as well as sunlight, wind, humidity, and dust. The overhead tarp apparatus serves also to protect against washout by diffusing rainfall. It also protects against hail and frost damage. The average equipment expense including jacks, post, cable, and tarp fabric is about $10,000 per acre.

When erected the tarp mechanism is used to provide shade, reduce air, and ground temperature, limit moisture, and protect against adverse climatological elements. The cable and tarp apparatus is used for no other purpose but ginseng production. The fabric tarp, cables, and cable splicers under sales and use tax assessment become constituent parts of the tarp shade mechanism. The cable stretchers were utilized primarily to construct and later adjust the cable and attached cloth.

Ginseng growers frequently adjust the cable and tarp apparatus—daily or more often. They utilize thermometers and light meters to monitor temperature and sunlight. Ground is kept damp by straw which serves as a mulch. Some growers use irrigation and sprinkler systems and electric fans. Some irrigate through the overhead tarp.

A comparatively minor additional assessment relates to the taxpayer's purchase of wire used primarily in constructing pens for use in mink ranching operations. This wire is also used to construct racks for drying ginseng roots.

The Commission concluded that the ginseng cloth, cables, cable splicers, and cable stretchers used in constructing shade apparatus for ginseng growing, the wire used in the taxpayer's construction of pens for its mink raising, and the wire used in the construction of drying racks for ginseng were not "machines, including accessories, attachments and parts therefor, used directly in farming" within the meaning of sec. 77.54(3), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

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Refunds and remedies of taxpayers—claims for refunds. *Dairyland Harvestore, Inc. and Badgerland Harvestore Systems, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, August 17, 1989). Dairyland Harvestore, Inc., and Badgerland Harvestore Systems, Inc., appeal from an order affirming the Wisconsin Tax Appeals Commission's decision that they are not "persons" under sec. 77.59(4), Wis. Stats., entitled to file a claim against the Department of Revenue for refund of sales taxes they paid to a retailer or to claim an offset for such sales taxes against their liability for additional sales taxes. The issues are whether the Commission properly construed sec. 77.59(4), Wis. Stats., both before and after its 1980 amendment, whether the Court should fashion for the taxpayers an equitable remedy under Wis. Const. art. I, sec. 9, and whether the doctrine of equitable recoupment permits the taxpayers to file claims for offsets.

The claimed offsets arose out of refunds on purchases by the taxpayers from A. O. Smith Harvestore Products, Inc. The taxpayers paid Wisconsin sales taxes to A. O. Smith at the statutory rate for each purchase. A. O. Smith in turn paid the taxes to the department, but later made refunds to the taxpayer which reduced the price of the products they had purchased. A. O. Smith did not, however, refund to the taxpayers the sales taxes on the refunded amounts. The refunds to Dairyland were for the fiscal years ending January 31, 1977, through 1981, and the refunds to Badger were for the years ending January 31, 1979, through 1981.

The Commission concluded that each taxpayer lacked standing under sec. 77.59(4), Wis. Stats., to file a claim for a refund of sales taxes paid and, therefore, lacked standing to claim an offset for sales tax paid. The Commission concluded that the doctrine of equitable recoupment was inapplicable and affirmed the department's denial of the taxpayers' petition for redetermination. The taxpayers petitioned for judicial review under ch. 227, Wis. Stats. The trial court affirmed the Commission.

All parties appear to assume that if the taxpayers had standing to file claims with the department for sales taxes they paid to A. O. Smith, then they are entitled to offset those sales taxes against additional sales taxes owing for the same taxable years in question. The Court accepted this assumption. However, the taxpayers' contend that under the plain meaning of sec. 77.59(4), Wis. Stats. (1977), before its amendment, they are "persons" who may claim a refund of sales taxes paid.

The Court concluded that:

A. At all relevant times before April 30, 1980, sec. 77.52(1), Wis. Stats. (1977-78), imposed the sales tax on A. O. Smith as the retailer. As the "retailer" A. O. Smith was required to file monthly or quarterly sales tax returns, as well as an "annual information return" detailing its total receipts for sales tax purposes. A. O. Smith was entitled by virtue of sec. 77.52(3), Wis. Stats., to collect the sales taxes from the taxpayers, and it is undisputed that it paid the taxes to the department. In its pre-amendment form, sec. 77.59(4), Wis. Stats. (1977), was unambiguous and rejected the taxpayers' argument that under the doctrine of equitable recoupment, they are entitled to a refund and, therefore, an offset even if they lack standing to file a claim.

