

catalog were quoted F.O.B. the catalog house and did not include charges for shipping and handling. On cash orders the customer computed and prepaid transportation charges for mailing the goods from the catalog house to his or her residence in Wisconsin. Ward would compute this amount for its charge account customers and added it to the invoice as a separate charge. The completed order form, together with payment for cash orders, was placed in the U.S. mails in Wisconsin by the customer. The order was accepted and the sales price collected at the out-of-state catalog house location where the goods were taken from inventory and packaged for shipment. Shipment was made from a point outside Wisconsin where the goods were deposited in the U.S. mails for delivery to the Wisconsin buyer.

During the period at issue, Ward did not collect Wisconsin sales or use tax on the transportation charges it charged and remitted Wisconsin tax only on the price of the item of merchandise being sold, which it reported as "use" tax rather than "sales" tax.

In the case of all such sales, the Wisconsin customers first obtained personal possession of the item purchased when the United States Postal Service or the common carrier delivered the item to the customer's home.

On April 8, 1976, the department issued to Ward a notice of additional sales and use tax and penalty for the period September 1, 1969 through October 31, 1975. Included was an assessment on an "Additional Measure of Sales Tax-Transportation Charges on Mail Order Sales" from the St. Paul and Chicago mail order houses. In addition, a 25% negligence penalty was imposed under s. 77.60(3) based only on additional sales tax and not on the entire assessment including use tax. Ward filed a timely petition for redetermination of the assessments on May 13, 1976, which was granted in part by reversing the negligence penalty and otherwise denied by the department on October 1, 1976.

On March 5, 1980, the department issued to Ward a notice of sales and use tax deficiency determination for the period November 1, 1975 through January 31, 1976. Again, an adjustment was made for transportation

charges billed by Ward in its direct mail sale of merchandise, determined by the department to be subject to sales tax under Wis. Adm. Code section Tax 11.94.

On June 17, 1982, the department issued to Ward a notice of sales and use tax deficiency determination covering the period February 1, 1976 through January 31, 1981. Among the various adjustments made was another for inclusion of sales tax on transportation charges billed by seller in its direct mail sales of merchandise from Chicago and St. Paul mail order houses. Also, a 25% negligence penalty under s. 77.60(3) was imposed.

The only disputed adjustments remaining were as follows:

A. The department's sales taxation of transportation charges billed in conjunction with mail order merchandise sales shipped from outside Wisconsin to Wisconsin customers for the period September 1, 1969 through January 31, 1981.

B. The department's use of a 12% interest rate on the June 17, 1982 assessment covering the period February 1, 1976 through January 31, 1981.

C. The department's imposition of a 25% negligence penalty under s. 77.60(3) applied to selected amounts relating to specific adjustments rather than the entire amount assessed for the period February 1, 1976 through January 31, 1981.

Excluded from the measure of the tax upon which the penalty under review was imposed were certain additional sales made by Ward which were determined to be taxable in the field audit, but for which Ward had accepted invalid exemption certificates; transportation charges on direct mail order sales which are at issue in this proceeding; newspaper inserts; and catalogs distributed from an out-of-state printer directly to the home of Wisconsin customers by mail. Both of the latter matters were the subject of litigation at the time regarding whether a retailer's use of such inserts and catalogs was subject to the use tax.

The department has a policy that authorizes imposition of the negligence penalty on only a portion of the additional tax assessed. The policy was adopted in the interest of equity since, in some cases, some transac-

tions are not properly reported for reasons other than neglect such as reasonable differences of opinion in the interpretation of the tax law held by the taxpayer on one hand and the Department of Revenue on the other, while at the same time, other items were not reported due to neglect.

The 25% negligence penalty was imposed upon the following items of sales and use tax adjusted: Catalogs, Fixed Assets, Supplies, Contract Installation, Border Stores, Catalog Desks and Bad Debts.

Among the major items assessed, the "Catalogs" adjustment related to failure to properly estimate use tax for catalogs sold over the counter for fiscal 1979 and 1980 and failure to self-assess any use tax for fiscal 1977, 1978 and 1981. The unreported sales involved approximately \$2.6 million for the five-year period. Ward's explanation was that its procedure was to pay the use tax once a year because it could not determine the amount to be estimated until after the close of the fiscal year. On the other hand, the taxpayer contended that use tax accruals were made on a monthly basis on the corporate books. No satisfactory explanation was furnished for failure to make proper estimates in three years or any estimates in two years.

The "Border Stores" adjustment related to sales made by Ward's retail stores in Duluth and St. Paul, Minnesota, which were delivered by truck to customers in Wisconsin. Such sales were exempt from Minnesota sales taxation and Ward had procedures directing sales/use tax to be paid to the state of delivery. No satisfactory explanation was offered for failure to report these sales for the fiscal years 1977 through 1981 in the total amount of approximately \$1.6 million.

The "Catalog Desks" adjustment relates to unreported taxable sales from store catalog desks of six retail stores for the month June 1980 in the total amount of \$165,212. No satisfactory explanation was offered for failure to report these sales.

