2.05 Information returns, forms 8 for corporations-R&R (3/1/90)
2.07 Income tax returns of liquidated or dissolved corporations-R (3/1/90)
2.081 Indexed income tax rate schedule-R (3/1/90)
2.085 Claim for refund on behalf of a deceased taxpayer-A (3/1/90)
2.105 Notice by taxpayer of federal audit adjustments and amended returns-A (3/1/90)
2.11 Credit for sales and use tax paid on fuel and electricity-A (3/1/90)
2.12 Amended income and franchise tax returns-A (3/1/90)
2.13 Moving expenses-A (3/1/90)
2.15 Methods of accounting for corporations-A (3/1/90)
2.17 Cash method of accounting for corporations-R (3/1/90)
2.18 Accrual method of accounting for corporations-R (3/1/90)
2.31 Taxation of personal service income of nonresident professional athletes-A (3/1/90)
2.50 Apportionment of net business income of interstate public utilities-A (3/1/90)
2.51 Rent received by corporations from Wisconsin real estate-A (3/1/90)
2.73 Involuntary conversion by corporations-A (3/1/90)
2.74 Gain or loss on disposition of property by corporations; adjustment to basis-R (3/1/90)
2.75 Recoveries by corporations-A (3/1/90)
2.76 Refunds of taxes to corporations-A (3/1/90)
2.80 Improvements of leased real estate, income to corporate lessor-A (3/1/90)
2.81 Damages received by corporations-A (3/1/90)
2.86 Income to corporations from cancellation of government contracts-A (3/1/90)
2.945 Spousal individual retirement contributions-R (3/1/90)
2.96 Extension of time to file corporation franchise or income tax returns-A (3/1/90)
2.98 Disaster area losses-A (3/1/90)
3.24 Corporation taxes, miscellaneous-R (3/1/90)
3.55 Donations and contributions - corporations—R (3/1/90)
14.01 Administrative provisions-R&R (3/1/90)
14.02 Qualification for credit-R&R (3/1/90)
14.03 Household income-R&R (3/1/90)
14.04 Property taxes accrued-R&R (3/1/90)
14.05 Rent constituting property taxes accrued-R&R (3/1/90)
14.06 Marriage, separation, or divorce during claim year-NR (3/1/90)

E. Rules Adopted in 1990 But Not Yet Effective

11.10 Occasional sales-A
11.16 Common or contract carriers-A
11.18 Dentists and their suppliers-A
11.26 Other taxes in taxable gross receipts and sales price-A
11.32 "Gross receipts" and "sales price"-A
11.41 Exemption of property consumed or destroyed in manufacturing-A
11.57 Public utilities-A
11.66 Communications and CATV services-A
11.67 Service enterprises-A
11.68 Construction contractors-A
11.84 Aircraft-A
11.85 Boats, vessels and barges-A

F. Emergency Rules

11.66 Communications and CATV services (effective 10/1/89)

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 department 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 the Commission's decision).

The following decisions are included:

Individual Income Taxes

Corporation Franchise or Income Taxes

Sales/Use Taxes

INDIVIDUAL INCOME TAXES

Employe vs. independent contractor. *Jerry and Lori Albright and Jerry M. Albright vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 27, 1989). The issue in this case is whether the taxpayer, a highly-skilled woodcraftsman, who had nearly complete independence as to his working hours and manner of completing his work, who had the right to quit work on any project at will, who conducted his trade out of his own shop, using his own tools and equipment, and whose almost exclusive source of income was a company that commissioned him continuously to build articles, that paid him by the hour on a regular 40-hour week basis, that treated his commission income as wages, that withheld from his pay amounts for social security, federal and state income taxes, and vacation pay, that

issued him W-2 certificates, that paid unemployment compensation taxes, that provided him with health and life insurance benefits, that provided him with materials that he needed to complete the projects, that reimbursed him for travel expenses, that bore the immediate financial risk of any unacceptable or unsatisfactory work done by the taxpayer, and that had the right to discharge him at will, was an employe or an independent contractor of the commissioning company.