B. The 1980 amendment to sec. 77.59(4), Wis. Stats., renders it ambiguous. The relevance of income tax and franchise tax returns to claims for sales tax refunds is obscure at best. The amended statute fails to specify to whom the person filing a claim paid the tax. It fails to differentiate between the person (such as the taxpayers who paid it to the retailer and the retailer who paid it to the department). The statute can be read to permit either person or both to claim a refund for the tax on a single transaction. Since reasonable persons could understand the statute differently, it is ambiguous. The new statute permits a "person" to "file a claim for refund of taxes paid," having deleted the qualifying words "by such person." Consequently, the basis under the old statute for concluding that the "person" entitled to file is the same person who paid the taxes no longer exists. Because the new statute refers to the Wisconsin income tax or franchise tax return, the basis under the old statute for concluding that the "person" entitled to file is the one who filed a sales tax return no longer exists.

Therefore, the Court concluded that the Legislature intended by its amendment to sec. 77.59(4), Wis. Stats., that all persons who have paid an excess sales tax, whether to a retailer or to the department, may file a claim for a refund. The court specifically inferred that the Legislature intended, through its amendment, to permit customers who paid excess sales taxes to retailers to claim tax refunds from the department. Because the taxpayers could have filed claims on and after April 30, 1980, for excess sales taxes they paid to A. O. Smith, they may offset those claims against the department's assessments for additional taxes.

The department appealed this decision to the Wisconsin Supreme Court. The petition for review was denied.

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Close-out sales. *Thomas D. Kenton vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 11, 1989). The issues in this case are:

A. Whether the taxpayer continued to "hold" his seller's permits on the date of a sale within the meaning of sec. 77.51(9)(a), Wis. Stats., (1985-86), and sec. Tax 11.13(3)(b), Wis. Adm. Code, and thus, was ineligible to claim the "occasional sales" exemption from the sales tax.

B. Whether the Wisconsin Department of Revenue is entitled to a summary judgment under sec. 802.08(2), Wis. Stats., since legal delivery to the department of the seller's permits at issue herein is conditional upon the postmark date on the envelope bearing such seller's permits. The taxpayer contended that the legislature amended the intent of sec. 77.51(9)(a), Wis. Stats., by adding sec. 77.51(9)(am), Wis. Stats., effective May 17, 1988.

The department made an assessment of sales and use tax against the taxpayer for the period ending September 25, 1987. The assessment related to the September 25, 1987, disposition of the assets of the taxpayer's laundromat business operated at two locations, one in the Village of Wild Rose and the other in the City of Wautoma. Attorney Thomas M. Kubasta conducted the closing in which the taxpayer sold his Wautoma, Wisconsin laundry and dry cleaning business. Said closing took place between 5:00 p.m. and 6:00 p.m. on Friday, September 25, 1987. The law clerk for Attorney Kubasta, at his direction, left the offices of Attorney Kubasta at approximately 5:45 p.m. with a properly addressed envelope with sufficient postage containing the seller's permits at issue and mailed the envelope by regular mail at the post office in Wautoma, later executing an affidavit to that effect. The envelope was postmarked September 26, 1987.

The Commission ruled that under the provisions of sec. 77.51(9)(a), Wis. Stats., the taxpayer's sale of business assets was not exempt as an occasional sale since it failed to comply with the applicable requirements. The Commission concluded that the department has shown good and sufficient cause for the granting of its motion for summary judgment pursuant to sec. 802.08(2), Wis. Stats.

The taxpayer has not appealed this decision.

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Leases and rentals—taxi cabs. *Joseph Sanfellippo vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 27, 1989). The issues in this case are:

A. Whether lease payments made by lessee-cab drivers to the lessor-taxpayer, for use of the cabs, were taxable receipts earned from leasing the cabs at retail; and

B. Whether the department was equitably estopped from collecting any sales tax from the taxpayer by its not having advised the taxpayer of the taxability of the lease payments or collaterally estopped by a court ruling that the taxpayer and the drivers had employer-employe relationships.

The years involved here are 1981 through 1984. In those years, the taxpayer owned one or two cabs. During most of the period, the taxpayer leased the cabs to a number of different lessee-drivers, who paid between $100-125 per week in rent. The leases were oral. The drivers were responsible for paying for gas used on their runs and for some routine maintenance. Dispatching of the cabs was done by a separate radio service company. The taxpayer paid that company a monthly fee for its dispatching services. The taxpayer had no right of control and exercised no control over the drivers. He took no share of the drivers' meter fares.

In 1974, the taxpayer was audited by the Department of Industry, Labor and Human Relations (DILHR), which concluded that the relationship between the taxpayer and the drivers he then had was that of employer-employes, for unemployment compensation purposes at least. That ruling was affirmed in Dane County Circuit Court in 1975. The relationships between the taxpayer and his drivers at the time of the court decision were the same as those in effect in the years involved here.

