

Retailer - imposition of tax. *Breaktime Services, Inc., a Wisconsin Corporation, and Richard W. Hurkman d/b/a Hurkman's Breaktime Services vs. Department of Revenue* (Court of Appeals, District IV, August 13, 1987). Breaktime Services appeals from an order affirming a Wisconsin Tax Appeals Commission decision holding Breaktime liable for sales taxes as a retail seller of snack foods. The issue is whether the Commission's conclusion that Breaktime was a retail food seller was reasonable based upon findings supported by substantial evidence.

Breaktime Services provides boxes of snacks and other foodstuffs to small businesses. Each box has seventy-four items chosen by the business. The suggested selling price is printed on the box, although the business has the option of charging a higher or lower price. Breaktime receives the total suggested selling price of the box's contents.

Breaktime's clients usually provide on-the-premises snacks to their employees as a convenience. The individually-priced snacks are set out in Breaktime's unlocked box, which contains an unlocked, easily accessible space for coins. At regular intervals, generally weekly, a Breaktime employee picks up the box and leaves a new one. Breaktime counts the money at the business. The business's employees may count the money in advance, observe Breaktime's count, or leave it entirely to Breaktime. Any spoilage is the business's loss unless reimbursement is requested from Breaktime. No commission or compensation is paid to the business for use of the space.

The Commission concluded as matters of law that Breaktime was a retailer under s. 77.51(7), Wis. Stats., because it owned and controlled the vending boxes, the contents, and had control over the gross receipts. Therefore, under s. 77.52(1), Wis. Stats., Breaktime was subject to Wisconsin's sales tax on the gross receipts from snack food sales.

The Court of Appeals concluded that the determination was reasonably based on findings and supported by substantial

evidence, and therefore, affirmed the Commission's decision.

The taxpayer has not appealed this decision.

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Computer and data processing - software. *Wisconsin Department of Revenue vs. International Business Machines* (Circuit Court of Dane County, October 9, 1987). The central issue in this case is what constitutes tangible personal property. More specifically, is computer software tangible personal property.

The monetary transactions at issue in this case fall under the definition of a sale and no one has contended to the contrary. The Tax Appeals Commission found this to be a case and a factual setting and an item of property that it could not distinguish from the decision in *Janesville Data*.

The tangible personal property issue in *Janesville Data* admittedly came up in the context of an effort on the part of the department to tax what was apparently conceded to be largely a service transaction whereas this case deals with an effort on the part of the department to tax what it pursues as exclusively a sales transaction.

Whether dealing with data, or whether dealing with instructions, the technological process by which that information can be subsumed under the general category of information, is transmitted to a computer, and is transmitted to the user of the computer in exactly the same way. The object of the transaction test that comes out of *Janesville Data*, therefore, cannot be avoided in its use to this situation.

The Tax Appeals Court Commission felt constrained by the decision in *Janesville Data*. In over nine years since that decision was released, there has, in fact, been no change in the law. The department's argument comes down to an attempt to have the court depart from the basic impact of *Janesville Data*.

The Circuit Court concluded that the petition for review is denied and the decision of the Tax Appeals Commission is affirmed.

The department has appealed this decision.

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Realty vs. personalty. *Tom Kuehne Landscape Contractor, Inc. v. State of Wisconsin Department of Revenue* (Court of Appeals, District IV, October 29, 1987). The issue is whether the installation of signs, sign bridges, delineators, and guardrails constitutes improvements to real property under the three-part fixture test long followed by the Wisconsin Supreme Court.

Kuehne engaged in the business of incidental highway construction work, mostly for the state. In order to perform its contracts with the state, Kuehne purchased highway signs, sign bridges, delineator posts, and guardrails. It did not pay sales or use taxes on such items because it believed they were exempt since they were intended for resale to the state. The department assessed sales and use taxes against Kuehne to which Kuehne filed timely objections. The Commission affirmed the assessments. The Circuit Court reversed the Commission's decision.

