which carries on a debarking and wood curing operation. The sole issue was whether certain machinery, equipment, and repair parts were subject to Wisconsin sales or use tax or were exempt from tax under sections 77.54 (6) (a) and 77.51 (27) of the Wisconsin Statutes. The machinery in question was a truck scale, Barko loader, 2 Prentice hydraulic loaders, Manitowoc debarker, Manitowoc portable debarker, 20 foot slab elevator, dump box, Barko hydraulic loader, Prentice loader, slab elevator, bulldozer, Franklin skidder, miscellaneous repair parts, and a Husky loader mounted on a Mack truck.

Taxpayer purchases rough wood. He then peels the bark from this wood using debarking machines. After debarking, the wood is aged for a period of up to one year. The wood aging process is critical to the manufacture of high quality paper products. A chemical change in the resins within the wood takes place during aging. They change from a gel state to a crystalline state through oxidation making the resins to be more easily extractable in the pulping process when paper is produced. The debarking process removes the dirt and mud from the wood. During the period involved herein, the taxpayer sold virtually all of his debarked wood to Proctor and Gamble Paper Products Company for the production of high quality paper.

Debarkers such as the taxpayer used are the type of debarker which would be used only to debark wood for use by a paper mill. Taxpayer's operation cut the wood into 100 inch lengths. His contract with Procter and Gamble had stringent specifications regarding the amount of bark that Procter and Gamble would accept and stringent specifications regarding the amount of aging that had to take place before the wood could be delivered. If the debarker machine was a stationary machine on site in the production line of a paper manufacturing process and the resulting end product of the manufacturing was paper or paper products, the machinery would be considered exempt from sales and use tax.

Under taxpayer's arrangement with Procter and Gamble, Procter and Gamble advanced taxpayer the money to buy the logs. The logs were the property of Procter and Gamble and were reported by Proctor and Gamble as raw materials inventory for property tax purposes.

The Commission ruled that the taxpayer produces by machinery a new article with a different form, use and name from existing materials. The taxpayer's process is popularly regarded among persons familiar with the industry in which the taxpayer is engaged as "manufacturing." Therefore, the taxpayer is entitled to the manufacturing exemption in s. 77.54 (6) (a), Wis. Stats., for the machinery, equipment and repair parts described in the first paragraph.

The department has not appealed this decision.

**Shopper Advertiser, Inc., d/b/a Shopper Advertiser-Walworth County, and Shopping News, Inc., d/b/a Greater Beloit Shopping News vs. Wisconsin Department of Revenue** (Circuit Court of Dane County, May 21, 1981). This case involves a sales tax assessment against Shopper Advertiser, Inc. for the sale of a publication known as the Greater Beloit Shopping News, and a use tax assessment against both Shopper Advertiser, Inc. and Shopping News, Inc. for the use of materials used in the process of publishing the Walworth County Shopper Advertiser and the Greater Beloit Shopping News. The issues before the Court were: (1) Are the publications exempt from the sales and use tax under s. 77.54 (15), Wis. Stats., on the ground that they qualify as newspapers or periodicals? (2) Are the publications exempt from the sales or use tax pursuant to s. 77.54 (2), Wis. Stats.? and (3) Did the department's interpretation and application of s. 77.54 (15), Wis. Stats., deny the taxpayers equal protection of the law? The Tax Appeals Commission held that the publications were not exempt from taxation under s. 77.54 (15) or 77.54 (2), Wis. Stats. The Commission also found that the department's interpretation and application of s. 77.54 (15), Wis. Stats., did not deny the taxpayers equal protection of the law.

Taxpayers' first argument was that their publications are exempt from taxation pursuant to s. 77.54 (15), Wis. Stats., which provides an exemption for:

> "The gross receipts from the sale of and the storage, use or other consumption of newspapers and periodicals regularly issued at average intervals not exceeding 3 months."

Under Technical Information Memorandum S-15.3, dated July 14, 1974, the department defined "newspapers" as "those publications which are commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly or other short intervals for the dissemination of news of a general character and of a general interest." This memorandum defines "periodical" as "those publications which appear at stated intervals, each issue of which contains news or information of general interest to the public, or to some particular organization or group of persons. Each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues of the series in the nature of the articles appearing in them. . . . The term does not include . . . shopping guides or other publications of which the advertising portion, including product publicity, exceeds 90% of the printed area of the entire issue in more than one-half of the issues during any 12 month period."

The Court concluded that the definitions of "newspaper" and "periodical" incorporated in the department's memorandum adequately reflects the ordinary and accepted meaning of the terms "newspaper" and "periodical." The Court also agreed with the department that the exemption for newspapers and periodicals does not apply here.

To qualify as a publication that is "commonly understood to be" a newspaper, the publication must contain reports of current events of a varied character. The Walworth County Shopper Advertiser is 100% advertising. The Greater Beloit Shopping News contains non-advertising material, but none that constitutes reports of current events of a varied character.