At no time prior to its audit of the taxpayer did the department specifically notify the taxpayer of its contention or position that lease payments of the kind paid here were gross receipts subject to sales tax, and the taxpayer never knew that the department considered such transactions to be taxable. However, the department did publish and distribute general materials on the subject of the taxability of lease payments in general.

The taxpayer argues that the lease payments were not taxable, because the transactions between the drivers and him were not retail transactions, and that even if the transactions were taxable, the department was estopped from collecting the tax, because another arm of the state, DILHR, ruled the that taxpayer and the drivers had employer-employe relationships with each other, and that ruling was affirmed as indicated above.

The ruling, the taxpayer reasoned, is important because in finding an employer-employe relationship, the ruling now precludes a sales tax. It is conceptually impossible, the taxpayer contended, for the drivers, as employes of the taxpayer, to be both employes and simultaneously stand in a lessee relationship with the taxpayer-employer—

particularly where the leased items were used by the drivers in the course of taxpayer's business. The taxpayer also claimed that because the department took no steps to notify him of the taxability of such transactions, the department is estopped from making him pay.

The department argued the taxability issue is controlled by the Commission's holding in *Peterson v. Wisconsin Department of Revenue*, 203-026 Wisconsin Tax Reporter (WTAC 1989), wherein it held, in similar circumstances, cab leases to be taxable retail transactions. The department also argued that it is not estopped from collecting the tax; it had no duty to notify taxpayer and isn't collaterally estopped by the DILHR case.

The Commission held that the lease payments are taxable retail receipts. The transactions were retail transactions because, among other things, the drivers — not the fare-paying consumers — were the ultimate users of the property and provided only services, not property, to the fare-payers.

The Commission also held that even if it accepted as binding the court's decision that the taxpayer and the drivers had employment relationships, it still could not say that those relationships legally exclude lease relationships with respect to the cabs. The Commission ruled that an employe can be his employer's lessee of property used in the course of the employer's business, and accordingly, the department is not estopped by the court ruling establishing an employment relationship.

Finally, the Commission ruled that the department is not estopped by its "failure" to notify the taxpayer of the taxability of the lease payments, that to impose such a duty to notify the taxpayers would be to impose an impossible burden, and that the existence of published statutory law constitutes notice to the state's taxpayers.

The taxpayer has appealed this decision to the Circuit Court. ❐

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. Distributions From Keogh and Deferred Compensation Plans (p. 17)
2. Farmers' Drought Credit and Its Effect on 1989 Federal and Wisconsin Income Tax Returns (p. 18)
3. Property Taxes/Rent Allowable for School Property Tax Credit Computation (p. 20)
4. Small Business Stock (p. 21)
5. Taxable Status of Interest Income Received from Certain Securities (p. 22)
6. Taxation of Dependents With Unearned Income (p. 22)
7. Wisconsin Tax Treatment of Lump-Sum Distributions (p. 23)

Homestead Credit

1. Homestead Credit - Ownership of Homestead (p. 24)

Corporation Franchise or Income Taxes

1. Difference Between Wisconsin Basis and Federal Basis of Assets Disposed of in Taxable Transactions (p. 25)

Sales/Use Taxes

1. Cost-Sharing of Telecommunications Equipment and Services (p. 26)
2. Electricity Used in Industrial Waste Treatment Facility (p. 26)
3. Leased Automobiles Used by Employes (p. 26)
4. License, Maintenance, and Enhancement of Computer Software (p. 27)
5. Sale of Waste Removal Services and Transfer of Tangible Personal Property (p. 28)
6. Supplies Used in Delivering Newspapers (p. 28)
7. "Transport" Natural Gas and Transportation Charges (p. 29)
8. When Is a Sale in Wisconsin for Purposes of Imposing Wisconsin Sales Tax (p. 31)

INDIVIDUAL INCOME TAXES

1. Distributions From Keogh and Deferred Compensation Plans

Statutes: Section 71.05(6)(b)1, Wis. Stats. (1987-88)

Background: In a Tax Release titled "Distributions from IRAs Which Invest in U.S. Government Securities," WTB 61, page 13, it stated that amounts withdrawn from an IRA which are attributable to interest from U.S. Government securities may be excluded from Wisconsin taxable income under sec. 71.05(6)(b)1, Wis. Stats. (1987-88), pursuant to 31 USCS § 3124.

Question 1: When amounts are withdrawn from a Keogh or deferred compensation plan which invests in securities issued by the U.S. Government, will a portion of the amount withdrawn constitute interest from U.S. Government securities which is exempt from Wisconsin income tax?