

- 11.12(5) Farming, agriculture, horticulture and floriculture-A (10/1/84)
- 11.13 Sale of a business or business assets-A (10/1/84)
- 11.15 Containers and other packaging and shipping materials-A (1/1/84, 10/1/84)
- 11.16 Common or contract carriers-A (1/1/84)
- 11.17 Hospitals, clinics and medical professions-A (10/1/84)
- 11.19 Printed material exemptions-A (1/1/84, 10/1/84)
- 11.26 Other taxes in taxable gross receipts and sales price-A (1/1/84)
- 11.27 Warranties-A (10/1/84)
- 11.30 Credit sale, bad debt and repossessions-A (10/1/84)
- 11.32(3) "Gross receipts" and "sales price"-A (1/1/84)
- 11.39 Manufacturing-A (10/1/84)
- 11.45 Sales by pharmacies and drug stores-A (10/1/84)
- 11.48 Landlords, hotels and motels-A (1/1/84)
- 11.50 Auctions-A (1/1/84)
- 11.51 Grocer's guidelist-A (10/1/84)
- 11.52 Coin-operated vending machines and amusement devices-A (1/1/84)
- 11.56 Printing industry-A (10/1/84)
- 11.65 Admissions-A (10/1/84)
- 11.67 Service enterprises-A (10/1/84)
- 11.68 Construction contractors-A (1/1/84)
- 11.72 Laundries, dry cleaners and linen and clothing suppliers-A (10/1/84)
- 11.79 Leases of highway vehicles and equipment-A (10/1/84)
- 11.83 Motor vehicles-A (10/1/84)
- 11.85 Boats, vessels and barges-A (10/1/84)
- 11.86 Utility transmission and distribution lines-A (10/1/84)
- 11.87 Meals, food, food products and beverages-A (10/1/84)
- 11.94 Wisconsin sales and taxable transportation charges-A (10/1/84)
- 11.95 Retailer's discount-A (10/1/84)

1984 INCOME TAX AND CORPORATE FORMS

For tax practitioners and others who wish to print their own supplies of Wisconsin tax forms, camera copy of the 1984 Wisconsin income and franchise tax forms and the 1985 declaration of estimated tax forms is

available for purchase from the WISCOMP Center. The cost is \$10.50 per page which includes the 5% Wisconsin sales tax, handling and shipping. The camera copy for 1984 corporation forms is available immediately. Camera copy for most of the other tax forms is expected to be available about November 1, 1984. A clip out order form is located on the last page of this bulletin. Address orders to WISCOMP, One West Wilson Street, Room B345, Madison, WI 53702. Make remittance payable to WISCOMP. Remittance must accompany order. Orders are processed on a 24 hour basis.

BULK ORDERS OF TAX FORMS

In October, the department will mail out the order blank (Form P-744) which practitioners and other persons or organizations should use to request bulk orders of 1984 Wisconsin income tax forms. As in past years, professional tax preparers are subject to a handling charge on their orders. No charge is made for forms used for distribution to the general public (for example, in a bank, library or post office).

Orders should be placed as early as possible after you receive the order blank. By receiving the orders early, the department can better identify possible shortages of specific forms.

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1983 forms. If you are not on this mailing list and do not receive a Form P-744, you may request the bulk order blank by contacting any department office or by writing to the Wisconsin Department of Revenue, Central Services Section, Post Office Box 8903, Madison, WI 53708.

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:

Income and Franchise Taxes

Leroy W. Knies
Constitutionality of taxes
Thomas R. Krueger
Property transferred pursuant to divorce
Larry Roe
Negligence penalty - late filing
WOKY, Inc., c/o The Charter Company,
Allocation of income between affiliates

Sales/Use Taxes

Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Manhole Co., Inc.
Construction contractors
Cuna Mutual Insurance Society
Advertising material used out-of-state
Edward Kraemer & Sons, Inc.
Claims for refund
Frisch, Dudek and Slattey, Ltd.
Retailer - who must register
Hein/Bakers Equipment Corporation
Manufacturing exemption
Oscar Mayer & Co., Inc.
Manufacturing - cleaning supplies
Valley Microforms, Inc.
Manufacturing exemption
Young Women's Christian Association of Madison, Wisconsin Inc.
Admissions

INCOME AND FRANCHISE TAXES

Leroy W. Knies vs. Wisconsin Department of Revenue (Circuit Court of Waukesha County, March 22, 1984). The issue before the court is whether or not the decision of the Wisconsin Tax Appeals Commission dismissing the taxpayer's appeal should be affirmed or reversed solely on the record.