The issue in this case arises in the context of whether the taxpayer should have been allowed to deduct in full unreimbursed expenses he incurred in connection with his trade. The taxpayer had reported these expenses as business expenses, deductible in full from his gross income. For 1984 and 1985, the department reclassified these deductions by requiring that they be reported as Schedule A expenses which made them subject to the limitation on itemized deductions. For 1986, the same sort of reclassification meant that none of the expenses were deductible.

The company's explanation for the outward treatment of the taxpayer as an employe was that artists, such as the taxpayer, are "strange cats," whose devotion to their work precludes them from properly concerning themselves with prosaic things like paperwork. Such artists must necessarily turn to a patron to keep their business affairs in order. Thus, here the simplest way of handling the taxpayer's business affairs was to treat him as an employe.

The Commission accepted the explanation that it was convenient for both the taxpayer and the company to treat the taxpayer as an employe. It ruled that while relevant, factors such as the W-2's and the company's deductions for unemployment compensation, suggesting the taxpayer was an employe, are not in themselves conclusive in this case. Here these factors must be weighed along side of other relevant factors. In determining whether an employer-employe relationship exists, the crucial question is one of the degree of control the putative employer exercises. This determination turns on a weighing of numerous, common-law factors, and on analysis of these factors, the Commission concluded that the taxpayer was an employe.

The taxpayer has not appealed this decision.

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Marital property—notification. *Joyce A. Bennett vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 15, 1989). The issue in this case is whether Thomas E. Bennett's notification on October 13, 1987, was timely and proper notification to Joyce A. Bennett of the amount and nature of his marital property income before the due date, including extensions, for filing his return for the taxable year in which the income was earned, under sec. 71.11(2m), Wis. Stats. (1985-86).

Joyce A. Bennett ("taxpayer") and Thomas E. Bennett were married to each other for all of 1986 and were full-year Wisconsin residents. The taxpayer filed for and received extensions to file her federal return for 1986, first to August 15, 1987, and a later extension to October 15, 1987, and these extensions equally applied for Wisconsin income tax purposes. Mr. Bennett filed for and received extensions to file his federal return for 1986 to October 15, 1987, and these extensions equally applied for Wisconsin income tax purposes.

The taxpayer's 1986 marital property information was sent by letter of July 24, 1987, to Mr. Bennett by certified mail, return receipt requested, and received on July 28, 1987. Mr. Bennett's 1986 marital property information was hand delivered to the taxpayer at 8:50 a.m., October 13, 1987, by a deputy sheriff of the Outagamie County sheriff's office.

The taxpayer timely filed her 1986 Wisconsin income tax return on or about September 14, 1987, reporting 100% of "her" wage and interest income rather than in amounts reported to Mr. Bennett as 1/2 marital; she also reported "her" itemized deductions.

Mr. Bennett notified Mrs. Bennett on or before the extended due date of his 1986 Wisconsin income tax return of "his" business and interest income, rental loss, and itemized deductions.

The department issued an assessment in the alternative for 1986, since there was a disagreement between the taxpayer and her spouse as to which party is liable for tax on unreported marital income.

The Commission concluded that the "due date" referred to in the second sentence of sec. 71.11(2m), Wis. Stats. (1985-86), renumbered sec. 71.10(6)(b), Wis. Stats. (1987-88), refers to the return of the taxpayer who is to make notification of marital property income to his or her spouse, that notifications by both the taxpayer and Thomas E. Bennett of their respective marital property incomes were timely and adequate under said section, and that the taxpayer is required to pay tax and interest on her share of Thomas E. Bennett's 1986 marital property income, as shown on the October 13, 1987, notification. The Commission ordered that the department's action be modified so as to adjust its assessment of the taxpayer in the alternative to reflect one-half of the marital property income of the taxpayer and Thomas E. Bennett, with applicable credits and deductions as provided by law.

The taxpayer has not appealed this decision.

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Gain or loss—property transferred by gift. *Laird C. Cleaver vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, August 24, 1989). Laird C. Cleaver appeals from a Circuit Court judgment affirming the decision of the Wisconsin Tax Appeals Commission which affirmed the Department of Revenue's denial of his income tax refund claim. His claim arises out of an alleged overpayment of income tax on the gain he realized when he made a "net gift" to the Laird C. Cleaver issue trust. See *Wisconsin Tax Bulletin* 59, page 7, for a review of this case.

