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:

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INDIVIDUAL INCOME TAXES

Chris Culver vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 13, 1985). The sole issue for the Commission to determine is whether, during 1979, the taxpayer may properly deduct $21,556.01 in 1979 Schedule F farm expenses for amounts deposited from his individual funds into the joint checking account he maintained with his wife, as "payment" for services performed for his farm.

The taxpayer was engaged, together with his brother, in a fairly large dairy and beef cattle farm operation. He and his brother owned, as tenants in common, all farmland including acreage purchased from their father, as well as from several third parties located conveniently nearby. Most of the other farm assets were owned by the brothers together. Gross farm profits, such as milk checks, were deposited in the brothers' joint checking account. The brothers assigned twenty-five percent of the milk checks to their father. There was no formal partnership agreement, oral or written, between the taxpayer and his brother, and each attempted to treat his "share" of the overall farm operation as a separate business.

In conjunction with implementing the farm operation, the taxpayer and his brother adopted an arrangement wherein they would employ their wives to perform two functions, bookkeeping and farm chores, for pay. The bookkeeping and farm chores were divided relatively equally between the two according to their training, ability and preference to perform certain tasks.

The taxpayer's wife, Linda, maintained the brothers' books with the assistance of her sister-in-law; maintained and signed checks from the brothers' joint checking account; and performed work supportive of tax return preparation. She also performed her primary duties of farm chores, principally related to caring for calves and milking.

For 1979, the taxpayer had contracted with his wife, Linda, to pay her $6,000 yearly for bookkeeping work based on an estimate of twenty hours per week. In addition, she was to be paid $6 per hour for farm chores. A yearly incentive payment was to be made in the amount of twenty-five percent of net farm profit from the joint farm operation of the taxpayer and his brother. The taxpayer and his wife recorded her hours spent performing farm chores.

The taxpayer's wife, Linda, received her "compensation" in the following manner. The taxpayer received checks from the Culver Brothers checking account representing his "share" of milk payments, less expenses. She was authorized to, and did, endorse those checks in his name. She then deposited them, less cash withdrawals in many instances, into the joint checking account maintained by her and the taxpayer. The taxpayer signed documents relating to these deposits which stated that they were considered to be her compensation under the services agreement. Although the taxpayer's wife claimed to be free to use the joint checking account money as she saw fit, she was responsible for most of her family's personal living expenses.

There were no payroll checks issued to the taxpayer's wife. No taxes were withheld from amounts representing bookkeeping or farm chore "earnings" nor was any social security withheld. No self-employment returns were filed by his wife. No other payments such as unemployment compensation or worker's compensation were made. The funds she received remained legally at his disposal in their joint checking account and were used, at least in part, for payment of his family living expenses.

The Commission held that the record does not establish that the taxpayer had established an employer-employe relationship with his wife. The relationship was too informally structured; there was no employment agreement established at the outset of or during the period under review. Amounts deducted by the taxpayer as wages or salary paid to his wife are not properly so characterized. Transfers of the taxpayer's individual funds respecting his wife's performance of services in his farm business to a joint checking account shared with her under the circumstances did not constitute deductible payment of "wages" under Wisconsin law.

The taxpayer has appealed this decision to the Circuit Court.

Joyce A. Gregg vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). The issue in this case is whether the taxpayer may take a deduction in 1981 for her contribution to an Individual Retirement Account (IRA). The department disallowed her deduction because she had also contributed to a qualified pension plan during 1981.

During 1981, the taxpayer worked for Kohls Corporation. At the time she was hired, she was hired on a part-time basis with no benefits. She was told that she never had a pension plan. Subsequent to her leaving her employment with Kohls, the taxpayer learned that during her employment, in certain months if she worked extra hours, payments were made on her behalf by Kohls into the United Food and Commercial Workers Union and Wisconsin Meat and Allied Industry Pension Plan.

