3.096 Interest paid on money borrowed to purchase exempt government securities-A (7/1/90)
3.10 Salesmen's and officers' commissions, travel and entertainment expense of corporations-R (7/1/90)
3.12 Losses on account of wash sales by corporations-R&R (7/1/90)
3.37 Depletion of timber by corporations-A (7/1/90)
3.38 Depletion allowance to incorporated mines and mills producing or finishing ores of lead, zinc, copper, or other metals except iron-A (7/1/90)
3.47 Legal expenses and fines - corporations-R (7/1/90)
3.54 Miscellaneous expenses - corporations-R&R (7/1/90)
3.81 Offset of occupational taxes paid against normal franchise or income taxes-A (7/1/90)
3.91 Petition for redetermination-A (7/1/90)
3.92 Informal conference-A (7/1/90)
3.93 Closing stipulations-A (7/1/90)
3.94 Claims for refund-A (7/1/90)
8.01 Tax liability-NR (8/1/90)
8.02 Revenue stamps - occupational tax-R&R (8/1/90)
8.03 Affixing stamps-R (8/1/90)
8.04 Refunds-R&R (8/1/90)
8.05 Special tax on intoxicating liquor-R (8/1/90)
8.06 Mixture of specially taxed and regularly taxed intoxicating liquors-R (8/1/90)
8.11 Reports-A (8/1/90)
8.12 Samples-NR (8/1/90)
8.21 Purchases by the retailer-A (8/1/90)
8.22 Purchases made outside of state-A (8/1/90)
8.23 Sales to non-licensees-NR (8/1/90)
8.31 Sales out of Wisconsin-A (8/1/90)
8.51 Labels-R (8/1/90)
8.61 Advertising-A (8/1/90)
8.66 Merchandise on collateral-A (8/1/90)
8.71 Bitters-R (8/1/90)
8.76 Salesperson-R&R (8/1/90)
8.81 Transfer of retail liquor stocks-A (8/1/90)
8.87 Intoxicating liquor tied-house prohibitions-A (8/1/90)
11.05 Governmental units-A (7/1/90)
11.09 Medicines-A (7/1/90)
11.12 Farming, agriculture, horticulture and floriculture-A (7/1/90)
11.19 Printed material exemption-A (7/1/90)
11.40 Exemption of machines and processing equipment-A (7/1/90)
11.51 Grocers' guidelist-A (7/1/90)
11.535 Operators of a swap meet, flea market, craft fair or similar event-NR (7/1/90)
11.57 Public utilities-A (7/1/90)
11.61 Veterinarians and their suppliers-A (7/1/90)
14.03 Household income and income-A (9/1/90)
14.06 Marriage, separation, or divorce during a claim year-A (9/1/90)

E. Rules Adopted in 1990 But Not Yet Effective

7.01 Purchases and invoices-A
7.23 Activities of brewers, bottlers and wholesalers-A

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

Keith Breyer (p. 7)
Corporate Liquidations — sec. 333

Franklin F. Koehler (p. 8)
Partnerships — partner's share of income (loss)

Klaus Wacker (p. 8)
Foreign taxes paid

Thomas Wall (p. 8)
Losses — allocation

Corporation Franchise or Income Taxes

Appleton Papers, Inc. (p. 9)
Business loss carryforward — merger

Consolidated Freightways Corporation of Delaware (p. 9)
Apportionment — motor carriers

The Hearst Corporation (p. 10)
Apportionment—property factor, rented property; sales factor

Presto Products, Incorporated (p. 12)
Interest expense - loans between related parties

Sta-Rite Industries, Inc. (p. 13)
Waivers — statute of limitations

U.S. Oil Co., Inc. (p. 13)
Leases-1986 and prior — safe harbor rules

Inheritance Taxes

Estate of Emily Pierron, et al (p. 14)
Residuary bequests

Sales/Use Taxes

Alton Cable Corporation (p. 14)
Cable TV — installations

GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company (p. 15)
Telecommunication services — access charges

INDIVIDUAL INCOME TAXES

Corporate liquidations — sec. 333. *Keith Breyer vs. Wisconsin Department of Revenue* (Circuit Court of Outagamie County,

date stamped April 26, 1990). The only issue in this case is whether the Wisconsin Tax Appeals Commission correctly decided that the taxpayer could not benefit from the favorable tax treatment of sec. 71.333, Wis. Stats. (1983-84), without following the procedure set forth in that statute, thus giving the department authority to adjust his income tax return accordingly.

