

ISI&E DIVISION OFFERS TAXPAYER ASSISTANCE

During the 1986 filing season (January through April 15th), the division's auditors and tax representatives will be available to answer questions.

In the department's larger offices, assistance is provided on a daily basis (Monday through Friday). Assistance in other offices generally is available on Mondays only, although there are exceptions for Ashland, Janesville and Wausau as noted below.

Offices Providing Daily Assistance

Location	Address	Telephone No.	Hours
*Appleton	265 W. Northland	(414)735-5001	7:45-4:30
*Eau Claire	718 W. Clairemont	(715)836-2811	7:45-4:30
*Green Bay	200 N. Jefferson St.	(414)436-4230	7:45-4:30
*Kenosha	5500- 8th Ave.	(414)656-7100	7:45-4:30
*LaCrosse	620 Main	(608)785-9720	7:45-4:30
*Madison	4638 University Ave.	(608)266-2772	7:45-4:30
Madison	212 East Washington Ave.	NONE	8:00-4:15
*Milwaukee	819 N. Sixth St.	(414)224-4000	7:45-4:30
*Racine	616 Lake Ave.	(414)636-3711	7:45-4:30
*Waukesha	141 N.W. Barstow St.	(414)521-5310	7:45-4:30

Offices Providing Assistance on Mondays Only (unless otherwise noted)

Ashland	Courthouse	NONE	10:00-2:00 (a)
Baraboo	1007 Washington	(608)356-8973	7:45-4:30
Barron	57 S. 4th St.	(715)537-3621	7:45-4:30
Beaver Dam	211 S. Spring St.	(414)887-8108	7:45-4:30
Cedarburg/Grafton	220 Oak Street	(414)377-6700	7:45-4:30
Elkhorn	300 S. Lincoln St.	(414)723-4098	7:45-4:30
Fond du Lac	160 S. Macy St.	(414)929-3985	7:45-4:30
Hayward	221 Kansas Ave.	(715)634-8478	8:00-12:00
Hudson	759 Sommer St., North	(715)386-8225	7:45-4:30
Janesville	115 S. Franklin	(608)755-2750	7:45-4:30 (b)
Lancaster	237 W. Hickory St.	(608)723-2641	7:45-4:30
Manitowoc	1314 Memorial Dr.	(414)683-4152	7:45-4:30
Marinette	Courthouse	(715)735-5498	9:00-12:00
Marshfield	630 S. Central Ave.	(715)387-6346	7:45-4:30
Monroe	1220- 16th Ave.	(608)325-3013	7:45-4:30
Oshkosh	404 N. Main St.	(414)424-2100	7:45-4:30
Park Falls	1114 S. 4th Ave.	(715)762-2160	7:45-11:45
Rhineland	Sunrise Plaza	(715)362-6749	7:45-4:30
Shawano	420 E. Green Bay St.	(715)526-5647	7:45-4:30
Sheboygan	504 S. 14th St.	(414)459-3101	7:45-4:30
Superior	Courthouse	(715)394-0204	8:00-4:30
Tomah	City Hall	(608)372-3256	8:30-12:00
Watertown	415 E. Main St.	(414)261-7700	7:45-4:30
Waupaca	201½ S. Main St.	(715)258-9564	7:45-11:45
Wausau	Courthouse Annex	(715)847-5380	7:45-4:30 (c)
West Bend	429 Walnut St.	(414)338-4730	7:45-4:30
Wisconsin Rapids	1681 Second Ave. S.	(715)421-0500	7:45-4:30

(a) Tuesdays only (b) Monday through Wednesday (c) Monday and Wednesday only *Open during noon hour

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 de-

partment 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

Orlando A. Boudreaux
Auto expenses

Edwin F. Gordon
Tax-option corporation—manufacturer's sales tax credit
Lynn R. Lauersdorf
Losses—not for profit activity
Wages paid to spouse
Robert L. Melton
Auto expenses
Roscoe Q. Much
Constitutionality of taxes
Edward J. Roepsch
Splitting of income—husband/wife

Corporation Franchise/Income Taxes

Cedarburg Mutual Insurance Company
Insurance companies—add-back for taxes
Payco Seeds, Inc.
Nexus

Sales/Use Taxes

Bargo Foods North, Inc.
Meals—transportation companies
Gross receipts
Brenner Tank, Inc.
Repair and maintenance service
Karen Gartzke
Corporate officer liability
K Mart Corporation
Appeals
Kohler Co.
Advertising displays
Schuster Construction Company
Petition for redetermination
Negligence penalty

INDIVIDUAL INCOME TAXES

Orlando A. Boudreaux vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 6, 1985). The issue for the Commission to determine is whether the taxpayer's mileage expense for traveling from his home in Racine to various job sites in the Milwaukee area is a nondeductible commuting expense or a deductible transportation expense.

