The taxpayer maintained that such a determination violates the United States Constitution's prohibition against state interference with interstate commerce, is violative of the department's own procedures, and is contrary to the evidence and applicable law. Ultimately, the issue focuses on whether there were sufficient facts to support the finding of the taxpayer's agents engaging in more than "mere solicitation" in Wisconsin.

First, the Tax Appeals Commission found that during 1973 through 1979, the taxpayer did not own any real property nor did it maintain an office in Wisconsin. It had its principal offices in Dassel, Minnesota.

Second, the taxpayer, by oral contract, employed two resident sales representatives who conducted business from their own Wisconsin offices and had sales areas in Wisconsin. They were not independent contractors and seldom sold products for any other business. They were paid a base salary with commissions. They were responsible for their own business expenses, although they were entitled to some reimbursements.

Third, these agents sent their Wisconsin dealers' orders to Dassel, Minnesota for approval or rejection. Upon approval, orders were filled and shipped or delivered from Dassel.

Fourth, these agents helped dealers fill out settlement sheets and made contacts for new dealers, made credit checks on new dealers, stocked and sold the taxpayer's product to new customers without risk for lost or damaged products, accepted payments and adjusted and collected payments for the taxpayer, delivered the taxpayer's product to dealers, and removed extra and spoiled products, all of which the Tax Appeals Commission determined "constituted far more than the mere solicitation of orders contemplated by Section 381 of 15 United States Code".

Finally, the taxpayer knew about and acquiesced in rental of an office in which the agents carried out their duties of solicitating sales for the taxpayer.

The Circuit Court concluded that the Tax Appeals Commission's order and decision does not violate the United States Constitution's prohibition against state interference with interstate commerce, is not violative of the Department's own procedures, and is not contrary to the evidence and applicable law. Ultimately, there were sufficient facts to support the finding of the taxpayer's agents engaging in more than "mere solicitation" in Wisconsin. Therefore, the decision and order of the Tax Appeals Commission is affirmed and the assessment against Payco Seeds, Inc. for corporate franchise taxes for the fiscal years ending August 31, 1973 through 1979 is sustained.

The taxpayer has not appealed this decision.

SALES/USE TAXES

Bargo Foods North, Inc. and Republic Airlines vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 2, 1985). The issues for the Commission to determine are (a) whether the sale of meals by Bargo Foods North, Inc. to Republic Airlines was for resale within the meaning of s. 77.51(4)(intro.), Wis. Stats., or was for transfer without valuable consideration within the meaning of s. 77.51(4)(k), Wis. Stats., and (b) whether the fee the taxpayer paid to Milwaukee County for the right to sell meals to airlines at the county-owned airport was tax deductible from gross receipts within the meaning of s. 77.51(11)(a)4, Wis. Stats.

During the period under review, 1978 through 1981, the taxpayer, Bargo Foods North, Inc. (Bargo), was a Wisconsin corporation engaged principally in food and beverage catering for commercial air transportation companies arriving and departing at Milwaukee County Airport. The Intervenor, Republic Airlines (Republic), is a Wisconsin corporation engaged in commercial air transportation, which maintains its corporate offices in Minneapolis, Minnesota.

Bargo sold meals and beverage kits to Republic which the taxpayer placed in Republic's aircrafts departing Mitchell Field. The meals, which were chilled when delivered, were placed by Bargo in ovens aboard the aircraft. The ovens were turned on in-flight by Republic employes to heat the meals to serving temperature. Bargo also serviced Republic's flights arriving at Mitchell Field. In connection with arriving flights, Bargo removed and washed the used dishes and equipment. Bargo also provided catering service at Mitchell Field to Ozark, Hughes Airwest, and Southern Airlines, and operators of corporate aircraft.

During the years 1978 through 1981, airline operations were regulated by the Civil Aeronautics Board, an agency of the federal government. The Board's regulations required that food service was to be provided at "no charge" Republic did not set any price for meals served passengers. If a passenger, for any reason, refused to accept a meal in flight, the passenger would not have received a rebate. On the other hand, Republic did sell alcoholic drinks to its passengers in flight. In those instances, the passenger was advised of the price of mixed drinks, wine or beer by the flight attendant and paid for the drink in cash. All meals purchased by Republic from Bargo in Milwaukee were served to passengers in flight at points beyond the geographic boundaries of the State of Wisconsin.