The Commission concluded that although the taxpayer's contribution to the qualified pension plan in 1981 was small, in order to qualify for the IRA deduction, the taxpayer must not have been an active participant in a pension plan "for any part" of 1981. The taxpayer was an "active participant" in a qualified pension plan during part of 1981. The taxpayer is not entitled to an IRA deduction for 1981.

The taxpayer has not appealed this decision.

Dennis R. Hough vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 28, 1985). The sole issue in this case is whether the taxpayer's mileage expense for traveling from his home in Janesville, Wisconsin to a job site in Byron, Illinois is a nondeductible commuting expense or a deductible transportation expense. The taxpayer's home is located approximately 67 miles from Byron, Illinois.

The taxpayer was a welder and a member of Local 214 of the National Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry located in Janesville, Wisconsin. Ordinarily he received his job assignments from Local 214 in Janesville. However, because of the shortage of work in the Janesville area, the taxpayer requested a "travel card" to enable him to receive work assignments from Union Local 23 of Rockford, Illinois. The job in Byron, Illinois was a job assignment from Local 23 in Rockford, Illinois.

During 1979 the taxpayer worked at the Byron Nuclear Power Plant in Byron, Illinois for the Hunter Corporation, except for a few weeks in January and in October or November. In January, he worked briefly for two other employers. In the fall, he was laid off during a "jurisdictional dispute". The taxpayer worked at the Byron, Illinois job site for Hunter Corporation during all of 1980 and most of 1981. The taxpayer commuted on a daily basis from his home in Janesville, Wisconsin to the job site in Byron, Illinois.

When the taxpayer accepted a job assigned to him through Local 23 in Rockford, Illinois, he did not know how long it would last. He was ready to return to his own Local 214 as soon as work in that area became available. He had no seniority rights at his job in Byron, Illinois and could be relieved of his position at any time if a Local 23 member was without work.

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

The taxpayer has appealed this decision to the Circuit Court.

Ervin F. Koenig vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 28, 1985). The sole issue for the Commission to determine is whether the taxpayer's mileage expense for traveling from his home in Beaver Dam to various job sites located more than ten miles from his home is a nondeductible commuting expense or a deductible transportation expense. The taxpayer's home in Beaver Dam is located approximately 26 miles from Watertown, 10 miles from Horicon, 15 miles from Waupun, 9 miles from Juneau and 32 miles from Johnson Creek. He worked at various job sites in the above communities during the years under review and commuted on a daily basis from his home. The taxpayer was a carpenter and a member of 2064 Carpenters Local in Beaver Dam, Wisconsin, from which he received his job assignments.

The taxpayer contended that his employment was temporary and that he should be allowed mileage deductions if the job site is beyond ten miles from his home, is a temporary job, and if he is required to carry his tools with him for the job.

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

The taxpayer has not appealed this decision.

William E. Korrer vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 19, 1985). The sole issue for the Commission to determine is whether during the tax years 1978 through 1981 a bona fide partnership existed between the taxpayer and his wife, which would permit the income derived from a motel tavern business to be split between the taxpayer and his wife as equal partners.

The taxpayer and his wife purchased the combination motel tavern business with funds from the sale of a jointly owned personal residence, the sale of a business Mr. Korrer had owned and some inherited monies of his wife. Business and personal funds were commingled in a checking account in the name of Little Minocqua Motel, William E. and Isabel M. Korrer. Neither the taxpayer nor his wife had a separate checking or savings account.

The taxpayer and his wife both worked full time, seven days a week and year-round in the business. Neither was employed outside of the business.

It appeared that both the taxpayer and his wife had an equal voice in the management of the business. Each had distinct areas of responsibility, including supervisory roles, which allowed them to contract or transact business individually or after consultation with one another.

Many of the bills were in the name of the business and/or the name of both the taxpayer and his wife. The

taxpayer and his wife maintained property insurance, liability insurance, worker's compensation insurance and loss of earnings insurance with both parties named as the insured. Both the taxpayer and his wife were named as makers doing business as Little Minocqua Motel in promissory notes for money loaned in the operation of the business.

