REPORT ON LITIGATION

This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.

The last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: 1) "the department appealed", 2) "the department has not appealed but has filed a notice of nonacquiescence" or 3) "the department has not appealed" (in this case the department has acquiesced to Commission's decision).

The following decisions are included:

Individual Income Taxes

- Floyd J. Manthey vs. Wisconsin Department of Revenue
- Patrick J. Piper vs. Wisconsin Department of Revenue
- Anna K. Rees vs. the Tax Appeals Commission, the Department of Revenue
- Ralph H. Schulz vs. Wisconsin Department of Revenue

Sales/Use Taxes

- Stanley A. Anderson, Inc. vs. Wisconsin Department of Revenue
- Badger Electric Construction Co., Inc. vs. Wisconsin Department of Revenue
- Brantwood Publications, Inc. and R.W. Morey Company, Inc. vs. Wisconsin Department of Revenue
- City of Racine vs. Wisconsin Department of Revenue
- Cuna Mutual Insurance Society vs. Wisconsin Department of Revenue
- Wisconsin Department of Revenue vs. Gene E. Greiling
- Wisconsin Department of Revenue vs. Milwaukee Brewers Baseball Club
- Wisconsin Department of Revenue vs. Mining Equipment Mfg. Corp.
- Wisconsin Department of Revenue vs. J.C. Penny Co., Inc.
- Rice Insulation, Inc. vs. Wisconsin Department of Revenue
- Eugene F. Rock and Eugene F. Rock d/b/a Rock's Round Barn vs. Wisconsin Department of Revenue

Homestead Credit

- Mary M. Flanders vs. Wisconsin Department of Revenue

INDIVIDUAL INCOME TAXES

Floyd J. Manthey vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 16, 1982). The department's office audit of Manthey's 1976 through 1979 income tax returns resulted in disallowing certain travel expenses as non-deductible commuting expenses. Manthey's home is located approximately 18-20 miles from Waukesha and 25 miles from Milwaukee. During the years involved Manthey was an electrician. Manthey was registered for employment at the business office of this union in Milwaukee and received his job assignments from the business office of the union.

During 1976 Manthey worked at temporary job sites in Milwaukee, Waukesha and South Milwaukee; in 1977, at job sites in Milwaukee, Cudahy, Oak Creek, South Milwaukee and Waukesha; in 1978, at job sites in Milwaukee, Oak Creek, Cudahy, Waukesha and Hales Corners; and in 1979, at job sites in Milwaukee, Hartford, Cudahy, Oak Creek, South Milwaukee, Waukesha and Menomonee Falls. Manthey commuted on a daily basis from his home at Route 3, Mukwonago, to his various job sites. Manthey claimed a deduction on his Wisconsin income tax return for employee business travel expenses for each of the years 1976 through 1979. The deductions were computed on a mileage basis from taxpayer's home to his various job sites and back home.

When Manthey accepted a job assigned to him through his union, he did not know how long it would last. During the four year period involved, none of the taxpayer's job assignments exceeded one year. Manthey was not an independent contractor, but was an electrician employee of the electrical contractor in charge of the job site at which the taxpayer was employed.

The Commission held that the taxpayer's travel expenses were nondeductible personal expenses incurred in commuting from his home to his place of employment and back home. Commuting expenses are not allowable as deductions under the provisions of Sec. 212 IRC (1954) as interpreted by IRC Regulation 1.212-1 (f).

The taxpayer has not appealed this decision.

Patrick J. Piper vs. Wisconsin Department of Revenue (Court of Appeals, District II, June 11, 1982). Taxpayer, Patrick J. Piper, did not file a Wisconsin individual income tax return for the year 1977. Pursuant to s. 71.11 (4), Wis. Stats., the department estimated the taxpayer's income tax for 1977 as $1,780. The department denied the taxpayer's petition for redetermination of the tax. Piper appealed to the Tax Appeals Commission. At the hearing before the Commission, Piper claimed that he had made an independent determination that he was not required to file a return for 1977 but refused to present any testimony or evidence in support of his position. He stated that he was not a Wisconsin resident during all of 1977, that he had filed a return in 1976 and that he had received a request to file a return for 1977 but determined that he was not required to file. He refused to answer questions regarding his income, sources of income, his Wisconsin employment and ownership of Wisconsin real estate based on the fifth amendment privilege of the United States Constitution against self-incrimination. The Tax Appeals Commission affirmed the department's determination holding that Piper had failed to meet his burden of proof to show that the assessment was incorrect.

The taxpayer petitioned for review in the Circuit Court pursuant to Chapter 227, Wis. Stats., and demanded a jury trial. There was no jury trial and the Circuit Court affirmed the Commission and the taxpayer appealed.

The taxpayer contended that the department lacked authority to make the assessment and in addition, he argued that he was not required to present evidence after he had asserted his fifth amendment privilege and that he was entitled to a jury trial.

The Court of Appeals held in favor of the department.

The taxpayer has not appealed this decision.