The taxpayer and his wife, Nancy L. Knies, filed with the department a form which purports to be a 1978 Wisconsin Income Tax form in which the taxpayer and his wife refused to answer any questions relative to the income they earned and received for the year 1978, by writing on the tax

form "Objected-self-incrim" The taxpayer and his wife did fill out line 13 on the front page of the income tax form, stating that \$1,445.63 was withheld on the earnings of Mr. Knies, and \$197 was withheld from the earnings of Mrs. Knies. Each of them signed the form on the back, although it was not dated. No employer was listed on the return, nor were there any W-2 forms attached. A tax assessment was made by the department against the taxpayer in the sum of \$5,085.00, payable on May 9, 1980.

At the Tax Appeals Commission hearing, the taxpayer refused to be sworn in to give any testimony until the Commission proved to him that it had jurisdiction over his case. The taxpayer further stated that all things must stop at any alleged hearing until jurisdiction is established by the Commission.

The Court found that the Commission did have proper jurisdiction and authority to proceed with the hearing. The law is clear pursuant to ss. 71.11(1)(4) and 71.12(3), Wis. Stats., that where the taxpayer fails to comply with the statute listing any income that he earned or received during the taxable year, or reports no income when in fact he did have income from which taxes were withheld, and later received an assessment of income taxes by the Department of Revenue, then the burden of proof shifts to the taxpayer to prove otherwise because he has not complied with the law relating to reporting his earned income. In this case both Mr. Knies and Mrs. Knies obviously had some earned income from some sources because they themselves listed the amount of tax withheld by some employer.

The Circuit Court affirmed the decision of the Wisconsin Tax Appeals Commission and dismissed the taxpayer's appeal from that decision.

The taxpayer appealed this decision to the Court of Appeals, which dismissed his appeal for noncompliance with the Rules of Appellate Procedure.

Thomas R. Krueger vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 10, 1984). The issues in this case are whether the taxpayer may be taxed on the January, 1980 transfer of his individual interest in appreciated real and personal property to his wife

as part of a stipulated divorce property division, and the amount of additional income that may be taxable.

The divorce property division disposed of all of the property acquired by the taxpayer and his wife during their marriage. The net fair market value of the property received by the taxpayer in the divorce property division was approximately equal to the net fair market value of the property received by his wife in the divorce property division. The farm real property which was transferred by the taxpayer to his wife had been originally purchased by them under a land contract as tenants in common, each having an undivided one-half interest. The taxpayer's undivided one-half interest in farm real property transferred by him to his wife had a fair market value of \$125,000 and an adjusted basis of \$41,815.40. The farm real estate was subject to their joint indebtedness in the full amount of \$136,162. The taxpayer's farm machinery and equipment transferred by him to his wife had a fair market value of \$32,000 and an adjusted basis of \$26,205.82. The machinery and equipment was subject to their joint indebtedness in the full amount of \$4,188. In accordance with the terms of the divorce judgment, the taxpayer's wife gave him her promissory note in the amount of \$60,000, the same being a lien against the farm real property until paid in full.

The Commission held that the taxpayer's January, 1980 transfer to his former wife of his undivided interest as a tenant in common in appreciated farm real property under a divorce decree dated January 10, 1980 is a taxable transfer resulting in \$83,185 additional income to him. His January, 1980 transfer to his former wife of his sole interest in farm machinery and equipment under a divorce decree dated January 10, 1980 is a taxable transfer resulting in \$5,794.18 additional income to him.

The taxpayer has appealed this decision to the Circuit Court.

Larry Roe vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 15, 1984) During 1980, the taxpayer worked at the powerhouse in Kenosha, Wisconsin. He had been advised to go tax exempt and no federal or state withholding was taken out. In 1980, he earned more income than in previous years, and in addition

he had a capital gain on the sale of a house. Therefore, he had a substantial Wisconsin tax liability for 1980.