According to Isabel Korrer's testimony, the liquor license was in the taxpayer's name alone, which kept open the option to switch the license to her name should that be necessary because of license violations resulting in the taxpayer's license revocation. The seller's permit was also in the taxpayer's name alone because the permit was from his previous vending business and, therefore, had been in his name alone.

The tax forms filed from 1978 through 1981 were consistent in their treatment of the business income, allocating equal amounts to the taxpayer and his wife.

Social security taxes were filed and paid for both individuals for all the years under review, again based on equal division of the business income.

The taxpayer and his wife did not file any Wisconsin or federal partnership tax returns for the years under review. There was no formal partnership agreement, oral or written, between the taxpayer and his wife, although each agreed that they would share all gains and losses equally.

The Commission held that during the taxable years 1978 through 1981 a bona fide partnership did exist between the taxpayer and his wife regarding their combination motel tavern business. The relationship between the taxpayer and his wife met all four elements of the *Skaar* requirement to find a valid partnership.

The department has not appealed this decision.

Thomas R. Krueger vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, June 24, 1985). The issue on appeal is whether the transfer, pursuant to a divorce property division agreement, by a husband to his wife of full title in appreciated real property held as tenants in common during the marriage together with appreciated personal property titled solely in the husband's name, in exchange for a promissory note and retention of other solely owned property when the property is of approximately equal value, is a taxable event for Wisconsin income tax purposes.

Krueger and his wife were divorced in 1980. Prior to their divorce, the couple had owned farm real property as tenants in common. Krueger was the sole owner of farm machinery and equipment.

Pursuant to a divorce agreement entered in January of 1980, the couple divided their property. Krueger transferred his one-half undivided interest as a tenant in common in the farm real property to his wife. His one-half interest had a fair market value of $125,000 and an adjusted basis of $41,815.40 at the time of the transfer. This real property was subject to a jointly-held debt of $136,162. Krueger also transferred farm equipment and machinery to his wife, along with its indebtedness. At the time of this transfer, this personal property had a fair market value of $32,000, an adjusted basis of $26,205.82 and a jointly-held debt of $4,188.

In exchange for these transfers, Krueger received a promissory note from his wife in the amount of $60,000. This note was secured by a lien against the farm real property. Krueger also retained some land, a business and some personal property that he had held in his own name during the marriage. The net fair market value of all of the property received by Krueger in the divorce property division was approximately equal to the net fair market value of the property received by his wife.

The Department of Revenue determined that Krueger's transfer of appreciated property to his wife, pursuant to a divorce settlement, was a taxable event. The department's decision was affirmed by the Wisconsin Tax Appeals Commission which in turn was affirmed by the Circuit Court. (See WTB #39 for a summary of the Wisconsin Tax Appeals Commission's decision.)

In order to answer the question raised, the following sub-issues must be addressed:

A. Did the adoption of the federal definition of income by the Wisconsin legislature in 1965 legislatively overrule *sub silentio* the Supreme Court's decision in *Department of Taxation v. Siegman*, 24 Wis. 2d 92 (1964), which held that the transfer of appreciated, jointly-held real property was not a taxable event in Wisconsin?

B. If so, does Wisconsin property and divorce law place this case under the rule of *United States v. Davis*, 370 U.S. 65 (1962), which held that the transfer of appreciated assets is a taxable event where the transferee spouse has no co-ownership interest in the assets during the marriage, or should this case fall outside of the *Davis* rule and the transfer of appreciated property be deemed to be a nontaxable division of property between co-owners?

In *Siegman*, the Supreme Court held that interspousal transfers of appreciated property made pursuant to a court-imposed divorce judgment were not subject to Wisconsin income tax, pursuant to the provisions of s. 71.03(1)(g), Wis. Stats. Section 71.03(1)(g) defined taxable income as: "All profits derived from the transaction of business or *from the sale or other disposition of real estate* or other capital assets. . ." (Emphasis added.) The Supreme Court determined that: "Because of the difficulty in assessing the economic benefit conferred upon the taxpayer in this context we conclude that the legislature did not intend the transfer of appreciated property, as an incident of a property settlement, to be a taxable event within the meaning of sec. 71.03(1)(g), Stats."