The taxpayer was an iron worker and a member of the Iron Workers Union Local 8 in Milwaukee, Wisconsin. He was registered for employment at the business office of the union in Milwaukee and received his job assignments from that office. During the year 1978, the taxpayer worked at job sites in Milwaukee and Kenosha; in 1979, at job sites in Kenosha; in 1980, at job sites in Kenosha, Milwaukee and Mt. Pleasant; and in 1981, at job sites in Mt. Pleasant, Kenosha and Racine. During the period involved, the taxpayer worked for five different employers, ranging from two to four employers per year. The taxpayer commuted on a daily basis from his home in Racine, Wisconsin to his various job sites.

The taxpayer, on his Wisconsin income tax returns, claimed a deduction for employee business travel expense. The deduction was computed on a mileage basis from the tax-

payer's home to his various job sites and back home. When the taxpayer 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 job assignments exceeded one year. The taxpayer was not an independent contractor, but was an iron worker employee of the contractor in charge of the job site at which he was employed.

The Commission held that the taxpayer's travel expenses were nondeductible personal expenses incurred by the taxpayer 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 of the Internal Revenue Code.

The taxpayer has not appealed this decision.

Wisconsin Department of Revenue vs. Edwin F. Gordon (Court of Appeals, District IV, October 22, 1985). The Wisconsin Department of Revenue appealed a judgment holding that s. 71.043(2), Wis. Stats., permits a sales and use tax credit to be taken against personal income tax. The department contended that the tax credit is available only to corporations. (See WTB #32 for a summary of the Wisconsin Tax Appeals Commission's decision.)

Edwin F. Gordon filed a 1979 nonresident tax return reporting Wisconsin net taxable income of \$316,419.36 and a net tax of \$30,051.94. Gordon's 1979 income included \$473,298.11 generated by his 100% share of the income of Gender, Paeschke and Frey Company (GPF), a tax-option corporation in which Gordon owned all outstanding stock. On his personal income tax return, Gordon claimed a tax credit of \$26,945.83 based on sales taxes paid by GPF. The department disallowed the full amount of the tax credit claimed. On appeal, the Wisconsin Tax Appeals Commission reversed, and the Circuit Court affirmed the decision and order of the Commission.

The sole issue in this case is whether a taxpayer who is the only shareholder in a Wisconsin tax-option corporation is entitled to claim the tax credit allowed under s. 71.043(2) on his personal income tax return.

Section 71.043(2) provides in pertinent part that "the tax imposed upon

or measured by corporation net income . . . pursuant to s. 71.01(1) or (2) may be reduced by an amount equal to the sales and use tax under ch. 77 paid by the corporation". When statutory language is clear and unambiguous the Court of Appeals may not resort to judicial rules of construction, and must arrive at the intention of the legislature by giving the language its ordinary and accepted meaning. The language of s. 71.043(2) is unambiguous. It provides that tax measured by corporation net income can be reduced by the amount of the tax credit. Since Gordon owns 100% of the stock of a tax-option corporation, a portion of his personal income tax liability is measured by corporation net income.

Therefore, the Court of Appeals held that the portion of Gordon's personal income tax that is measured by the net income of the tax-option corporation can be reduced by an amount equal to the corporation's tax credit under ch. 77, Wis. Stats.

The department has not appealed this decision.

Lynn R. Lauersdorf vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 13, 1985). The issues in this case are as follows:

A. Is the taxpayer entitled to deductions, as ordinary and necessary business expenses, in excess of the cottage rentals actually received from 1979 through 1982?

B. Is the taxpayer entitled to deductions, as ordinary and necessary business expenses, of amounts allegedly paid to his wife in conjunction with the cottage rentals or the taxpayer's part-time business as a consulting engineer?

Continuously throughout the years involved, the taxpayer was a structural and civil engineer employed full-time by the State of Wisconsin, in Madison, Wisconsin.

On August 7, 1968, the taxpayer and his wife purchased joint ownership of a cottage near Shawano, Wisconsin. They rented it out parts of each summer. For seventeen consecutive years (from 1968 through 1984), they never showed a profit, although they intended throughout those years to operate the rental business at a profit.

On his Wisconsin income tax return (but not for federal purposes), the taxpayer reported wage payments of up to \$6,544 annually to his wife, in connection with renting out the cottage (including transportation between Madison and Shawano), and also for office work done by her in conjunction with his part-time consulting engineering business. These expenses were shown on their Wisconsin income tax returns as modification deductions from their otherwise taxable income.

The taxpayer and his wife never entered into a formal partnership, lease or other business relationship between themselves; usually set no hourly wages nor regular method of compensation to her; and made no employee-type deductions or annual W-2 forms regarding her alleged wages.