On April 14, 1981, on the advice of his preparer, the taxpayer filed for an extension of time in which to file his 1980 return. Extensions were subsequently filed and granted through September 30, 1981. The taxpayer's 1980 return was filed on March 26, 1982 without payment of taxes due. In 1981 Mr. Roe went into business for himself and lost money. In 1982 he was employed but went on strike, medical leave and then got laid off. He could not afford to pay the taxes due when the 1980 return was filed on March 26, 1982. The department assessed Mr. Roe \$4,424.71 including taxes, interest, penalty and late filing fee. The taxpayer does not contest the assessed tax. His only objection is to the department's imposition on a negligence penalty for late filing.

Mr. Roe claimed that his accountant did not inform him that he could be subject to such a big penalty for not filing his 1980 return on time. He stated that had he been aware of the possibility of this penalty, he most certainly would have filed his return on time. He was ignorant of the filing requirements and penalties, and due to his financial situation he could not pay the taxes due.

The Commission ruled that the burden of proof was upon the taxpayer to establish that his failure to file his 1980 Wisconsin income tax return by September 30, 1981 (the filing date pursuant to three extensions granted by the Internal Revenue Service) was due to reasonable cause and not due to willful neglect. Ignorance of the law is not reasonable cause for failure to timely file. Since the taxpayer did not establish that the failure to file his 1980 Wisconsin income tax return within the time provided by law was due to reasonable cause and such failure was not due to willful neglect, the department's action was proper in imposing upon the taxpayer the 25 percent penalty provided in s. 71.11(46), Wis. Stats., for the year 1980.

The taxpayer has not appealed this decision.

WOKY, Inc., c/o The Charter Company, vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 5, 1984). The issue

for the Commission to determine is whether the department may allocate gross income, and thus, impute interest income between entities controlled by the same interests for almost \$2 million on inter-company receivables and loans to stockholders loaned by the taxpayer to its parent for which the taxpayer was never paid interest.

WOKY, Inc. was engaged in the business of radio broadcasting and advertising in the State of Wisconsin. During the period 1975 through April of 1978, WOKY, Inc. was owned by Bartell Media, Inc., whose parent was Downe Communications, Inc. During this period there were various inter-company loans made primarily from WOKY, Inc. to Downe. These loans were carried on the books and tax returns of WOKY, Inc. as "inter-company receivables" or inter-company advances. These amounts were carried on Downe's books and tax returns as inter-company payables. These amounts were neither declared as dividends by WOKY, Inc. nor reported as dividend income by the parent.

In April of 1978, the Charter Group acquired Downe, and Downe was merged into Chartcom, Inc., a Charter subsidiary. The same pattern of inter-company loans continued from WOKY, Inc. to the parent. However, the terminology was changed and the loans were carried on the books and tax returns as "loans to stockholders" Chartcom, Inc. was the sole shareholder of WOKY, Inc.

In 1982, WOKY, Inc. was sold to Surrey Broadcasting Co. Pursuant to the Board of Director's Resolution of April 1, 1983, all inter-company receivables owed WOKY, Inc. by The Charter Company, Chartcom, or any other subsidiary were declared dividends as of the closing of the sale. The loans to shareholders were never declared as dividend income by the parent in any year during the audit period.

The department maintains that the loans were not dividends prior to the April 1, 1983 declaration date, and thus, has imputed interest income to the taxpayer on the loans to stockholders during the audit period pursuant to s. 71.11(7m), Wis. Stats.

The taxpayer maintains that the inter-company transactions are not in fact loans. They are, if anything, constructive dividends. For the taxable

years 1975 through 1979, its balance sheets did indicate an inter-company receivable from the parent, Downe Communications, Inc. (DCI), which ranged from \$1.75 to \$2.05 million. No written instrument was ever executed with respect to the inter-company "debt" and no interest was paid to the taxpayer. Additionally, the "debt", which originated in 1973 has, to this day, never been repaid.

The Commission concluded that during the period under review, the department properly imputed interest to the \$2 million in loans to shareholders pursuant to the authority of s. 71.11(7m), Wis. Stats., to allocate income between and among related entities.