Section 71.333, Wis. Stats., is identical to sec. 333 of the Internal Revenue Code (IRC). All requirements of the IRC were met, including the filing of Form 964 with the Internal Revenue Service to elect to have the gains on liquidation taxed under sec. 333, IRC. The taxpayer did not file a copy of Form 964 with the Wisconsin Department of Revenue within 30 days of adoption of the plan, notifying the department of liquidation and the election to dissolve under sec. 71.333, Wis. Stats. The taxpayer's 1984 federal tax return was filed in accordance with the federal tax laws and rules and in accordance with the benefits of sec. 333, IRC.

When the 1984 Wisconsin income tax return was filed, there was no adjustment made to the federal income tax return for failure to file the Form 964 with Wisconsin. Upon audit, the department disallowed the sec. 71.333, Wis. Stats., treatment, adjusting the federal income tax for Wisconsin's purposes accordingly.

The Circuit Court held that the controlling question in this case is whether sec. 71.05(1) and (4), Wis. Stats., provides for any modification for not following sec. 71.333, Wis. Stats. Since the taxpayer timely elected under section 333, IRC, he was entitled to the benefits thereunder for federal purposes. The Court concluded that in accordance with sec. 71.02(2)(e), Wis. Stats., only those modifications contained in sec. 71.05(1) and (4), Wis. Stats., apply. Thus, since the department cannot rely on a specific modification to adjust the federal gross income in sec. 71.05(1) or (4), Wis. Stats., it cannot deviate from the taxpayer's federal adjusted gross income and impose a tax for not filing the state notice under sec. 71.333, Wis. Stats. The Circuit Court also concluded that since all actions by the taxpayer and the liquidating corporation complied with sec. 333, IRC and sec. 71.333, Wis. Stats., with the exception of the sec. 71.333, Wis. Stats., notice to the Department of Revenue, the total actions of the taxpayer and the liquidating corporation amount to be a substantial compliance including the timely filing of the notice under sec. 333, IRC, with the IRS, and substantial compliance has been accomplished regarding sec. 71.333, Wis. Stats.

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

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Partnerships — partner's share of income (loss). *Franklin F. Koehler vs. Wisconsin Department of Revenue*, (Wisconsin Tax Appeals Commission, June 26, 1990). The issue in this case is whether the taxpayer, a limited partner, who received no distribution from the partnership in 1982, and who eventually lost all of his investment in the partnership, is nonetheless liable for taxes on 1982 income reported by the partnership.

As of the beginning of 1982, the taxpayer and his wife were each limited partners, each holding a 7.4% interest in an enterprise called Irving Investment Company, a limited partnership dealing in real estate, and an enterprise that was subject or became subject to the jurisdiction of the federal bankruptcy court in that year. For 1982, the enterprise filed a federal partnership return signed by the trustee in bankruptcy, showing that the shares of the taxpayer and his wife in the partnership's income for 1982 were each $2,800 of ordinary loss and $17,233.85 of net long-term capital gain. None of the gain recognized, however, ever made its way into the hands of either the taxpayer or his wife, who eventually lost everything they had invested in the partnership. There is no evidence to contradict the accuracy of the figures the trustee reported in the 1982 return.

The Commission concluded that the taxpayer is subject to taxation on income the partnership earned, even though the income remained in the partnership and was never distributed to the taxpayer. It also concluded that because the taxpayer did not show that the figures reported by the bankruptcy trustee in the return were wrong, the assessment is correct.