The publications also failed to meet the requirements for periodicals. The Court agreed with the Commission that a publication composed entirely of advertising (Walworth County Shopper Advertiser) does

not fall within the ordinary and accepted meaning of a periodical.

On the other hand, the Greater Beloit Shopper News (which is distributed on a regular basis) averages about 88% advertising. Consequently, some of the requirements for a periodical, as established by the department's memorandum, are met. However, to constitute a periodical each issue of a publication must contain news or information of general interest to the public, each issue must bear a relationship to prior or subsequent issues in respect to continuity of literary character or similarity of subject matter, and there must be some connection between the different issues in the nature of articles appear in them. The latter requirements were derived from Houghton v. Payne, 194 US 88, 97 (1904), the leading case on the subject of what constitutes a periodical.

The remaining 12% of the Beloit publication consists of a variety of items including articles submitted by freelance writers on such topics as antiques, ecology, recipes, area school menus and notices of local activities sponsored by organizations such as the PTA and church groups. The publication consists of miscellaneous articles received without charge from county agents and business organizations. Some columns, such as a column on antiques and the column on the outdoors, appear somewhat regularly, but even these appear only if the writers choose to submit them. Articles and notices are not solicited, although the owner had told churches and other organizations that she would print notices submitted. During the period involved, the publication did not subscribe to any news services or syndicated columns. The publication does not include national or local news items or articles related to politics.

The Court determined that the Beloit publication does not contain sufficient continuity and connection as to the nature of its contents to constitute a periodical. The non-advertising materials in the Beloit publication do not seem to be narrowly enough confined to the same class of subjects from edition to edition to justify labeling it a periodical as that term is ordinarily used. The Court agreed that the hodge podge nature of the articles published, combined with the extensive amount of advertising included in each publication rendered reasonable basis for the Commission's conclusion that the Beloit publication is not a periodical as that term was defined in the department's memorandum, in Houghton v. Payne, supra, and as it is ordinarily used.

The next issue was whether the distribution of shopping guides constitute a "sale" within the meaning of s. 77.54 (2), Wis. Stats. Most of the publications are distributed free of charge to homeowners in both Walworth County and Rock County, although some subscriptions are sold. The Court agreed with the Commission that distribution of the publications does not constitute a "sale" within the meaning of s. 77.54 (2), Wis. Stats.

The final issue was whether the department's construction and application of s. 77.54 (15), Wis. Stats., denied the taxpayers equal protection under the law. The Court disagreed with this assertion by the taxpayers. The distinction is not between shopper guides on one side and newspapers and other publications on the other. Rather, the law distinguishes newspapers and periodicals from materials whose primary purpose is advertising. Newspapers and other periodicals are used primarily to inform people of current events, literature, etc. Advertising is used primarily to sell products.

The taxpayers have appealed this decision to Court of Appeals.

## EXCISE TAXES

**State of Wisconsin vs. Black Steer Steak House, Inc.** (Court of Appeals, District III, May 26, 1981). This case is an appeal from an order of the Circuit Court for Eau Claire county.

The State of Wisconsin appealed the dismissal of its criminal complaint against Black Steer Steak House, Inc., for Black Steer's violation of the credit restrictions imposed by s. 176.05 (23) (c), Wis. Stats., on retail liquor licensees. The parties stipulated that there is a factual basis for the charge, and the only issue was whether s. 176.05 (23) (c), Wis. Stats., violates the equal protection clause of the fourteenth amendment to the United States Constitution.

Section 176.05 (23) (c), Wis. Stats., limits the right of retail liquor licensees to purchase intoxicating liquors on credit from liquor wholesalers. A licensee who has been indebted for more than thirty days for intoxicants purchased from any wholesaler may not make any liquor purchases. A violation subjects the licensee to license suspension or revocation and a fine of up to $500.

Because s. 176.05 (23) (c), Wis. Stats., is presumptively constitutional, Black Steer has the burden of proving that it is unconstitutional beyond a reasonable doubt. Where doubt exists, it must be resolved in favor of constitutionality. If any fact can be conceived in the mind of the court to provide a reasonable basis for the legislative classification, the court will attribute to the legislature the requisite diacritical reliance on that fact in passing the statute.

The fact providing the reasonable basis for the passage of s. 176.05 (23) (c), Wis. Stats., is that particular evils may be associated with monopolistic practices in the liquor industry. Credit is a financial inducement that may lead to monopolistic control. The limitation of credit reasonably furthers the statutory goal of deterring monopolistic control.