The taxpayer has not appealed this decision.

SALES/USE TAXES

Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Manhole Co., Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, June 25, 1984). The first issue in this case was whether the taxpayers are retailers when they sell and deliver manholes to the job site, or construction contractors engaged in real property construction activities. (See WTB #37 for a summary of the Wisconsin Tax Appeals Commission's decision.) An additional issue of estoppel was raised by the taxpayers before the Circuit Court.

The taxpayers contend that the Department of Revenue is equitably estopped from collecting the sales tax based on a letter written by the department to Advance Pipe on April 13, 1972. The letter states that Advance Pipe is being refunded overpayments on its sales tax remittances. Attachments to the letter state that the taxpayer's principal business activity "includes contracting and/or subcontracting for real property construction as well as the manufacturing of materials consumed therein." The attachment, a tax return filed by Advance Pipe, stated that its sales "are generated primarily from real construction activity and are not subject to sales tax."

Equitable estoppel is a defense which prevents a party from claiming a right when its action induces reliance by another when that other's

reliance is to its detriment. However, the reliance on the words or conduct by the other party must be reasonable and justifiable. Equitable estoppel may be applied against governmental agencies, but courts will do so with utmost caution and restraint to avoid tying the government's hands by the acts and conduct of its officials. Moreover, when asserting estoppel against a government agency, the injured party must prove that he acted honestly and in good faith reliance on the conduct of the government department.

In the present case, the taxpayers assert that estoppel should be applied because the department refunded sales taxes in 1972 based on the representations of the taxpayers. The Court cannot accept such a theory. The taxpayers were not relying upon the statements made by the department. Indeed, the department was relying upon statements made by Advance Pipe. Therefore, the Court ruled that the department is not estopped from collecting the tax involved because it previously issued a refund to Advance Pipe.

The Court also agreed with the Commission's findings and conclusions that the taxpayers' activities constituted retail sales within the meaning of ss. 77.51(4)(i) and 77.52(1), Wis. Stats., and are therefore subject to the sales tax.

The taxpayers have appealed this decision to the Court of Appeals.

Cuna Mutual Insurance Society vs. Wisconsin Department of Revenue (Court of Appeals, District IV, August 9, 1984). The issue in this case is whether *Dimensions*, a publication of the society, is printed advertising material exempt from the sales/use tax under s. 77.54(25), Wis. Stats.

The Department of Revenue determined that Cuna Mutual Insurance Society's publication *Dimensions* is subject to sales and use tax, and the Tax Appeals Commission affirmed the deficiency determination. (See WTB #26 for a summary of the Tax Appeals Commission's decision.) The Circuit Court reversed the Tax Appeals Commission's order and that decision was appealed. (See WTB #31 for a summary of the Circuit Court's decision.)

Cuna Mutual Insurance Society (CUNA) is a life insurance company whose business is to provide insurance for credit unions and their

members. CUNA and its subsidiaries, known collectively as the CUNA Mutual Group, sell their products and services only to credit unions and credit union members. The publication *Dimensions* is produced and paid for by the CUNA Mutual Group and is sent monthly, free of charge, to all credit unions in the United States and 59 countries where companies within the Group do business; 94.3% of the copies are distributed outside Wisconsin. *Dimensions* is a 16 page magazine containing a variety of articles relating to CUNA's products and services, CUNA's relationship to the credit union movement, and CUNA's commitment of selling to and servicing only credit unions and their members. Each issue of *Dimensions* is labeled a CUNA Group publication. CUNA considers *Dimensions* to be part of its advertising program.

The Tax Appeals Commission's finding of fact #15 stated:

"[Cuna's] publication, *Dimensions*, while including what could be characterized as advertising to promote [Cuna's] services and products, does not when taken as a whole constitute advertising or institutional advertising so as to qualify for the exemption under section 77.54(25), Stats."

The Court of Appeals found that this was a conclusion of law rather than a finding of fact. The court has the authority to set aside or modify an agency's action if it finds that the agency has "erroneously interpreted a provision of law".