The Commission concluded that the taxpayer failed to meet his burden of proof by satisfactory evidence that his cottage rental business was entered into for profit. The record does not establish that the taxpayer had established an employer-employee relationship with his wife. The relationship was too informally structured; there was no employment agreement established at the outset or during the period under review; no employee-type deductions were taken from Mrs. Lauersdorf's "wages"; and the amounts which she received in each year were calculated as of the end of each year. Amounts deducted by the taxpayer as wages or salary paid to Mrs. Lauersdorf are not properly so characterized.

The taxpayer has not appealed this decision.

Robert L. Melton 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 Beloit to a job site in Edgerton, Wisconsin is a non-deductible commuting expense or a deductible transportation expense.

The taxpayer resided in Beloit and worked as a millwright for the Kenneth F. Sullivan Company of Madison, Wisconsin. He took a deduction for mileage to and from his home to the job site while employed by the Sullivan Company. Once he terminated his employment for the Sullivan Company and began working

for the Dana Corporation in Edgerton, Wisconsin, he ceased deducting his mileage as a business expense.

The taxpayer contends that his employment was temporary and outside of his tax home; thus, his transportation expenses are deductible. It was the taxpayer's understanding that the job would last anywhere from two to three months, although it actually lasted 28 months before he voluntarily left the employment to take another job.

The Commission concluded that the taxpayer's travel expenses were non-deductible 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.

Roscoe Q. Much vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 19, 1985). The department made a motion to dismiss the petition for review in this matter on the following grounds:

A. The taxpayer failed to file a proper petition for review within 60 days after receipt of the department's notice of denial of the petition for redetermination, as required by s. 73.01(5)(a), Wis. Stats., and, therefore, the Tax Appeals Commission lacks jurisdiction to review the alleged grievances of the taxpayer.

B. The department's action was proper as a matter of law in estimating the taxable income and income taxes of the taxpayer for the years 1978 through 1980 and 1982 pursuant to s. 71.11(4), Wis. Stats., due to the continued refusal of the taxpayer to properly file and report his income for income tax purposes.

C. The petition for review fails to state a claim upon which relief can be granted by the Commission.

D. There is no genuine issue as to any material fact and the department is entitled to dismissal of the taxpayer's petition for review as a matter of law.

E. There exists no legal basis on which to grant relief to the taxpayer.

During each of the years 1978, 1979 and 1980, the taxpayer filed a timely Wisconsin individual income tax return with the department in which he reported wages he earned each year. For the year 1982, the taxpayer filed a Wisconsin individual income tax return with the department in which he reported "00" wages or other income earned in Wisconsin during the year. The taxpayer claimed a \$641.13 refund of Wisconsin income tax withheld by the taxpayer's employer, FWD Corporation, which paid him \$15,971.98 in wages during 1982.

The taxpayer claimed an itemized charitable contribution deduction to "Basic Bible Church of America" of \$7,139.36 in 1978, \$7,021.26 in 1979 and \$6,555 in 1980.

The department disallowed the taxpayer's claimed charitable contributions for the years 1978 through 1980 and estimated his income as \$12,572 for 1982.

The taxpayer filed a petition for redetermination of the assessment with the department on August 21, 1984 which the department denied on November 26, 1984. On January 22, 1985, 56 days after receiving the department's denial, the taxpayer filed an appeal of the denial with the Commission. The taxpayer's appeal to the Commission was filed within 60 days after receipt of the department's notice of denial of the petition for redetermination, as required by s. 73.01(5)(a), Wis. Stats.

The taxpayer's petition for review to the Commission was general in nature, asserting "God-Given Inalienable Rights" and alleging violation of his constitutional rights under the state and federal constitution.

There is a justiciable issue as to the deductibility of alleged contributions made by the taxpayer to The Basic Bible Church of America for the years 1978 through 1980. The taxpayer is entitled to have that issue heard and decided on its merits.

There is not a justiciable issue as to the taxpayer's 1982 Wisconsin income tax liability. The return he filed for 1982 did not meet the requirements of Chapter 71 of the Wisconsin Statutes. The department acted properly and reasonably in estimating the taxpayer's 1982 income and the income tax due.

The Commission held that the taxpayer's petition for review as it relates to 1982 fails to state a claim upon which relief can be granted by the Commission; therefore, that portion is dismissed. The department's motion to dismiss the taxpayer's petition for review as it relates to 1978, 1979 and 1980 is denied.

The taxpayer has appealed this decision to the Circuit Court.

Edward J. Roepsch vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 6, 1985). The department adjusted the taxpayer's total taxable income for the years 1980 and 1982 and only allowed him to claim one-half of the total rental losses. The remaining one-half of the rental losses was allocated to the taxpayer's wife.