Krueger argued that *Siegman* is the controlling law to be applied in this case and that the Circuit Court erred in not applying it. The department argued that *Siegman* is not applicable because the state legislature, following the *Siegman* decision, amended chapter 71 and changed the definition of taxable income to be co-extensive with the federal definition of income. The Supreme Court found the department's argument to be compelling in this regard.

Chapter 163, Laws of 1965, federalized Wisconsin tax law and adopted many definitions from the Internal Revenue Code as Wisconsin law. Section 71.02(2)(e), Wis. Stats. 1979-80, states that "'Wisconsin adjusted gross income' means federal adjusted gross income, with the modifications prescribed in s. 71.05(1) and (4)." The Court found that in adopting a definition of state income to mean the same as federal income,

the legislature intended that the federal definition of income be applicable as it is interpreted and modified. In other words, what constitutes income for Wisconsin purposes changes as the federal standard evolves. In order to determine Krueger's tax liability in the instant case it is necessary to determine whether the transfer of appreciated property is a taxable event within the federal definition as it has evolved to date.

The department argued that this case is governed by the rule in *Davis*, and that therefore Krueger's transfers are taxable income within the definition of federal taxable income. In *Davis*, the Supreme Court held that there was a taxable event within the meanings of Sections 61 and 1001 of the Internal Revenue Code when a husband transfers property to his wife in exchange for the release of her marital property rights in her husband's separately-owned property where, under state law, such rights are not the equivalent of ownership.

Davis established a general rule that a transfer in satisfaction of a marital obligation is taxable, but a transfer in satisfaction of a property interest is not. If a transfer of appreciated property simply divides jointly-acquired or marital property, the transfer is not generally considered to result in income to the transferor because the transferee, as co-owner of the property, received no more than that which he or she already owned. The transfer merely changes the record title to correspond to the transferee's rights of ownership. In order to determine whether a divorce-forced transfer is in satisfaction of a marital obligation or a division of property between co-owners it is necessary to examine the marital property system of a given state.

Krueger contended, and the Supreme Court agreed, that the couple's property must be considered to be effectively co-owned, given the explicit legislative pronouncement of s. 767.255, Wis. Stats., which presumes that upon the dissolution of a marriage all property which is not traceable to a gift or inheritance is to be divided equally between the parties except where specific factors are present to militate against such a division. Thus, regardless of how the property which was acquired during the marriage may have been titled, each spouse in Wisconsin, since the statutory changes made effective in 1978, has presumptively an equal ownership interest in such property upon the dissolution of the marriage. In the instant case, the parties stipulated that the transfer made pursuant to the divorce agreement equally divided the Kruegers' real and personal property.

Thus, the transfer does not result in a capital gain to the husband. Accordingly, the decision of the Circuit Court must be reversed.

Jeanne F. Polan vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 8, 1985). The taxpayer contended that (a) the department improperly applied s. 71.337(1), Wis. Stats., because the imposition of a tax where the nonresident shareholder suffers a loss is inconsistent with the language and the records stating the legislative purpose of the statute; (b) s. 71.337(1), Wis. Stats., as applied, violates the United States Constitution; and (c) s. 71.11(21)(bm), Wis. Stats., bars any of the department's tax assessments against her.

Jeanne F. Polan is and was, at all relevant times, a resident of the State of Illinois. She was the sole shareholder of Burr Oaks Camp, Ltd. (the "Corporation"), until its dissolution on May 17, 1976. The corporation was incorporated in the State of Illinois and operated a camp (Burr Oaks Camp) in the State of Wisconsin.