The taxpayer has not appealed this decision.

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Foreign taxes paid. *Klaus Wacker vs. Wisconsin Department of Revenue* (Court of Appeals, District I, May 1, 1990). This is an appeal from an order of the Circuit Court of Milwaukee County, which reversed a decision of the Wisconsin Tax Appeals Commission. The Commission had upheld the department's disallowance of a "subtraction modification" for German trade taxes on the taxpayer's 1981 Wisconsin tax return. The issue presented by the appeal is whether the department properly disallowed the taxpayer's "subtraction modification". See *Wisconsin Tax Bulletin* 63, page 8 and *Wisconsin Tax Bulletin* 47, page 12, for prior summaries of the case.

The Court of Appeals held that where an administrative agency has particular expertise, it will not substitute its judgment for the agency's application of a particular statute to the found facts if there is a rational basis in law for the agency's interpretation and the interpretation does not conflict with the statute's legislative history, prior decisions of the Wisconsin appellate courts, or constitutional prohibitions. The Court concluded that the department and the Commission have particular expertise to decide the propriety of the taxpayer's "subtraction modification", that there is a rational basis for the department's disallowance of the modification claimed by the taxpayer, and that the department properly disallowed the claimed subtraction modification.

The taxpayer has not appealed this decision.

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Losses — allocation. *Thomas Wall vs. Wisconsin Department of Revenue* (Court of Appeals, District II, May 23, 1990). The department appeals from a judgment of the

Circuit Court of Ozaukee County, reversing a decision of the Wisconsin Tax Appeals Commission, which had affirmed the department's earlier determination that the taxpayer underpaid his income taxes for the years 1982-84. The three issues in this case are:

A. Whether improper service deprived the Circuit Court of subject matter jurisdiction;

B. Whether for tax purposes record title constitutes legal title; and

C. Whether 100% allocation of losses to the taxpayer lacked "substantial economic effect."

In 1986, the department issued against the taxpayer a notice of income tax deficiency for the years 1982-84. A portion of the alleged underpayment stemmed from the 1981 purchase of some investment property in Columbus, Ohio. The taxpayer and his wife, Barbara, intended to purchase the property jointly but, through the seller's mistake, the deed named Barbara as sole owner of the property. Though aware that Thomas's name was not on the deed, the Walls made no effort to change it, believing that as joint obligors on the mortgage note they were also joint owners. In fact, other than the deed, all pertinent documents relating to the sale listed both Thomas and Barbara as joint purchasers. In each of the years at issue, losses of approximately $10,000 were attributable to the Ohio property; Thomas and Barbara each claimed one-half. The department disallowed Thomas's portion of the claimed losses on the ground that, for tax purposes, record title was determinative of ownership.

The other portion of the alleged underpayment arose from the Wall's ownership of a Waukesha county horse farm ("Harmony Farm") purchased in 1983. After purchase, the Walls entered into a partnership agreement with their son Steven. The agreement provided that each partner was to contribute $500 as initial capital, and that the partners:

> shall contribute any additional capital deemed necessary for carrying on the business and to the extent such capital contributions are unequal, the capital account records shall reflect any such capital contributions.

In addition, the agreement allocated gains and losses as follows:

> The partners shall be entitled to the net profits or shall share losses of the partnership in equal shares or as agreed .... Unless otherwise agreed, all profits shall be allocated to Steven and all losses to Thomas and all losses shall be charged against the partners [sic] capital account.

In each of the relevant years, Thomas, a physician, earned an average of $155,000, while Barbara earned less than $25,000. In 1983, Harmony Farm showed losses of nearly $51,000; in 1984, nearly $68,000. All were claimed by Thomas. The department ruled that Thomas was entitled to claim only one-half of those losses, a proportion equal to his ownership interest in the partnership.