On May 8, 1980, the taxpayer and his wife signed a land contract to purchase two townhouses (rental property). The purchase price for the rental property was \$125,000. The down payment on the rental property was \$30,000. The down payment on the rental property was paid from the joint checking account of the taxpayer and his wife. The subsequent operating expenses were paid from the checking accounts entitled "Roepsch and Associates" or "Edward J. Roepsch, Attorney-at-Law". At the hearing before the Commission, the taxpayer testified that the Associates were his two minor sons. The taxpayer's wife was a signator on the checking accounts entitled "Roepsch and Associates".

The taxpayer on his 1980 tax return reported rental losses of \$9,283.15. The taxpayer deducted from his total taxable income the total rental losses on the rental property in 1980. The taxpayer on his 1981 tax return reported rental losses of \$10,817.95. The rental losses were divided equally between the taxpayer and his wife in 1981. The taxpayer on his 1982 tax return reported rental losses of \$9,530.23. The taxpayer deducted from his total taxable income the total amount of the rental losses in 1982.

The Commission held that income or loss arising from the sale or rental of real estate follows the legal title of the real estate. Therefore, the department's action on the taxpayer's petition for redetermination was affirmed.

The taxpayer has not appealed this decision.

CORPORATION FRANCHISE/INCOME TAXES

Cedarburg Mutual Insurance Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 1, 1985). This is a timely filed appeal to determine whether Cedarburg Mutual Insurance Company must add back for Wisconsin franchise tax purposes, fire insurance dues deducted on its federal income tax returns for the period involved, under the add-back language contained in s. 71.01(4)(a)6, Wis. Stats.

During the period under review, the taxpayer conducted all of its business in Wisconsin selling five lines of insurance: fire, allied, farmers multiple peril, homeowners multiple peril and inland marine. The taxpayer's gross income was derived from the following sources: interest, dividends, rents, premiums written, and gains on the sales of assets.

As an insurer engaged in the fire insurance business in the State of Wisconsin, the taxpayer is required under s. 601.93, Wis. Stats., to pay Wisconsin fire department dues to the Commissioner of Insurance. Wisconsin fire department dues are program revenues which are returned solely to local fire departments for use in fire inspection, prevention or protection or for funding pensions or other special funds for the benefit of disabled or superannuated fire fighters.

The Wisconsin Commissioner of Insurance's long standing administrative interpretation of the measure for calculating Wisconsin fire department dues is based on the amount of net direct fire insurance premiums less dividends. The measure for Wisconsin fire department dues, net direct fire insurance premiums less dividends, is computed as follows. Direct fire insurance premiums are collections on fire insurance policies written directly by the company. Net direct premiums are direct premiums reduced by returns to policyholders. Dividends are amounts returned to policyholders at year-end because actual experience was better than expected, which generated a surplus. Reinsurance premiums are not included in this measure.

The taxpayer paid \$18,617 in Wisconsin fire department dues in 1981. On its federal return the taxpayer deducted the fire department dues in question. By notice dated April 4, 1983, the department notified the taxpayer that it was disallowing (or adding back) the deduction it had taken for fire insurance premiums on its 1981 federal income tax return, using s. 71.01(4)(a)6 as authority, stating: "Since premium taxes and fire department dues are based on gross receipts they are not deductible."

The Commission concluded that Wisconsin fire department dues are unrelated to an insurer's profits, but rather are a cost of doing business. The fire department dues paid by the taxpayer during the period under review are not an add-back item as defined in s. 71.01(4)(a)6, Wis. Stats., but rather a component of the taxpayer's "gross income" and "gross receipts". "Gross income" and "gross receipts" as those terms are used in s. 71.01(4)(a)6, Wis. Stats., is the total of all income and receipts of an insurer. Net direct fire insurance premiums less dividends is not equal to or synonymous with gross income or gross receipts. Wisconsin fire department dues are not taxes imposed on or measured by gross income or gross receipts and are not subject to the add-back provisions of s. 71.01(4)(a)6, Wis. Stats. The department acted improperly in adding back, for Wisconsin income/franchise tax purposes, the fire department dues paid by the taxpayer and deducted on its federal income tax return during the period under review.

The department has appealed this decision to the Circuit Court.

Payco Seeds, Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, June 10, 1985). Payco Seeds, Inc., a Minnesota corporation, sought judicial review of a Wisconsin Tax Appeals Commission decision and order affirming the department's assessment of corporate franchise taxes against the taxpayer from 1973 to 1979. At issue was the determination that Payco's activities through agents "constituted far more than mere solicitation of orders" thus subjecting the taxpayer to the challenged taxes. (See WTB #41 for a summary of the Wisconsin Tax Appeals Commission's decision.)