Bargo had an agreement with Milwaukee County, Wisconsin, which owned Mitchell Field, whereunder Bargo was granted a right to operate its airline catering business at the County's airport for a fee computed at 7% of Bargo's gross receipts for some of the period of time in dispute and 8% for the remainder. Bargo passed on this airport charge to Republic dollar for dollar. For the years 1978 through 1981, the airport charges totaled $245,860. These airport charges were included in the gross receipts upon which the department's deficiency assessment was calculated.

Republic did not give Bargo a resale certificate certifying that the meals it purchased were for resale. Neither did the other airlines Bargo serviced at Mitchell Field. Bargo initially charged them all sales tax on the meals, but Republic objected and indemnified Bargo if Republic was subsequently found liable on its purchase. Bargo then stopped charging sales tax to Republic, but continued to collect sales tax from the other airlines.

The Commission concluded that the sale of meals by Bargo Foods North, Inc. to Republic Airlines was not for resale within the meaning of s. 77.51(4)(intro.), Wis. Stats., but rather was for transfer without valuable

consideration within the meaning of s. 77.51(4)(k), Wis. Stats. The fee Bargo Foods North, Inc. paid to Milwaukee County for the right to sell meals to airlines at the county-owned airport was not a tax and was not deductible from gross receipts within the meaning of s. 77.51(11)(a)4, Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

Brenner Tank, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 29, 1985). The dispute between Brenner Tank, Inc. and the Wisconsin Department of Revenue relates to the sales tax on $70,141 of the taxpayer's gross receipts in the years 1978 through 1982, inclusive. The issue for the Commission to determine is whether or not the gross receipts for repair work performed in the State of Wisconsin on truck bodies for nonresident customers that will remove the truck bodies from this state and only use the truck bodies in the customer's operation outside of Wisconsin is exempt from the sales tax under s. 77.52(2)(a)10, Wis. Stats.

The taxpayer is engaged in the business of manufacturing and repairing stainless steel truck bodies which are used to haul milk and other liquids. The $70,141 of gross receipts were received by the taxpayer for the repair of stainless steel truck bodies owned by out-of-state customers that are not engaged in operations in Wisconsin.

These out-of-state customers brought the truck bodies from out of Wisconsin to the taxpayer's facility in Fond du Lac, Wisconsin so that the tanks could be repaired at that facility. The tanks were then removed from Wisconsin by the customers for use in their operations outside Wisconsin.

The taxpayer did not charge sales tax on the gross receipts from the repair of the stainless steel truck bodies owned by these out-of-state customers nor did the taxpayer have valid exemption certificates on file for these out-of-state customers.

The Commission concluded that the stainless steel truck bodies involved in this proceeding were tangible personal property and under the provisions of s. 77.52(1), Wis. Stats., these stainless steel truck bodies were taxable tangible personal property. Under the provisions of s. 77.52(2)(a)10, Wis. Stats., the taxpayer was subject to sales tax on its gross receipts from the repair services performed on these stainless steel truck bodies. The taxpayer's gross receipts for the in-state repair of stainless steel truck bodies of out-of-state customers to be used outside the state but delivered in the state were not exempt under the provisions of ss. 77.52(2)(a)10 and 77.54(5)(a), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

Karen Gartzke vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). The issues in this case are (a) whether the department was correct in imposing an officer liability against the taxpayer relating to Dousman Lawn and Garden, Inc. and (b) whether the taxpayer willfully failed to make payment of the sales tax due for the period October 1978 through September 1979.

The taxpayer was the secretary of Dousman Lawn and Garden, Inc. and a full-time employe and general manager of the company. She and her husband owned one-half of the common stock of Dousman Lawn and Garden, Inc. The taxpayer was authorized to and did sign the majority of checks on the account of Dousman Lawn and Garden, Inc. at the Dousman State Bank.