In *Smith Harvestore*, 72 Wis. 2d at 67-68, 240 N.W. 2d at 360, the Wisconsin Supreme Court stated it has long followed a three-part test to determine whether or not particular articles of personal property are fixtures and thus improvements to the real estate:

Whether articles of personal property are fixtures, i.e., real estate, is determined in this state, if not generally, by the following rules or tests: (1) actual physical annexation to the real estate; (2) application or adaptation to the use or purpose to which the realty is devoted; and (3) an intention on the part of the person making the annexation to

make a permanent accession to the freehold.

The Court of Appeals concluded that because of the nature of highways as a service facility to the motoring public, the signing and marking of highways must be flexible and impermanent. The objective and presumed intention of a hypothetical ordinary, reasonable person charged with the responsibility of installing highway signs, sign bridges, delineators, and guardrails is to not thereby make permanent accessions to the realty. Therefore, the Court of Appeals affirmed the Circuit Court decision.

The department has not appealed this decision.



Leases and rentals. *Robert J. Zunker, d/b/a Bob's Trucking vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, April 27, 1987). This is an action for judicial review of a decision and order of the Wisconsin Tax Appeals Commission sustaining a determination by the Wisconsin Department of Revenue assessing certain sales taxes against the taxpayer.

Robert J. Zunker, d/b/a Bob's Trucking, owns and operates a tractor-trailer combination suitable for over-the-road trucking operations. Beginning in 1980, and including the period under review, the taxpayer received rental fees from the leasing of one or more such trucks to Lynn's Wastepaper Company, Inc. (Lynn's).

Lynn's was primarily engaged in the business of waste paper recycling, but also obtained scrap metals as well. During the period at issue, Lynn's would use the trucks privately to haul scrap paper and metal to its place of business. Hauling paper to its place of business for baling and eventual resale to paper mills was a regular and recurrent part of Lynn's business. Using the taxpayer's vehicles, it also provided carrier service from its place of business to its customers—primarily pa-

permits, which paid for the transportation Lynn's provided. Finally, Lynn's also leased the vehicles on a "trip" basis to one of three other transportation companies.

The taxpayer became a full-time employee of Lynn's in September, 1980. He was paid a flat salary and was covered by the Lynn's health insurance plan. His primary duty was to manage Lynn's trucking division, and included driving and repairing leased vehicles. His employment with Lynn's continued throughout the period at issue.

During the period in question, the trucks were used for private carriage only part of the time. The rest of the time they were leased to third parties as part of Lynn's overall business, or "trip leased" to third parties. Lynn's leased no other trucks but those from the taxpayer, and Lynn's authority was used for all contract carriage. Lynn's signed the trip leases and did the billing on the other hauling. The taxpayer would rebill Lynn's for the contract hauling, with each party receiving a percentage of the receipts. The taxpayer drove the trucks 30% to 40% of the time, with other employees of Lynn's driving the remainder. The taxpayer only drove the trucks for Lynn's private or contract hire during the period at issue.

Although he was generally aware of exemption certificates and had used them, the taxpayer did not seek and was not given any exemption certificate from Lynn's during the period in questions.

The department field-audited the taxpayer for sales tax purposes in 1984. The taxpayer was advised that, because the trucks were used privately by Lynn's, he was liable for the sales tax. After being advised of the department's position, the taxpayer applied for and received both Wisconsin and federal (I.C.C.) authority to operate as a contract carrier.

The taxpayer argues that the Commission erroneously disregarded section Tax 11.29(4)(a), Wis. Adm. Code, in reaching its determination that notwithstanding s. 77.54(5)(b), Wis. Stats., sales tax should be assessed on the lease receipts. The taxpayer contends that this section approp-

riately encompasses the lease arrangement he had with Lynn's during the period in question. Therefore, under the language of this provision, the taxpayer would be providing a service, and would not be responsible for collecting sales tax on the lease receipts.

The taxpayer contends that the letter sent to him by the Department of Transportation notifying him of the cancellation of his private carrier status declared unambiguously that what had been determined previously to be private carriage would henceforth be deemed "for hire." Therefore, he concludes that there can be no question but that the responsible administrative agencies considered the leasing arrangement to be a transportation service ("for hire"), and not taxable, under the provisions of the statute.

The remaining question under the rule is whether the taxpayer "provided the drivers" under the lease arrangement. The Commission found that the drivers were not "provided by the truck owners to operate the trucks within the meaning of such rule." The Commission explained that the rule required the owner to provide all drivers, and since all the drivers, including the taxpayer were employed by Lynn's, the taxpayer provided no drivers.