The department also argued that the Circuit Court lacked subject matter jurisdiction because the taxpayer improperly served his petition for review upon the department and the Commission by regular mail rather than by certified mail or in person. Noting the timely service and lack of any resultant prejudice, the Court held that there was substantial compliance with the statute and denied the department's motion to dismiss. The department submitted to the Circuit Court's jurisdiction by filing a "Notice of Appearance." The department did not allege in it any jurisdictional objections, but first raised the issue four months later in a motion to dismiss.

The Court of Appeals waived the first issue due to the department's failure to timely raise it. As to the second, the Court of Appeals concluded that record title does not conclusively establish legal title and so reversed that portion of the Commission judgment. The Court affirmed the third issue because the partnership's records do not support the taxpayer's position.

The department and the taxpayer have not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Business loss carryforward — merger. *Wisconsin Department of Revenue vs. Appleton Papers, Inc.* (Circuit Court of Dane County, June 27, 1990). The issue in this case is whether the manufacturer's sales and use tax credit acquired by one organization, Appleton Papers Inc. (old API) can be utilized by the taxpayer, a corporation which is made up of that "old" corporation merged with others, Appleton Papers Inc. (new API). See *Wisconsin Tax Bulletin* 63, page 10, for a prior review of this case.

After reviewing briefs and arguments from both the department and the taxpayer, the Circuit Court affirmed the decision of the Commission and denied the department's appeal.

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

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Apportionment — motor carriers. *Consolidated Freightways Corporation of Delaware vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, June 14, 1990). Consolidated Freightways Corporation of Delaware (Consolidated) appeals from an order affirming a decision of the Wisconsin Tax Appeals Commission. The Department of Revenue assessed additional franchise taxes against Consolidated for years 1974-77. The Commission affirmed the department's decision denying Consolidated's petition for a redetermination of the assessment, and the Circuit Court affirmed.

Consolidated challenges the formula used by the department to determine the portion of its income subject to Wisconsin tax in the years in question. Consolidated's claim is that the formula — as applied to its business activities during the tax years in question — violates (1) sec. 71.07(2), Wis. Stats., which limits the state's taxing power to income "derived from business transacted ... within the state," and (2) the Commerce Clause of the United States Constitution.

Consolidated is a "general commodity" common carrier, and its trucking business is nationwide. It is a Delaware corporation and its main offices are in California. As a general commodity carrier, Consolidated serves small and large shippers around the country, transporting manufactured and consumer goods.

Because Consolidated is primarily a hauler of small shipments — usually of less-than-truckload size — it normally consolidates several small shipments for over-the-road movement, utilizing a network of established routes and terminals across the country. Consolidated picks up freight from a shipper's dock, moves it to a satellite terminal, where it is combined with other freight from other shippers. It then moves the combined load to a large regional terminal, called a "consolidation center," where the load is consolidated with freight from other satellite terminals bound in the same direction.

Consolidated maintains 410 terminals nationwide and a fleet of 14,000 trailers and 2,400 tractors. It has 12 satellite terminals and a regional consolidation center in Wisconsin.

In 1966, the department adopted sec. Tax 2.47, Wis. Adm. Code, which contains a formula for apportioning the taxable Wisconsin income of a national unitary business. It is a two-factor formula which adds (a) the ratio of gross receipts from carriage of goods first acquired in Wisconsin — the "originating" or "outbound" revenues — to gross receipts from carriage of property everywhere, and (b) the ratio of ton miles of carriage to, from, and in Wisconsin to ton miles of carriage everywhere, and then (c) divides the total by two to average the results. The final figure is the percentage of the company's income subject to the Wisconsin franchise tax.

During the years in question, Consolidated continued to apportion its income, as it had in the past, using a different formula. After a field audit in which the department applied the sec. Tax 2.47, Wis. Adm. Code, formula to Consolidated's income, it issued an assessment of additional franchise tax and interest totaling $115,002.98 for the 4-year period. The department denied Consolidated's request for a redetermination and the Tax Appeals Commission affirmed the assessment, concluding that the formula 'was not contrary to law and did not result in the taxation of extraterritorial values ... [or] distort that portion of [Consolidated's] income properly taxable to Wisconsin."