In 1976, the Corporation executed a plan of complete liquidation, pursuant to Internal Revenue Code Section 337, under which it sold Burr Oaks Camp for $650,000. The Corporation's basis in the property and its expenses in the sale were $260,818.69 and $22,213.44, respectively. Therefore, the Corporation realized a net gain of $366,967.87 on the sale. The Corporation distributed all of its cash and other assets to Jeanne F. Polan, its sole shareholder, after it paid all of its non-Wisconsin tax liabilities.

The taxpayer had acquired her stock in the Corporation on September 30, 1973, and had a basis in that stock of $235,874. When the Corporation distributed its assets, she received $190,361.48. Under Internal Revenue Code Section 337, she realized a net capital loss in the amount of $45,512.52. The taxpayer claimed this loss on her 1976 federal income tax returns.

Under Internal Revenue Code Section 337, the Corporation recognized no gain or loss on the sale of its property because it distributed all of its assets to the shareholder within 12 months of the date that the shareholder adopted a plan of complete liquidation.

Under s. 71.337(1), Wis. Stats., the Corporation realized a taxable gain of $366,967.87 on the sale of its property, notwithstanding the fact that the Corporation distributed all of its assets to its sole shareholder within 12 months of the date that the shareholder adopted a plan of complete liquidation, because there were no Wisconsin resident shareholders of the Corporation.

On May 30, 1978, pursuant to s. 71.337(1), Wis. Stats., the department sent the Corporation a franchise tax assessment notice for the 1976 calendar year, in the amount of $20,578.30 ($18,011.64 tax and $2,566.66 interest). Additional income of $230,780.23 was assessed ($366,967.87 capital gains minus $133,187.64 in operating losses from the last five years of operations). The Corporation petitioned for redetermination of the assessment. The department denied the petition for redetermination. No appeal was made.

Jeanne F. Polan did not file Wisconsin income tax returns for the years 1976, 1977, 1978 or 1979. On April 27, 1981, the department assessed the Corporation's tax against her, pursuant to s. 71.11(21n), Wis. Stats. This assessment consisted of the $18,011.64 in tax plus $6,845.88 in interest.

The Commission concluded that the department properly applied the provisions of s. 71.337(1), Wis. Stats., and assessed the taxes due from Burr Oaks Camp, Ltd. against Jeanne F. Polan, per the clear and unambiguous language contained in s. 71.11(21n), Wis. Stats. The six-year statute of limitation contained in s. 71.11(21)(g), Wis. Stats., applies to the matter before the Commission, because Burr Oaks Camp, Ltd. reported no income for taxation to the State of Wisconsin on its 1976 fiscal year tax return while its properly assessable taxes were in fact $18,011.64. The provisions of s. 71.337(1), Wis. Stats., are presumed to be constitutional until they are de-

clared unconstitutional by a Court of competent jurisdiction. The Wisconsin Tax Appeals Commission is not vested with the authority to review the constitutionality of laws legally enacted by the legislature of the State of Wisconsin.

The taxpayer has appealed this decision to the Circuit Court.

Joseph F. Schissler Estate vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). The issue for the Commission to decide is whether the decedent's estate came into possession of a real estate interest in a Florida apartment complex not subject to Wisconsin taxation, or an income interest in the proceeds of the sale, subject to Wisconsin taxation as "income in respect of a decedent" under Section 691(a) of the Internal Revenue Code.

Prior to March 13, 1981 the decedent entered into an agreement to sell a 24-unit apartment building located in Florida. The closing was scheduled to be held at 12:30 p.m., Central Standard Time, in Florida. The decedent signed the Warranty Deed and other closing documents prior to March 12, 1981, postdating the documents for March 13, 1981, and sent them to Donna M. Waniewski, a Florida attorney representing the decedent at the closing. The transaction was closed on March 13, 1981 after 12:30 p.m., Central Standard Time. The decedent died at 11:08 a.m., Central Standard Time, in Milwaukee, Wisconsin.

The Commission held that the proceeds received on the sale of the decedent's interest in the Florida apartment complex constituted income in respect of a decedent within the meaning of Section 691(a) of the Internal Revenue Code and, thus, were includable in gross income for 1981.