The Court of Appeals determined that whether the taxpayer is entitled to his claimed refund requires construction of sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977),

in relation to sec. 1026 of the Deficit Reduction Act of 1984. The application of a statute to a factual situation is a question of law.

The Court concluded that sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977), is ambiguous and does not answer the inquiry of whether sec. 1026 of the Deficit Reduction Act of 1984 was an "amendment" to the Internal Revenue Code within the meaning of sec 71.02(2)(b)3, Wis. Stats. (1977). The Court, thus, resorted to the legislative history and found that there are conflicting indications as to the legislative intent as to the meaning of sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977).

The Court of Appeals resolved the conflict as to the legislative intent by concluding that the Legislature did not intend "internal revenue code," for the taxable year 1977, to include acts of Congress enacted after December 31, 1976, whose substantive effect was to amend the Code. The legislative history of the federalization of the Wisconsin income tax law establishes that the Legislature sought the advice of the Attorney General as to whether it could incorporate by reference future amendments by the Congress of the Internal Revenue Code. The care which the Legislature has taken to avoid incorporating by reference future enactments of Congress convinced the Court that the Legislature intended that sec. 71.02(2)(a), (b)3, and (e), Wis. Stats. (1977), does not incorporate by reference future acts of Congress whose substantive effect is to amend the Internal Revenue Code. Because sec. 1026 of the Deficit Reduction Act had the substantive effect of amending the federal definition of gross income under sec. 61(a) of the Internal Revenue Code, it was made inapplicable to Wisconsin by sec. 71.02(2)(b)3, Wis. Stats. (1977).

The Court of Appeals concluded that taxpayer is not entitled to the claimed refund.

The taxpayer has appealed this decision to the Wisconsin Supreme Court.

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Interest—assessments. *Marilyn L. Jenness vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 14, 1989). The issue is whether allegedly misleading instructions in the department's 1984 income tax instruction booklet constitute grounds to excuse the taxpayer from interest on taxes that the taxpayer conceded were due.

The taxpayer's argument is that the 1984 instructions failed to alert her and her husband, who prepared their returns, to the existence of her additional tax liability for minimum tax. She agrees the tax was proper and has paid it, but says the instructions did not identify certain capital gains she obtained as a "tax preference" item, and neither she nor her husband associated that terminology with the capital gains. As a result, they didn't do the minimum tax calculation that was required and that caused the additional tax.

The Commission concluded that sec. 71.82(1)(a), Wis. Stats., provides, "In assessing taxes interest **shall** be added to such taxes...." The word "shall" leaves no room for any waiver of interest. Apparently, even if a taxpayer were abducted by terrorists and held in captivity for years, with no one to look after his financial affairs, interest would still be assessable against him under the statute. It seems absolute, and even the department would be powerless to waive it. There is no authority permitting a waiver of the interest. Thus, here interest must be charged even if the instructions were inartfully written or incomplete.

The taxpayer has not appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be cited as precedent. It is provided for informational purposes only.

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CORPORATION FRANCHISE OR INCOME TAXES

Deductions—accrued expenses. *Journal Communications, Inc. f/k/a The Journal Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 28, 1988). The only issue in this case is the deductibility of the accrued performance bonus expense claimed by the taxpayer on its 1982 and 1983 Wisconsin franchise tax returns.

On June 2, 1981, the board of directors of the Journal Company adopted the Journal Employes' Performance Bonus Plan (hereinafter referred to as the "Plan"). On July 1, 1981, the Plan was officially announced to employes of the company.

In April 1983, the performance bonus awards for 1982 were announced and awarded. Of the $240,000 accrued for 1982 performance bonus awards, $234,220 was awarded to employes, but $23,780 of these awards were never paid out and were forfeited because of union objections. In March 1984, the performance bonus awards for 1983 were announced and delivered. The amount accrued for 1983 was $641,920, but the amount actually awarded and paid out to employes was $649,300.

The taxpayer's calendar year tax returns for 1982 and 1983 claimed and deducted accrued expenses for The Journal Employe's Bonus Plan of $240,000 and $641,920, respectively. The department disallowed the taxpayer's performance bonus award accruals of $240,000 for 1982 and $641,920 for 1983. Of the 1982 awards made in April of 1983, $210,440 was paid in 1983, and the department allowed a deduction of $210,440 for 1983, thus, reducing the bonus award adjustment for 1983 from $641,920 to $431,480.