Anna K. Rees vs. The Tax Appeals Commission, The Department of Revenue (Court of Appeals, District II, November 18, 1981). Taxpayer appealed the Circuit Court decision which held that the entire amount of the lump sum distribution made to the taxpayer under Western Electric Co., Inc.'s profit sharing and savings plan should have been included in her 1977 Wisconsin taxable income (see WTB 22).

The Court of Appeals affirmed the Circuit Court decision. The Court of Appeals held that Rees elected to use the ten-year income averaging method and that once the election is made, the ordinary income portion, by definition, becomes equal to the entire lump sum distribution and is taxable under s. 71.05 (1) (a) 8, Wis. Stats. (1977).

The taxpayer has not appealed this decision.

Ralph H. Schulz vs. Wisconsin Department of Revenue (Circuit Court of Dane County, July 21, 1982). Ralph Schulz paid more in estimated taxes and taxes withheld in 1968 than was necessary to pay his state income tax liability for 1968. He claimed the full amount paid as a deduction in his 1968 tax. The excess over what was necessary to pay the 1968 tax he elected to have applied as a credit to the 1969 tax, but he did not report that excess as income for the year 1969. The same occurred in 1970 and 1971. The question in this case is whether the amounts credited against the 1969 through 1971 taxes are income.

The taxpayer contended that nowhere in the tax law, state or federal, does it specifically say that one year's excess payment credited to the next year's tax is income. Section 71.02 (2), Wis. Stats., defines Wisconsin adjusted gross income as federal adjusted gross income. Federal law recognizes that when a deduction results in a tax benefit one year, recovery of the loss in a succeeding year is income.

The Circuit Court held that there was no difference between this case and the situation where a taxpayer opted for a cash refund and then applied the cash toward his tax and the refunds were taxable income in the year received.

The taxpayer has appealed this decision to the Court of Appeals.

SALES/USE TAXES

Stanley A. Anderson, Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, August 19, 1982). Anderson is a plastering and lathing contractor who purchased certain metal products from the U.S. Gypsum Company for use in its business. The purchases were made in Wisconsin. Gypsum did not charge Anderson any Wisconsin sales tax on these purchases, and no such tax was ever reported or paid with respect to the transactions. Following an audit of both Gypsum and Anderson, the department assessed a use tax against Anderson (as opposed to a sales tax against Gypsum). The issue in this case is the Tax Appeals Commission's determination (see WTB 28) that the department may assess a Wisconsin use tax against Anderson on Anderson's purchase of goods in Wisconsin from a Wisconsin seller, where the seller collected no sales tax.

The Court indicated that the Wisconsin Supreme Court has never addressed the issue of whether the department may freely choose between assessing a sales tax against the seller or a use tax against the purchaser. However, the Illinois Supreme Court did address the issue in Klein Town Builders, Inc. v. Department of Revenue, 36 Ill. 2d 301, 222 N.E. 2d 482 (1966). In a very similar situation the Illinois Supreme Court held that the seller's failure to collect tax does not discharge the purchaser's liability for the use tax. Given the similarities between the Wisconsin and Illinois statutes in this area the Circuit Court held that the department may collect either tax from either party.

Anderson also claimed that the assessment of interest in this case is inequitable since the assessment could have been made against Gypsum. The Court indicated that the imposition of interest is mandatory under the statutes and the Court has not been provided with authority to waive interest.

The taxpayer has appealed this decision to the Court of Appeals.

Badger Electric Construction Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 30, 1982). On March 12, 1980 the department denied the taxpayer's claim for refund involving a use tax paid on materials used in the construction of school additions to the McFarland Elementary and High Schools. During the period involved, Badger Electric Construction Co., Inc. was engaged in business as an electrical contractor.

The McFarland School District is a tax-exempt organization. The McFarland School District commissioned Brust-Zimmerman, Inc. architects and engineers to design the additions to said schools. Brust-Zimmerman produced, for the project, a set of plans and specifications, and also bidding documents. The bidding documents were broken down into 16 different categories, with each category including labor and materials. The McFarland School District acted as its own prime contractor in this project, and Vogel Bros. Building Co. acted as construction manager. Badger Electrical Construction submitted a successful bid proposal for all of the electrical work required in said building project, which included both labor and materials.

The taxpayer entered into electrical contracts with the McFarland School District for labor and certain materials for remodeling and adding on to the elementary and high schools in question. The school district submitted purchase orders to the taxpayer for the remaining materials included in the bid proposal for the purpose of acquiring those items ex-tax. The school district also submitted said purchase orders to the taxpayer rather than directly to the suppliers, because it did not have the necessary expertise. The materials at issue were purchased by the taxpayer ex-tax by use of the tax exempt number of the school district.

The materials were delivered to the work site by the suppliers and were used by the taxpayer to make real estate improvements for the school district. Payment requests for the materials were submitted by the taxpayer to the school district after the materials were delivered by the suppliers.

The McFarland School District had no employees on the job site, performing physical or supervisory functions. The taxpayer and the McFarland School District did not enter into a formal agency agreement. The taxpayer and the School District had an agreement that any tax as-

sessed against the taxpayer, as a result of the transactions would be reimbursed to the taxpayer by the school district.

The issue in this case is whether a contractor engaged primarily in real property construction activities, is entitled to a refund of use taxes paid on materials it purchased and used for real property construction activities on behalf of a tax-exempt entity.