The taxpayer has appealed this decision to the Circuit Court.

Richard P. Singer vs. Wisconsin Department of Revenue (Circuit Court of Waukesha County, June 12, 1985). The issue on appeal is whether the taxpayer is liable for an additional underpayment penalty because of his failure to make estimated payments in the first three quarters on the additional $750,000 received in December of 1981, even though the Wisconsin Tax Appeals Commission found that such income was not "reasonably expected" by the taxpayer until September of 1981. The Commission's decision answered this question in the affirmative.

Section 71.21(1), Wis. Stats., requires a taxpayer to make quarterly declarations and payments of estimated tax whenever his tax for a taxable year "can reasonably be expected" to exceed withholding by $100 or more. The Commission found that the taxpayer reasonably expected to receive approximately $40,000 of income not subject to withholding in 1981. It also found that he had "no reasonable expectation" until "sometime in September" of 1981 of receiving the $750,000 which was received in December of 1981 as a result of a corporate redemption of his Clark Oil common stock. It is undisputed that the taxpayer failed to make the required estimated payments on the $10,000 received in each of the first three quarters of 1981. He did make an estimated payment of $80,000 for the fourth quarter, in January of 1982. The taxpayer concedes that he owes a penalty of $126.60 due to his failure to make the required payments for the first three quarters.

Section 71.21(11), Wis. Stats., provides a penalty determined at the rate of 12 percent per year "on the amount of the underpayment for the period of the underpayment". The manner in which this penalty is calculated is prescribed by s. 71.21(12) and (13), Wis. Stats.

The Circuit Court concluded that the decision of the Commission is based upon an erroneous interpretation of s. 71.21, Wis. Stats., and must be reversed. The matter is remanded to the Commission for determination of whether the taxpayer's expectation of receipt of the $750,000 took place before or after September 15, 1981. If before, the taxpayer was liable under s. 71.21(2)(b), Wis. Stats., to pay an estimated tax on this $750,000 for the third quarter and is subject to a penalty under s. 71.21(11), Wis. Stats., for failure to do so. If after, his liability on the $750,000 arose only with the fourth quarter and no penalty is due on the $750,000. In either event, the taxpayer is liable for the conceded penalty of $126.60 for failure to make the quarterly payments on the $30,000.

The department has not appealed this decision.

CORPORATION FRANCHISE/INCOME TAXES

Wisconsin Department of Revenue vs. Lake Wisconsin Country Club (Wisconsin Supreme Court, June 4, 1985). The department appealed the adverse decision of the Court of Appeals, District IV, which concluded that the Wisconsin Tax Appeals Commission's determination that assessments for Lake Wisconsin's capital improvement fund were nontaxable contributions to capital is reasonable. (See WTB #42 for a summary of the decision of the Court of Appeals.)

The Supreme Court denied the department's petition for review.

Wisconsin Railroad Services Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 5, 1985). The issue in this case is whether or not the taxpayer correctly reported its income for franchise tax purposes under s. 71.11(8)(a), Wis. Stats., on the cash method of accounting.

The taxpayer is engaged in the business of repair, maintenance and construction of railroad beds, spurs and associated functions. It supplies labor, material and track in construction of railroad beds. The taxpayer maintains an inventory used in the construction business.

The cash method of accounting was regularly employed by taxpayer in keeping its books and records. The taxpayer used a carbonized check writing system to record expenses and a carbonized deposit system to record income. No general ledgers were kept. A monthly spread sheet was prepared to track expenses.

The taxpayer prepared and filed its Wisconsin income and franchise tax returns on the cash basis.

The Commission concluded that the taxpayer's method of reporting income for the Wisconsin franchise tax during the period under review was computed in accordance with the method of accounting which the taxpayer regularly employed in keeping its books. The taxpayer's use of the cash method of reporting income for the Wisconsin franchise tax during the period under review has not been proven by the greater weight of credible evidence to clearly reflect the taxpayer's income for purposes of s. 71.11(8)(a), Wis. Stats. The department's assessment which changed