The taxpayer contended its liability for making the 1982 and 1983 bonus payments accrued on the last day of 1982 and 1983 respectively, and, therefore, the deductions were properly taken in those years as opposed to the years in which the payments were actually paid.

The department maintained that the payments did not accrue until they were actually paid and, accordingly, the 1982 bonus plan, paid in 1983, should have been deductible in 1983, and the 1983 bonus plan, paid in 1984, should have been deductible in 1984.

Pursuant to paragraph 11 of the Journal Employes' Performance Bonus Plan, the taxpayer's liability for paying the bonuses did not become fixed and determinable until the awards had been "made," since the Board of Directors had reserved the right to discontinue the plan prior to that time. Performance bonus awards were "made" at the time the recipients were chosen and their names and the amounts of their awards were announced. The 1982 bonus awards were not actually made until 1983 and the 1983 bonus awards were not actually made until 1984.

The Commission concluded that for the taxpayer's 1982 and 1983 performance bonus payments to be deductible in the taxable years to which they relate, the events which determine the fact of liability must have occurred in those years, and that the liability for making the 1982 and 1983 bonus payments had not accrued by the end of fiscal years 1982 and 1983, respectively. Therefore, the awards were not deductible as accrued expenses for the years in which they were deducted, but were deductible as paid expenses in the years in which the awards were actually made.

The taxpayer has not appealed this decision.

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Nexus. *William Wrigley, Jr., Co. vs. Wisconsin Department of Revenue and Wisconsin Department of Revenue vs. William Wrigley, Jr., Co.* (Court of Appeals, District IV, December 7, 1989). The department appeals from a judgment reversing a decision of the Commission, which upheld a franchise tax assessment against the taxpayer, an Illinois manufacturer of chewing gum which markets its products in Wisconsin and other states. The department assessed taxes and delinquent interest for the years 1973 through 1978, and the taxpayer appealed to the Commission on grounds that the assessment was prohibited by federal law. The Commission upheld the assessment, but ruled that the department had applied an improper rate of interest. On review, the Circuit Court reversed and the department appealed. See WTB 50, 55, and 59 for summaries of prior decisions in this case.

The issues are:

A. Whether the assessment is barred by the provisions of 15 U.S.C. sec. 381, which allow state taxation of income from interstate commerce only if the company's business activity within the state exceeds the "solicitation of (sales) orders."

B. If not, whether the assessed taxes were "delinquent" within the meaning of sec. 71.10(9), Stats. (1985-86), so as to justify application of an 18% (1.5% per month) interest rate on the balance due. The Circuit Court, voiding the assessment, did not reach the question of the proper interest rate. An ancillary issue concerns the scope of the Appeals Court's review — whether it owes any deference to the Commission's interpretation of a federal law.

The Court of Appeals concluded that while it owed no deference to the Commission in this instance, the Commission nonetheless correctly determined that the assessment was not barred by federal law. It also concluded that the department applied the correct rate of interest and, therefore, reversed the judgment of the Circuit Court and remanded with directions to enter an order affirming the Commission's decision on the validity of the assessment and reversing its determination on the appropriate rate of interest to be applied to the assessment.

The taxpayer appealed this decision to the Wisconsin Supreme Court. The taxpayer's petition for review was granted.

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SALES/USE TAXES

Water conditioners. *Irvin Kozlovsky, d/b/a Culligan Water Conditioning of Waupaca vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, November 7, 1989). The issue in this review is whether the monthly fee the taxpayer receives from his customers is subject to sales tax because it constitutes the gross receipt from the leasing or renting of tangible personal property. See *Wisconsin Tax Bulletin* 51, page 8, for a review of this case.

The Court affirmed the Commission decision that the true objective of the taxpayer's customers is to obtain properly and efficiently functioning water softening equipment, not, as the taxpayer argued, to obtain his personal services. The Court concluded that the Commission's decision must be affirmed, and that the gross receipts the taxpayer receives from his customers for the leasing or rental of water softening equipment are subject to sales tax.

The taxpayer has not appealed this decision.

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