The Commission held that the taxpayer, under the provisions of s. 77.51 (18), Wis. Stats., was a contractor who purchased and consumed the tangible personal property it used in the real property construction activities involved herein, and the use tax applies to the sale of materials to it. Under the provisions of s. 77.53 (1), Wis. Stats., the taxpayer is liable for use taxes on its purchase of materials which it sold to and installed for the real estate improvement of a tax-exempt school district.

The taxpayer has appealed this decision to the Circuit Court.

Brantwood Publications, Inc. and R. W. Morey Company, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, December 30, 1981). The issue in this case is whether the taxpayer's publishing process is popularly regarded as manufacturing and therefore qualifies for the manufacturing exemption. Since April 1, 1972, R. W. Morey Co., Inc. was engaged in publishing five horticultural magazines and had its principal offices in Wisconsin. On September 30, 1974, Brantwood Publications, Inc. was incorporated by the shareholders of R. W. Morey Co., Inc. to continue publishing said magazines, while the latter held title and ownership of the publishing rights and equipment used by Brantwood Publications, Inc.

In the conduct of their business of publishing magazines, the taxpayers perform, in house, the initial prepwork, including the writing and editing of articles, photographic layout, format design, advertisement solicitation and, in general, create the images and content that appear in the final publication. The publication process begins with the composing operation and concludes with the printing and binding of the finished product, five magazines, which are distributed to subscribers throughout the United States and Canada. During the period involved, April 1, 1972 to March 31, 1976, the taxpayers contracted out the final stages of the publication of their magazines, namely the actual printing and binding process. The large majority of the taxpayers' advertisers and subscribers are located outside of Wisconsin. The taxpayers purchased materials and supplies used in the preparation work of the original pages of the magazines, such as paper, ink, paste, etc. The taxpayers leased a composer or typesetter machine, which it used in the operation of its business. The materials and supplies involved in this proceeding relate to the preparatory or "prep-work" stage, which precedes the actual printing of the magazines and includes the initial typesetting, assembling, designing, pasting-up, combining with words and creation of the page "make-up", all of which was done "in-house" by the taxpayers. All of the materials and supplies were cut, cropped, pasted, taped, partially deleted, marked up, written upon, etc., and had no further use or function once they had been processed.

The Commission held that the taxpayers were not engaged in "manufacturing" as that term is defined in s. 77.51 (27), Wis. Stats. The taxpayers' composer or typesetting machine and computer were not used by a manufacturer in manufacturing and, therefore, such machines are not exempt from the sales and use tax under s. 77.54 (6) (a), Wis. Stats. The taxpayers' supplies used in its "prep-work" were not used in manufacturing a product for sale and, therefore, are not exempt from the use tax under s. 77.54 (2), Wis. Stats. Also, the taxpayers' purchases of such machines and supplies are not the sale or use of printed advertising material and, therefore, are not exempt from the sales and use tax under ss. 77.52 (2) (a) 11 and 77.54 (25), Wis. Stats.

In March, 1982 taxpayers appealed the Wisconsin Tax Appeal's decision to the Circuit Court.

Taxpayers withdrew their appeal to the Circuit Court and on September 27, 1982 the Court issued an order dismissing the appeal.

City of Racine vs. Wisconsin Department of Revenue (Circuit Court of Dane County, June 19, 1982). The issue in this case is whether sales and use tax under s. 77.52 (2) (a) 2, Wis. Stats., is due on fees charged to individuals and teams in city sponsored athletic activities conducted on City of Racine recreational areas. The Tax Appeals Commission held that the fees are taxable (see WTB #23). The tax imposed under s. 77.52 (2) (a) 2, Wis. Stats., covers "2. The sale of admissions to amusement, entertainment or recreational events or places. . .or the privilege of access to or use of amusement, entertainment, athletic or recreational devices or facilities."

The City contended that the fees were charged to participants in various games sponsored by the City and the charge was solely to defray the cost of the events for which the charges were made. There was no profit and no intent to make any. The City did on occasion rent picnic areas and baseball diamonds and acknowledges that such rentals are taxable. The issue in this case does not relate to such rentals, but to charges made and used to defer cost of organizing leagues and supervision of the leagues and the play on the city grounds as well as the use of the physical facilities. The charge was to the players, not to spectators. The City contends that the statute does not cover the charges in question.

The Circuit Court held in favor of the department. The statute includes the "sales of admissions to recreational. . .places. . .". Also, "the privilege of access or use of athletic or recreational. . . facilities." The playing fields are clearly "recreational places" and "athletic recreational facilities" and the amount of the charge is related to the cost the City incurs in operation. The amount of the charge made is the prerogative of the City. But, whatever the amount of the charge, what the payor gets is admission to the place of the contest and the use of athletic or recreational facilities, which is what the statute taxes. The tax is imposed expressly on the charges made for the privilege of access to or the use of the facilities. The charges were made as a condition of such access or use and are therefore taxable under the statute. An exemption under s. 77.54 (9) (a), Wis. Stats., does not apply since the exemption covers sales and services made to the City, not by it.