The "Bad Debts" adjustment resulted from Ward improperly including finance charge amounts in reducing gross receipts for bad debts, thus overstating the reduction in taxable gross receipts. Finance charges were not segregated on the bad debt documents used to prepare the re-

turns. No satisfactory explanation for this error was made.

The Commission held as follows:

A. Throughout the period in question, Ward was a "retailer" within the meaning of s. 77.51(7), Wis. Stats., and a "retailer engaged in business in this state" within the meaning of s. 77.51(7g), Wis. Stats., and subject to Wisconsin's sales and use tax jurisdiction.

B. The separately stated cost of transportation included as charges in Ward's mail order sales to Wisconsin customers from its Chicago, Illinois and St. Paul, Minnesota catalog houses was "cost of transportation of the property prior to its sale to the purchaser" and includable, therefore, as "gross receipts" within the meaning of ss. 77.51(11)(a)3 and (4r), Wis. Stats., subject to the Wisconsin retail sales tax of 4% under s. 77.52(1), Wis. Stats.

C. Such transportation charges also constituted "the cost of transportation of the property prior to its purchase" and were includable in the "sales price," within the meaning of ss. 77.51(12)(a)3 and (4r), Wis. Stats., subject to the 4% Wisconsin use tax under s. 77.53(1), Wis. Stats. If such sales were taxable under the sales tax provisions, they are exempt from use tax under s. 77.56(1), Wis. Stats. If such sales were not taxable under sales tax provisions, they were taxable under the use tax statutes, which Ward was required to collect under ss. 77.51(7g) and 77.53(3), Wis. Stats.

D. The 12% interest rate on unpaid sales and use taxes under s. 77.60(1), Wis. Stats., as amended by Laws of 1981, Chapter 20, Section 1125hm applies to all assessments made on or after August 1, 1981, "regardless of the taxable period to which they pertain." This Commission has construed parallel language pertaining to interest on income and franchise taxes to require the 12% rate to cover all the years those taxes have been outstanding, or in other words, from the original due date. The June 17, 1982 assessment of sales and use tax is thus subject in its entirety to 12% interest rate.

E. The Commission is not a constitutionally mandated judicial body and is, therefore, without the power to rule on the constitutional validity of any duly enacted statute.

F. The burden was on Ward to prove that the errors in the incorrect sales/use tax returns filed were due to good cause and not due to neglect. Ward failed to meet that burden with respect to those errors which the department deemed due to neglect. Such penalties were, therefore, properly imposed. Nothing in the controlling statute requires that the penalty be applied to the entire assessment.

The taxpayer has appealed this decision to the Circuit Court.

James M. Salmon d/b/a General Lighting and Maintenance vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 29, 1985). The assessment in dispute before the Commission imposed a sales and use tax on the cleaning and maintaining of fluorescent lighting fixtures, lamps or chandeliers in offices.

The department maintained that the taxpayer's cleaning, servicing and maintenance of lighting facilities is subject to sales and use tax under the provisions of s. 77.52(2)(a)10, Wis. Stats. The taxpayer contended that the personal property it consumed and the repair and maintenance services it performed became a part of the real estate and were not subject to tax.

During the period involved, 1977 through 1980, the taxpayer held a seller's permit and specialized in the cleaning, maintenance and replacement of lamps in free-hanging and built-in lighting facilities. The taxpayer collected sales taxes on the lamps he installed but not on the labor expended to install them or on the other maintenance services he performed.

The Commission concluded that the taxpayer's cleaning, maintenance and replacement of lamps and lighting systems for commercial customers in the Milwaukee area during the period under review constituted servicing tangible personal property in the form of "office, restaurant and tavern type equipment including by way of illustration but not of limitation lamps, chandeliers. . ." as those terms are used in s. 77.52(2)(a)10, Wis. Stats., and the gross receipts received from those services are subject to tax. The services the taxpayer performed retained their character as tangible personal property subject to tax per the clear and unam-

biguous language contained in s. 77.52(2)(a)10, Wis. Stats.

The taxpayer has not appealed this decision.

Senior Golf Association of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Court of Appeals, District IV, November 5, 1985). The Senior Golf Association of Wisconsin, Inc. appealed an order affirming a Wisconsin Tax Appeals Commission ruling concerning its sales tax liability. The association, a nonprofit corporation, exists to organize golf outings for its members. The outings occur at various private clubs, and members pay a negotiated fee to the clubs to participate in each event. Nonmembers are excluded. The issue is whether s. 77.52(2)(a)2, Wis. Stats., allows the state to impose a sales tax on the association's initiation and dues payments, which it uses to pay administrative costs. (See WTB #38 for a summary of the Circuit Court's decision.)

Section 77.52(2)(a)2 imposes a tax on receipts from the sale of access to athletic or recreational facilities. The association argued that the members purchase access to the facilities through the charges for the individual outings, not through the dues and initiation fees. It also contended that it cannot sell access to facilities it does not own. The department responded that the initiation and dues payments are also access charges and therefore taxable because nonmembers are excluded from the outings.