During the fiscal year ending September 30, 1979, Dousman lawn and Garden, Inc. filed timely monthly sales tax returns and remitted a total of $3,972.85 in sales tax based upon reported taxable receipts of $99,321.25. Dousman Lawn and Garden, Inc. filed a Wisconsin sales and use tax annual information return for the fiscal year ending September 30, 1979 showing total gross receipts of $138,364.10 (indicating previous under reporting of $39,042.85) and additional sales tax due of $1,561.71. This return was signed by the taxpayer on December 12, 1979 (the due date). No remittance accompanied this form.

Richard Herr owned the other one-half of the common stock of Dousman Lawn and Garden, Inc. In the fall of 1979, the taxpayer and Herr had a falling out. The taxpayer attempted to purchase Herr's interest in Dousman Lawn and Garden, Inc. but Herr had another purchaser and would not sell to the taxpayer. At the end of November 1979, the taxpayer left the business. The business shut down in late November 1979 and remained closed through December 1979.

The taxpayer and her husband brought a lawsuit against Herr over the corporation. On January 11, 1980, the taxpayer and her husband entered into an agreement with Herr for settlement of the lawsuit. Her understanding was that Herr agreed to pay the sales tax liability.

Subsequent to the taxpayer's sale of her interest to Herr, Herr sold the business to Verhoeven Enterprises, Inc., which continued to do business as Dousman Lawn and Garden, Inc.

During 1980, the department attempted to collect the outstanding sales tax liability from Dousman Lawn and Garden, c/o Richard Herr, but was unable to do so. On August 19, 1983, the department issued a Notice of Potential Successor Liability against Verhoeven Enterprises, Inc. for the sales tax liability of $1,561.71, but no interest. Verhoeven Enterprises, Inc. paid the tax on November 25, 1983. There remained only the interest due and owing as of that date.

The Commission held that the taxpayer was an officer and employe of Dousman Lawn and Garden, Inc. with responsibility for filing the sales tax returns and for making payment of sales tax due. She willfully failed to make payment of the sales tax due with the annual information return. She was personally liable for the sales and use tax. The taxpayer's total liability is the amount of interest due on the original sales tax liability as of November 25, 1983 and there is no additional interest which would have accrued subsequent to that date.

The taxpayer has not appealed this decision.

K Mart Corporation vs. Wisconsin Department of Revenue (Circuit Court of Dane County, August 21, 1985). K Mart appealed a decision of the Wisconsin Tax Appeals Commission which held that the Commission is without jurisdiction to hear the taxpayer's appeal because the notice of appeal was filed after the statutory time for appeal had expired.

On August 21, 1980, the department assessed sales and use taxes against K Mart in the amount of

$97,246.80. On September 3, 1980, K Mart filed a petition for redetermination of the assessment with the department. Section 71.12(1)(a), Wis. Stats., requires the department to make a redetermination on the petition within six months after it is filed. On February 3, 1981, before the six month period expired, the department and K Mart agreed to extend the time for the department to act on K Mart's petition until "six months after the [Department] is notified by the taxpayer of the final decision in the case 'J.C. Penney Co., Inc. vs. Wisconsin Department of Revenue' which is currently pending before the Circuit Court".

On July 27, 1982, the Court of Appeals issued its decision in the Penney case referred to in the stipulation. On August 20, 1982, the department and J.C. Penney Company agreed not to appeal the Court of Appeals' decision. K Mart never gave notice to the department of the Penney decision. On March 8, 1983, the department denied K Mart's petition for redetermination. K Mart received the department's denial on March 10, 1983.

On May 10, 1983, K Mart mailed to the Wisconsin Tax Appeals Commission a petition for review of the department's denial of the petition for redetermination. The department moved the Commission to dismiss the petition for review on the grounds that it was filed late. K Mart asked the Commission to declare that the department's assessment was null and void because the department had failed to act within the time set by statute. On January 27, 1984, the Commission ruled that it had no jurisdiction to hear the matter because K Mart's petition for review was filed after the statutory time for appeal to the Commission had expired.