Consolidated has no argument with the portion of the formula implementing a ratio of Wisconsin ton miles to national ton miles. Consolidated's argument is this:

> Originating revenues do not measure Wisconsin activity. The [outbound revenue] factor measures activity in other states. Because the income for a shipment is earned not merely by activities in Wisconsin but by activities in other states this formula factor attributes to Wisconsin [Consolidated's] activity in other states. The whole journey is attributed to Wisconsin. In fact, under this factor, the longer the journey, the greater the apportionment to Wisconsin — even while the Wisconsin activity is becoming a smaller and smaller part of the whole.

The department counters with a reference to *W.R. Arthur & Co. vs. Department of Taxation*, 18 Wis 2d 225, 118 N.W 2d 168(1962), the primary authority for the Commission's decision, and a case the department claims upheld its use of outbound revenues in apportioning the income of multistate trucking companies.

In this case, Wisconsin is but one of 50 states in which Consolidated does business. Unlike the carrier in *Arthur*, the originating revenue factor lumped together in one location (Wisconsin) the company's sales, management, terminal, over-the-road and pick up and delivery activity. But, all of its sales were in Wisconsin, as were its management and offices. There was no inbound freight; thus the company's only activity in other states was over-the-road mileage and delivery — and the extraterritoriality of these factors was reflected by the mileage and payroll components of the formula used by the department in that case — both of which attributed part of these activities to the other states in which its trucks moved.

The Court concluded that given these distinguishing factors, the *Arthur* decision is not controlling here. The burden is on the taxpayer to show that an apportionment formula imposes an unreasonable or inequitable tax and such a showing was made in this case. Use of the outbound revenue factor exaggerates Consolidated's Wisconsin income, for it assumes that outbound and inbound revenues are equal indicators of activity within the state. Consolidated established that long haul carriers are more heavily laden going out of Wisconsin than coming in, and that freight revenues are higher outbound; and the commission so found. There was evidence that Consolidated's outbound revenues in Wisconsin in the years in question were substantially in excess of its inbound revenues. In addition, because the originating revenue factor attributes the entire journey to Wisconsin, it measures Wisconsin income by activity in other states. Section 71.07(2), Wis. Stats., mandates that foreign companies can be taxed only on income from business transacted within Wisconsin. Therefore, the apportionment formula, as applied to Consolidated's activities in the years at issue, violates the mandate of sec. 71.07(2), Wis. Stats. Because of its decision, the Court held it need not consider the constitutional arguments.

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

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Apportionment — property factor, rented property; sales factor. *The Hearst Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 15, 1990). The primary issues involved in this case relate to allocation and apportionment of income for Wisconsin tax purposes and are as follows:

A. Whether amounts that were paid by the taxpayer pursuant to certain agreements for the right to exhibit motion picture films on its WISN-TV station are rental payments made for the use of tangible personal property so as to require their inclusion in the property factor of the Wisconsin apportionment formula at 8 times their values pursuant to sec. 71.07(2)(a)3, Wis. Stats.

B. Whether the network revenue received by WISN-TV under its affiliation agreements first with CBS and then with ABC and its revenue which it received from the sale of national advertising time is properly includable in the numerator of the sales factor of the taxpayer's Wisconsin apportionment formula.

C. The inclusion of dividend income in the taxpayer's apportionable income for Wisconsin tax purposes for the years 1975 through 1977.

During the period under review, 1974 through 1977, The Hearst Corporation, was a Delaware corporation with its principal offices in New York. Its activities during that period in Wisconsin consisted of the ownership and operation of WISN-TV, a television station located in Milwaukee, Wisconsin, and radio stations WISN-AM and FM, which are radio stations located in Milwaukee, Wisconsin.