The Court of Appeals concluded that the association's initiation fees and dues payments are clearly taxable under the statute. The essential question under s. 77.52(2)(a)2 is whether the association's members must pay these charges to gain access to the golf courses. The answer is that they must because nonmembers may not participate in the outings. The statute makes no distinction where the organization does not own the recreational facility, or only uses the charges to pay administrative costs.

The taxpayer has not appealed this decision.

Troyanek's Tap & Line Service, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 1, 1985). During

the period involved, the taxpayer was in the business of cleaning beer taps and lines in taverns and bars located in the LaCrosse, Wisconsin area.

During the calendar years 1979, 1980, 1981, 1982, 1983 and January-August 1984, the taxpayer received payment for its services which it reported on its Wisconsin corporate franchise or income tax returns. The taxpayer, however, did not file Wisconsin sales tax returns or pay Wisconsin sales or use taxes on the gross receipts it received during that period of time.

Under date of September 28, 1984, the department issued notices of sales and use taxes due against the taxpayer covering the calendar years 1979, 1980, 1981, 1982, 1983 and January-August 1984 totaling \$14,881.70. The assessments imposed a sales and use tax on the gross receipts the taxpayer received from its beer tap and line cleaning operation during the period involved.

The assessments resulted from an audit the department conducted on the G. Heileman Brewing Company of LaCrosse, Wisconsin during which it discovered that the taxpayer was not reporting or paying sales taxes on the gross receipts it received from its beer tap and line cleaning operations.

The taxpayer was not aware it had a sales and use tax liability until the assessments were made in September of 1984. It did not collect sales and use tax from its customers during the period under review.

The taxpayer objected to the assessments on the following basis:

- A. Its services are not subject to tax.
- B. It relied on the advice of its attorney and accountant.

C. The department should have notified them of its sales and use tax obligation at an earlier date.

D. It can't afford to pay the assessments.

The Commission held as follows:

A. The taxpayer's cleaning of beer tap and line equipment in taverns and bars in the LaCrosse, Wisconsin area during the period under review constituted servicing tangible personal property in the form of "bar equipment" and/or "restaurant and tavern type equipment" as those terms are used in s. 77.52(2)(a)10, Wis. Stats., and the gross receipts received from those services during the period under review were subject to tax.

B. The taxpayer's reliance on advice it received from its attorney and accountant does not relieve it from the sales and use tax liability arising from the provisions of Wisconsin's sales and use tax law.

C. Wisconsin sales and use tax law is based on a self-reporting and self-assessment system with the primary responsibility for compliance resting with the taxpayer, not the Wisconsin Department of Revenue.

D. Ability to pay is not a valid criteria to determine liability under Wisconsin sales and use tax law.

The taxpayer has not appealed this decision.

Wisconsin State Telephone Association, et al. vs. Mark E. Musolf and Wisconsin Department of Revenue (Circuit Court of Dane County, October 31, 1985). This matter was before the Circuit Court on the defendants' motion for summary judgment. The plaintiffs are domestic and foreign corporations and cooperatives, as well as the telecommunications trade association, and they provide or purchase telephone services within Wisconsin. They claimed that

s. 77.52(2)(a)4, Wis. Stats., which forces them to pay a 5% sales tax on the gross receipts from all interstate and international telephone calls originating from and charged to telephones located in Wisconsin, violates their substantive due process rights guaranteed by the constitution.

In *Wisconsin Tel. Co. v. Dept. of Revenue*, 125 Wis. 2d 339 (Ct. App. 1985), the Court of Appeals rejected a challenge to s. 77.52(2)(a)4, Wis. Stats., brought on commerce clause grounds. The question before the Circuit Court now is whether this rejection is fatal to the plaintiffs' due process challenge. The plaintiffs have contended that the *Wisconsin Tel. Co.* case does not control this case because a due process challenge requires a different approach to the issues than a commerce clause challenge. The plaintiffs' final argument is that the *Wisconsin Tel. Co.* court did not consider the effect of the tax on out-of-state telephone companies.

The Circuit Court concluded that the *Wisconsin Tel. Co.* case controls the instant case and summary judgment in favor of the defendants must be granted.

The plaintiffs have not appealed this decision.

Wisconsin Telephone Company, et al. vs. Wisconsin Department of Revenue, et al. (Wisconsin Supreme Court, November 5, 1985). The taxpayers appealed the adverse decision of the Court of Appeals, District IV, which held the sales tax imposed by s. 77.52(2)(a)4, Wis. Stats., constitutional. (See WTB #44 for a summary of the decision of the Court of Appeals.)

The Supreme Court denied the taxpayers' 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. Adoption Expense Deduction

Corporation Franchise/Income Taxes

1. Sales Factor: Items of Income Includable
2. Deductibility of Motor Carriers' Operating Authorities
3. Bad Debts - Savings and Loan Associations
4. Nexus and Certain Exempt Activities for Foreign Corporations