It is undisputed that K Mart had 60 days from receipt of the denial of redetermination to appeal the Department's decision. It is further undisputed that K Mart received the denial of redetermination on March 10, 1983, and that its 60 days within which to file an appeal expired on May 9, 1983. Finally, it is undisputed that K Mart's appeal was untimely.

K Mart contended that the department failed to make a final redetermination within the time permitted by statute, and thus lost jurisdiction to collect the tax. Since the tax was thus rendered void by the department's own actions, K Mart contended that it could not be late in appealing from the assessment of a *void* tax. Additionally, K Mart argued that the department should be estopped from asserting the validity of the tax and K Mart's untimeliness in appealing because the department failed to hold a required conference and also sent K Mart allegedly misleading statements regarding the time to appeal.

The Circuit Court concluded that the department's denial of redetermination, before the stipulated time for redetermination expired, does not render the taxes void ab initio. The Court also concluded that the department is not estopped from asserting K Mart's untimeliness in filing a notice of appeal with the Tax Appeals Commission. Finally, the Court concluded that K Mart's appeal was untimely. Therefore, the Court affirmed the decision of the Tax Appeals Commission and dismissed K Mart's petition for review.

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

Kohler Co. vs. Wisconsin Department of Revenue (Court of Appeals, District IV, September 25, 1985). Kohler Company appealed a judgment affirming a Wisconsin Tax Appeals Commission decision which held Kohler liable for use taxes on promotional display items. (See WTB #38 for a summary of the Circuit Court's decision.)

Kohler manufactures plumbing fixtures which it sells to its distributors who sell the products to plumbing supply retailers, builders and contractors. To promote sales, Kohler designed a series of product displays for distributor and dealer showrooms. Typically these displays highlight a Kohler bathtub, toilet or sink in an attractive environment of false walls, carpeting, towels, lighting fixtures, mirrors and sometimes potted plants.

Distributors may acquire certain displays at "No charge with the purchase of. . . fixtures and fittings at net". For the tax years in question, 1973 through 1976, Kohler purchased the decorative items used in these displays from suppliers both inside and outside Wisconsin. It did not pay a sales tax on the Wisconsin purchases, giving each supplier a resale certificate pursuant to s. 77.53(11), Wis. Stats. Neither did it pay a use tax. The Department of Revenue decided that the decorative items in the displays were gifts by Kohler to its distributors, and issued a notice of deficiency for use tax in the amount of $39,987.61.

" '[A] person who acquires property to give it away is a user or consumer as opposed to a reseller, and is liable for the use tax.' " Revenue Dept. v. Milwaukee Brewers, 111 Wis. 2d 571, 578 (1983), quoting Revenue Dept. v. Milwaukee Brewers, 108 Wis. 2d 553, 558 (Ct. App. 1982); see also s. 77.51(4)(k), Wis. Stats.

The Commission found that "in most cases, there was no separate charge to the distributor for the display materials when the listed package of fixtures and fittings were purchased at wholesale price to the distributor", and that Kohler "purchased the advertising display materials involved herein free of sales tax, by giving resale certificates to its Wisconsin vendors". The Commission's conclusion of law drawn from these findings was that "the display materials in question were given, not sold to petitioner's distributors", and therefore that Kohler was liable for use tax on those materials.

The department argued that the Commission's conclusion is sound because Kohler called the decorative items in these displays "free" and available at "no charge". Kohler did not dispute these facts, but attacked the conclusion the Commission drew from them. Kohler contended that it is the economic realities of a transaction, not advertising "puffery", which should govern its taxability.

The department argued that, because the evidence shows the invoice amount for the displays in question equals the distributor net price of the fixtures alone, there can be no consideration given for the included decorative items. The undisputed testimony of Kohler's witnesses showed that, in every case, its cost for the decorative items provided in each display were recovered in the invoice price.