Film License Fee: During each of the years 1974 through 1977 inclusive, the taxpayer's Wisconsin television station, WISN-TV ("WISN"), broadcast 4 basic types of programming, including: (1) feature-length films which had either been exhibits in theaters or previously shown on a television network; (2) "off-network" programs, that is, comedy or drama programs which had previously aired on a television network; (3) "first-run" programs, that is, programs which had not previously been broadcast on any television network; and (4) network programs that were carried by WISN as an affiliate of a television network.

WISN acquired the right to broadcast films and programs in the first 3 categories of programming by entering into license agreements which granted WISN a limited license of the copyright of that film or program. The taxpayer on behalf of WISN, entered into a number of contracts permitting WISN to broadcast various copyrighted films or television programs over WISN's Channel 12 facility in Milwaukee. The taxpayer entered into at least 5 such license agreements in 1974; at least 16 such license agreements in 1975; at least 15 such license agreements in 1976; and at least 26 such license agreements in 1977. (All such license agreements in effect during any part of the years 1974 through 1977, including contracts which were executed during those four years as well as contracts which had been executed in prior years, will be collectively referred to hereinafter as "License Agreements.")

Each License Agreement contained an Exclusivity Clause which gave WISN the exclusive right to broadcast a given program or film in the Milwaukee television market. The License Agreements did not grant WISN an unlimited right to broadcast the copyrighted films or programs during the contract term. Rather, the License Agreement limited the number of times which WISN could broadcast the film or program over the contract term, and further limited WISN's right to broadcast the program by specifying the time period in which WISN could broadcast the program.

To the extent WISN received prints or tapes pursuant to the License Agreements to facilitate broadcast of the licensed films or programs, WISN acquired ownership rights in those prints or tapes. WISN could not sell or subcontract the prints or tapes, and could not copy the prints or tapes for any purposes other than exhibiting them over the Channel 12 facilities pursuant to the License Agreements.

During the years 1974 through 1977, films or programs which the taxpayer had purchased under the License Agreement were delivered to WISN either through an electronic feed of the image of the program over cable lines, or through the physical delivery of a film or tape to WISN's studio.

The licensee fee set forth in each of the License Agreements represented payment solely for a limited license of the copyright to broadcast the program in the Milwaukee television market. In addition to that license fee, WISN would generally pay a separate cost for the prints over and above the licensee fee. This print cost was very small in comparison to what WISN paid as a licensee fee for the right to air a given program. In some instances, no separate print fee was charged, and the licensor was willing to provide an entire set of library prints at no additional cost beyond the license fee.

Because of advances in technology since 1977, WISN now receives 95% of its programming via satellite feed. In such cases, no print or tape is physically delivered to WISN's broadcasting studios. Rather, WISN intercepts a signal which has been transmitted to it over a broadcasting satellite and records that intercepted image onto WISN's own videotape stock. Notwithstanding this fundamental change in the way in which WISN receives licensed programs, license agreements which WISN enters into for programs which are transmitted to it via satellite are basically identical to the License Agreements in effect during the years 1974 through 1977. License agreements which WISN enters into under the current technology are at least as restrictive as the License Agreements in effect between 1974 and 1977 and are occasionally more restrictive. The procedures under which WISN currently stores, edits, and broadcasts the videotape stock on which it records programs from a satellite image are identical to the procedures under which WISN stored, edited, and broadcast videotapes which were delivered to WISN under License Agreements in effect during the years 1974 through 1977.

Network Revenue: In November, 1966, WISN entered into a Television Affiliation Agreement with the CBS Television Network ("CBS"). Under that agreement, WISN served as the Milwaukee affiliate of CBS until 1976. On December 20, 1976, petitioner entered into a Television Affiliation Agreement with the American Broadcasting Company ("ABC") under which WISN became the Milwaukee affiliate of ABC.

The only revenue which a network affiliate station receives for broadcasting network programming is the compensation fee calculated according to the formula set forth in the Affiliation agreement. The station receives no direct portion of the revenue earned by the network for selling network commercials, and the only revenue which a network affiliate might earn during a network program other than the network compensation fee consists of local commercials which it can sell during station breaks within the network programs.