otherwise qualified under s. 71.09, Wis. Stats., to receive the homestead credit he claimed.

The Tax Appeals Commission ruled that at the time the taxpayer filed his 1977 Wisconsin homestead credit claim, he was residing in housing which was subject to taxation under Chapter 70 of the Wisconsin Statutes, and therefore this housing was not "exempt from taxation under ch. 70" within the meaning of s. 71.09 (7) (t) 1, 1977 Wis. Stats. The taxpayer being otherwise eligible was entitled to file a Wisconsin homestead credit claim for 1977.

The department has not appealed this decision.