The Commission's finding that there is "no separate charge" for the decorative materials in these displays is accurate. However, the Court of Appeals found no evidence suggesting that "no separate charge" is in reality no charge. Therefore, the Court of Appeals concluded that the determi-

nation does not reflect economic reality within the meaning of Department of Revenue v. Sterling Custom Homes, 91 Wis. 2d 675, 679 (1979). The fact that Kohler referred to the display materials as "free" or "no charge" is irrelevant to the economic realities of the taxed transactions. The department and the Commission have confused the concepts of cost and price. Given this standard and the evidence of record, the Court of Appeals concluded that reasonable minds could not have made the same determination as the Commission. Because the record showed that Kohler recouped the costs of all included decorative items, the Court of Appeals concluded those items were resold and were not gifts. Kohler is therefore not liable for a use tax on the items.

The department has appealed this decision to the Supreme Court.

Schuster Construction Company vs. Wisconsin Department of Revenue (Court of Appeals, District IV, July 11, 1985). Schuster Construction Company appealed a Circuit Court order which affirmed an order of the Wisconsin Tax Appeals Commission. The taxpayer contended the Commission erred in limiting its jurisdiction to issues raised in the petition for redetermination, and in concluding that the taxpayer failed to show good cause which would abate the penalty imposed on a sales and use tax deficiency. (See WTB #38 for a summary of the Circuit Court's decision.)

The Department of Revenue notified the taxpayer of a sales and use tax deficiency determination including interest and a penalty. The taxpayer filed a petition for redetermination which stated in part: "[W]e are requesting partial abatement of the proposed addition to the Sales Taxes for the periods 1974, 1975, 1976, 1977, and January 1, to August 31, 1978. We do not object to the measure of the tax; however, the objection is to the penalty as proposed in the amount of $23,049.53."

The department denied the petition for redetermination. The taxpayer filed a petition for review of the department's decision, and at the hearing on the petition, the taxpayer contended it was appealing the assessment plus interest, as well as the penalty. The Commission ruled that it lacked jurisdiction to decide issues not raised in the petition for redetermination and upheld imposition of the penalty. The Circuit Court affirmed.

While the statutes governing petitions for redetermination are silent as to the contents of a petition, the administrative rules are not. Wis. Adm. Code section Tax 3.91 provides that "[t]he petition for redetermination specified in sections 71.12(1), . . . and 77.59(6), Wis. Stats., shall . . . set forth clearly and concisely the specific grievances to the assessment or to parts thereof, including a statement of the relevant facts and propositions of law upon which the grievance is based". The failure to set forth all grievances precludes their consideration as would failure to specify an issue in a petition for review before the Commission.

The record does not contain a closing stipulation indicating that the parties agreed on different issues at an informal conference (Wis. Adm. Code section Tax 3.93). In the absence of such a stipulation, the Court is bound by the issues alleged in the petition.

The taxpayer challenged the Commission's finding that it failed to show good cause which would abate the penalty. A court must uphold an administrative agency's factual finding if, "upon an examination of the entire record, the evidence, including the inferences therefrom, is found to be such that a reasonable man, acting reasonably, *might* have reached the decision. . ."

A field auditor for the department testified that he recommended imposition of a penalty because the taxpayer had previously been penalized and had made very few changes in its procedures. The taxpayer did not ask how to compute the use tax. The method used in the prior audit was employed because proper records were not kept. The taxpayer offered no evidence of the reasonableness of its reliance on other companies' representations that purchases were exempt, or that there was good cause for its accounting error.

A reasonable person could have found that the taxpayer did not meet its burden of proving there was good cause for the error. Substantial evidence supports the finding.

The Court of Appeals affirmed the Circuit Court order.

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

TAX RELEASES

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

Individual Income Taxes

1. Gain on Installment Sales — Persons Moving Into or Out of Wisconsin
2. Land Contract as "Security" in Corporate Liquidation

Corporation Franchise/Income Taxes

1. Expenses Related to Wholly Exempt Income (Note: This is a corrected version of the Tax Release which originally was published in WTB #44.)
2. Declaration Requirements of Surviving Corporation After Merger

Sales/Use Taxes

1. Farmers' Exempt Milk House Supplies
2. Paging Equipment in Central Office of Telephone Company
3. Cable Company Purchases Cable It Installs
4. News Service Provides Ticker Tape
5. Service of Shredding Sensitive Business Records
6. Manufacturing in a "Self-Service" Print Shop Which Uses Photocopy Machines