The mere fact that other states and Congress have enacted similar laws does not make s. 176.05 (23) (c), Wis. Stats., constitutional. The court accepted, however, as a logical assumption from recognized historical fact, that there are particular evils associated with monopolistic practices in the liquor industry. The state is not required to verify a logical assumption with statistical evidence. In addition, because the court cannot try the legislature, the court must consider any fact necessary to uphold the statute to have been conclusively found by the legislature. The court must therefore assume that the legislature conclusively found particular evils associated with liquor industry monopolies. Since Black Steer has not shown the nonexistence of this fact, Black Steer has not proven beyond a reasonable doubt that the statute violates the equal protection clause of the fourteenth amendment.

The taxpayer has not appealed this decision.

## WITHHOLDING

**William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, and Chief, Central Compliance Section, W. H. Wescott; and Automation Engineering Company, Inc., AA Electric Division, 1220 Highway 143, Cedarburg, WI 53012, General Manager, Neil Stein.** (Dane County Circuit Court). On March 6, 1981, the taxpayer completed and filed with his employer, Automation Engineering Company, Inc., a Wisconsin Withholding Exemption Certificate (Form WT-4) certifying that he was "exempt" from Wisconsin withholding tax. On March 12, 1981, Automation Engineering Company, Inc. mailed a copy of the taxpayer's Wisconsin withholding exemption certificate to the Department of Revenue as required by s. 71.20 (8) (f), Wis. Stats.

The department reviewed the taxpayer's withholding exemption certificate and on March 18, 1981 notified Automation Engineering Company, Inc. and the taxpayer that it had been determined that the certificate was incorrect, and instructed Automation Engineering Company, Inc. to start to withhold tax from the taxpayer's wages on the basis of five exemptions. As a result of this action by the department, the taxpayer filed a claim for declaratory judgment and injunctive relief with the Dane County Circuit Court.

The taxpayer has asked the Court to grant a preliminary injunction, enjoining and restraining the department from collecting withholding tax from his wages. He has also asked that the Court grant a permanent injunction, enjoining and restraining the department from collecting withholding tax from his wages as long as he has on file with his employer a current Wisconsin Withholding Exemption Certificate, Form WT-4, wherein he has certified that he is exempt from withholding tax.

On June 5, 1981 the Circuit Court of Dane County dismissed the taxpayer's request for a declaratory judgment.

## TAX RELEASES

*("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answers may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)*

## INCOME TAXES

### I. Interest Paid by Financial Institutions

Facts & Question: A resident individual has several small savings accounts with a single financial institution located in Wisconsin. The interest income received from each of these accounts is less than $100 for the calendar year; however, in the aggregate the interest income received from all of the accounts is in excess of $100. Is the financial institution required to file an information return (Wisconsin Form 9b or federal Form 1099-INT) with the Department of Revenue regarding interest paid to this individual? If so, must a separate information return be filed for each account?

Answer: Under s. 71.10 (15), Wis. Stats., the financial institution is required to report to the department interest paid to a Wisconsin resident whenever the total paid during a calendar year to the person is $100 or more. It does not matter whether the interest is paid on a single account or multiple accounts.

The financial institution must either file (a) one information return showing the total interest paid on all accounts, or (b) separate information returns for each account.

### II. Installment Sale Qualifies for Capital Gain Treatment in 1982

Facts & Question: In 1981 a Wisconsin resident sells a cottage at a gain. The sale is a deferred payment sale which qualifies for installment reporting. Payments will be received equally in the years 1981, 1982, 1983, 1984 and 1985. Will the amounts of gain which are reportable in 1982 and subsequent years qualify for the long-term capital gain exclusion provided by Wisconsin law (s. 71.05 (1) (a) 2, as amended by Chapter 20, Laws of 1981) for those years, even though the sale took place in 1981?

Answer: Yes. The gain reportable in each of the years 1982, 1983, 1984 and 1985 will qualify for the long-term capital gain exclusion available under Wisconsin law for such years.

## CORPORATION INCOME/FRANCHISE TAX

### I. Cost Depletion Recognized in Property Factor for Apportionment Purposes

Facts & Question: Corporations which are operating owners or owners of an economic interest in properties such as mines, oil and gas wells, other natural deposits and timber, are allowed by federal and Wisconsin income tax laws to account for the consumption or exhaustion of such asset interest by a reasonable charge against revenues produced. This is recognized by a charge to depletion expense of which there are two methods: (1) Cost depletion, and (2) Percentage depletion. Cost depletion is generally calculated on the unit-of-production basis, while percentage depletion is based upon a certain percentage of gross income from the property during the tax year. Wisconsin Administrative Code sections Tax 3.35 through 3.38 provide rules regarding the depletion allowance for Wisconsin purposes.

A corporation which operates both within and outside Wisconsin and whose business in Wisconsin is an integral part of a unitary business is required to report its income to Wisconsin under the apportionment method which uses three factors: property, payroll and sales. Property is valued at original cost. In regard to oil companies, exploration and development costs of corporations involved in extracting products from depletable assets are often capitalized and subsequently depleted.

For the purposes of the property factor, shall original costs of depletable property, including capitalized exploration and development costs, be reduced by depletion deducted?