The taxpayer next argues that "exclusive use" under s. 77.54(5)(b), Wis. Stats. is subject to the primary business test enunciated in *Gensler v. Dept. of Revenue* in order to determine whether an arrangement is "private" or "for hire" carriage.

The taxpayer contends the department is equitably estopped from assessing sales tax on the lease receipts because it was reasonable for the taxpayer to rely on the advice provided by legal counsel at the Transportation Commission as well as advice provided by its tax representatives.

The Circuit Court ruled:

- A. There are no deficiencies in the Commission's determination rejecting the taxpayer's claim that the lease arrangement was a service agreement rather than a rental agreement. The Commission's conclusions that the

taxpayer did not provide drivers for the trucks as required by the rule is a reasonable interpretation—certainly not inconsistent with the language or clearly erroneous.

B. The Commission's determination that *Gensler* does not sanction the "primary business" test as controlling in deciding all questions of "exclusive use" is reasonable.

The taxpayer has not appealed this decision.



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.)

The following Tax Releases are included:

Individual Income Taxes

1. Gross Income and Income Tax Return Filing Requirements (p. 13)

Corporation Franchise or Income Taxes

1. Treatment of Capital Losses by Corporations for 1987 (p. 14)

Sales/Use Taxes

1. Taxable Lease vs. Nontaxable Service: Parent/Subsidiary Transactions (p. 14)

County Sales/Use Taxes

1. County Tax - Motor Vehicle Purchased Before Tax Was in Effect (p. 15)

Homestead Credit

1. Homestead Credit: Property Taxes on Property Used for Business Purposes (p. 15)

INDIVIDUAL INCOME TAXES

1. Gross Income and Income Tax Return Filing Requirements

Statutes: Section 71.10(2)(a) and (d), 1985 Wis. Stats.

Background: Wisconsin income tax return filing requirements as provided in s. 71.10(2)(a)5, Wis. Stats., are based on filing status, age as of December 31, and gross income (or total gross income of husband and wife). Section 71.10(2)(d), Wis. Stats., defines gross income as "all income from whatever source derived and whatever form realized, whether in money, property, or services, which is not exempt from Wisconsin income tax."

Question 1: A full-year Wisconsin resident who is single and under age 65 operates a Wisconsin farm. This individual derives gross receipts of \$60,000, but also incurs expenses of \$59,000, for net farm income of \$1,000 in 1987. Is this individual required to file a 1987 Wisconsin tax return?

Answer 1: Yes. Section 71.10(2)(a)5a, Wis. Stats., provides that a full-year Wisconsin resident who is single and under age 65 must file a Wisconsin tax return if he or she has Wisconsin gross income of \$5,200 or more. Section 71.10(2)(d), Wis. Stats., provides that gross income from a business or farm consists of the total gross receipts without reduction for cost of goods sold, expenses, or any other amounts. Since this individual derived gross farm receipts of \$60,000, he is required to file a 1987 Wisconsin tax return.

Question 2: A nonresident of Wisconsin who is single and under age 65 sells Wisconsin real estate held for investment purposes on land contract in 1987. The selling price was \$50,000 and the selling expenses and basis totalled \$40,000. The individual received installment payments totalling \$5,000 in 1987. Is this individual required to file a 1987 Wisconsin tax return and pay the tax due thereon?

Answer 2: Yes. Section 71.10(2)(a)5b, Wis. Stats., provides that a nonresident must file a Wisconsin tax return if he or she has Wisconsin gross income of \$2,000 or more. Section 71.10(2)(d), Wis. Stats., provides that gross income from the sale of property consists of the gross selling price without reduction for the cost of the property, expenses of sale, or any other amounts. Since this individual received total installment payments of \$5,000 in 1987, he is required to file a 1987 Wisconsin tax return and pay any tax owing on that return.

Question 3: Nonresidents of Wisconsin who are married and under age 65 own Wisconsin rental property. They derive gross rental income of \$6,000 and incur rental expenses of \$7,000, for a net rental loss of \$1,000. Is this married couple required to file a 1987 Wisconsin tax return?