The Court of Appeals found that the Commission's conclusion (Finding #15) that *Dimensions* is not advertising, and so does not fall within s. 77.54(25), Wis. Stats. (1977), is contradicted by its own findings (Findings #12 and #14). These findings are supported by substantial evidence in the record. Copies of the publication were made part of the record and CUNA's agents testified at the hearing, explaining their companies' use of *Dimensions* to sell products and services. In addition, the Commission made no finding that *Dimensions* had any purpose other than to advertise CUNA's companies.

The Court of Appeals ruled that because the Commission's decision of September 8, 1981 is an erroneous interpretation of the law, and be-

cause it is not supported by the evidence in the record, the Commission's decision must be set aside. The Circuit Court's decision of October 28, 1982 is affirmed.

The department has not appealed this decision.

Edward Kraemer & Sons, Inc. vs. Wisconsin Department of Revenue

(Wisconsin Tax Appeals Commission, May 30, 1984). The sole issue for the determination of the Commission is whether the taxpayer is a person who may file a claim for refund of sales taxes within the meaning of s. 77.59(4), Wis. Stats. 1975-1977.

The department has moved the Commission for an order dismissing the petition for review of the department's denial of the taxpayer's claims for refund, for the reason that Edward Kraemer & Sons, Inc. is not the "person" who paid taxes within the intent and meaning of s. 77.59(4), Wis. Stats.; and, thus, is not entitled to claim any refund thereunder or under any of the other provisions of the General Sales and Use Tax Law. Therefore, the Tax Appeals Commission lacks jurisdiction to review the alleged grievance of the taxpayer.

Edward Kraemer & Sons, Inc. is a Wisconsin corporation engaged in the business of operating quarries, and sand and gravel pits, and in bridge, highway and building construction, and has its principal offices at Plain, Wisconsin. During the period involved, 1971-1982, the taxpayer purchased large amounts of manufacturing and processing equipment and paid sales taxes on it to approximately 150 retailers who in turn reported and remitted the taxes paid to the Wisconsin Department of Revenue.

On February 19, 1976, the taxpayer filed its first claim for refund of such sales taxes, contending that the crushing and loading equipment was exempt from sales tax, as manufacturing machinery. Other claims were subsequently filed covering other portions of the years 1971-1982. On March 17, 1983, the Circuit Court of Dane County affirmed the Commission's earlier decision in an appeal by the taxpayer of a use tax assessment against it wherein the Commission concluded that crushing and loading equipment was exempt from Wisconsin sales and use tax.

The Commission found that the taxpayer was not the "person" required to file, with the department, a sales tax return, reporting the sales tax in question. The taxpayer was not the "person" who paid the sales tax involved to the department within the intent and meaning of s. 77.59(4), Wis. Stats. Thus, the taxpayer has no legal standing to make a claim for refund of sales taxes paid, either on its own behalf or the behalf of the some 150 retailers involved with it. The Commission lacks the authority to act on the claims for refund in question when the legislature has made no provision which grants the taxpayer legal standing to proceed in the matters involved herein.

The taxpayer has appealed this decision to the Circuit Court.

Frisch, Dudek and Slatery, Ltd. vs. Wisconsin Department of Revenue

(Wisconsin Tax Appeals Commission, May 25, 1984). The sole issue in this case is whether or not the taxpayer's charges to its clients for photocopies are subject to sales tax.

During the period under review, January 1, 1975 to October 31, 1979, the taxpayer was a Wisconsin corporation engaged solely in the business of providing legal services. Its common practice was to charge its clients separately for legal services and for disbursements on the same billing document. Examples of disbursements which were listed separately on a bill included photocopies, court reporter fees, airline or other travel charges, transcript costs and corporate minute books. Not every photocopy prepared in connection with performing legal services for a client was billed to that client. The attorney involved in the matter exercised a judgment on whether or not to bill photocopies. As a general guideline, if a copy was made for the benefit of a client, the client was billed for it; if a copy was made for the benefit of the attorney or office, the client was not billed for it. About 50% of photocopies were billed to clients and about 50% were absorbed by the law firm as a cost of doing business.

The cost of billed disbursements for photocopying has ranged from about \$.25 to about \$650. The fee per photocopy during the period under review was \$.20 per copy until 1977, then \$.25 per copy, with some exceptions. For example, if there was a large amount of photocopying for a particular client, occasionally the