In exchange for giving up the revenue which it could earn if it were able to sell commercial time on network programs itself, WISN receives the network programming. Accordingly, at the time WISN entered into the Affiliation Agreements covering the time period at issue in this case, WISN considered the difference between the network compensation it actually received and the revenue it could have earned had it been able to sell all commercial time in the network programs itself to constitute the net cost of WISN of acquiring the network programs.

National Advertising Revenue: In addition to network revenue received under network affiliation agreements during the years 1974 through 1977, WISN generated its own advertising revenue in two ways: (1) local advertising and (2) national advertising. Local advertising consisted of local accounts within WISN's coverage area. Such advertising was directly solicited by a sales staff of WISN employes located in Milwaukee. National advertising was placed by national sales representatives, i.e., brokers located outside Wisconsin who generated business from national advertisers and advertising agencies located primarily in New York, Chicago, and Los Angeles.

Commercials sold by national sales representatives as national advertising were all produced independently of WISN and were transmitted to WISN either by satellite feed or by courier. No national advertising broadcast by WISN was produced by WISN or through the use of WISN's studio facilities.

Between 1974 and 1977, WISN incurred the following costs outside Wisconsin in generating national advertising revenues: (1) national sales commissions paid to WISN's national sales representatives, all of which were paid to entities outside of Wisconsin (the amounts of which are set forth in the previous paragraph); (2) film license fees paid by WISN under the License Agreements, all of which were paid to entities outside of Wisconsin; and (3) the cost to WISN of acquiring network programming in the form of foregone advertising revenue, all of which were paid to entities outside of Wisconsin.

Dividends Received from Corporations Apportioning Less Than 50% of Their Income to Wisconsin: During the years 1975, 1976, and 1977, the taxpayer received dividend income from corporations who apportioned less than 50% of their income to Wisconsin.

The Commission concluded that:

A. All license fees paid by the taxpayer under the License Agreements in effect during the years 1974 through 1977 were paid to acquire limited copyright licenses which permitted the taxpayer's television station, WISN, to broadcast certain copyrighted films and television programs over Channel 12 in Milwaukee, and were not paid for the rental of tangible personal property within the meaning of sec. 71.07(2)(a), Wis. Stats. No portion of the fees paid by the taxpayer under the License Agreements is includable in the property factor of the taxpayer's Wisconsin apportionment formula for any of the years 1974 through 1977.

B. The network income is a result of the income-producing activity of broadcasting the network programming in Wisconsin, and, thus, is includable in full in the numerator of the sales factor. The direct cost of performing the network programming function is the cost of broadcasting in Wisconsin and is fully allocable to Wisconsin. The national advertising income is a result of the income producing activity of broadcasting in Wisconsin, and, thus, the income is includable in full in the sales factor numerator. The direct cost of performing the national advertising function is the cost of broadcasting that programming with those ads in Wisconsin and is allocable in full to Wisconsin.

C. The dividends received from corporations apportioning less than 50% of their income to Wisconsin during the period under review are includable in the taxpayer's Wisconsin apportionable income within the intent and meaning of secs. 71.04(4) and 71.07(1m), Wis. Stats. (1975-77). The statutes do not unlawfully discriminate in favor of local business at the expense of business conducted in interstate commerce in violation of the Interstate Commerce Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

D. The income tax statutes of the State of Wisconsin are deemed to be constitutional until they are declared otherwise by a court of competent jurisdiction. The Wisconsin Tax Appeals Commission does not have the jurisdiction to determine the constitutionality of the income tax statutes of the State of Wisconsin.

The taxpayer and the department have not appealed this decision.

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Interest expense — loans between related parties. *Presto Products, Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 18, 1990). The taxpayer and the department each filed motions for summary judgment in this matter.

During the period in question, 1981 through 1985, the taxpayer was a wholly-owned subsidiary of The Coca-Cola Company. The taxpayer was indebted to the parent and paid interest on such debt at commercially reasonable rates to the parent. The interest deducted by the taxpayer in 1981 through 1985 was incurred in the maintenance and operation of its business; it was not incurred on notes or securities issued to acquire the taxpayer's own capital stock.

The taxpayer would have sought financing from third parties had the parent not loaned it the funds in question. The existence of third party debt would not have prevented the taxpayer from paying dividends to the parent.

The Commission concluded as follows:

1. This case presents no genuine issue of fact.

2. The interest paid to the taxpayer's parent has been shown to be ordinary and necessary in conducting its business and therefore comes within sec. 71.04 (2)(a)3, Wis. Stats., and is deductible by the taxpayer.

3. The mere fact that the taxpayer borrowed money from its parent at commercially reasonable rates and also paid dividends to its parent in the same year does not in and of itself prove a distortion of income sufficient to permit the nullification of bona fide loans between related parties.

The Commission therefore granted the taxpayer's motion for summary judgment and denied the department's motion for summary judgment.

The department has not appealed this decision.

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Waivers — statute of limitations. *Sta-Rite Industries, Inc. vs. Wisconsin Department of Revenue* (Circuit Court of Milwaukee County, March 14, 1990). This is a review of a decision of the Wisconsin Tax Appeals Commission, wherein it was determined that an assessment against the taxpayer for 1978 franchise taxes was not barred by the 4-year statute of limitations for assessments. On June 17, 1983, Sta-Rite executed an agreement extending the department's assessment period for 1978. The issue in this case is the validity of the assessment extension agreement.

On June 15, 1979, the taxpayer mailed its franchise tax return for 1978 to the department. The return was received by the department on June 18, 1979. The taxpayer claimed the assessment extension agreement of June 17, 1983, was invalid, because the 4-year statute of limitations period began running on June 15, 1979, the date it mailed the return, and expired on June 15, 1983, two days before the extension agreement was executed. The department took the position that the statute did not begin to run until June 18, 1979, when the department received the return, and that therefore, the statute hadn't expired on June 17, 1983, the date on which the extension agreement was executed. The Commission determined that there was no indication in sec. 71.10(13), Wis. Stats. (1983-84), that mailing a return constituted the date on which the 4-year assessment statute of limitations began "ticking" and that "to say that something is, by mailing, 'considered ... filed ...on time' is not a declaration that it is thereby *actually* filed."

The Circuit Court concluded that the Wisconsin statute does not equate mailing with filing for all purposes, but instead indicates that timely mailing constitutes timely filing. Qualifying words "on time" show that the Wisconsin statute treats mailing as filing only for purposes of determining the mailed item's timeliness. It, therefore, upheld the decision of the Commission denying the taxpayer's petition for redetermination.

The taxpayer has not appealed this decision.

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Leases-1986 and prior — safe harbor rules. *U.S. Oil Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 18, 1990). The issues in this case are:

1. Whether the taxpayer, a purchaser-lessor in two 1981 sale and leaseback transactions with two separate seller-lessees, was entitled to deduct in fiscal year (FY) 1982 and FY 1983 the depreciation it took on the equipment it purchased and the interest expense it paid to seller-lessees on the deferred sales prices.

2. If not, whether upon the taxpayer's sale of the equipment back to the seller-lessees in FY 1984, it was entitled to a deduction for the loss it incurred on the sale, and if so, when and in what amount the loss should have been reported.

On November 13, 1981, the taxpayer entered into two sale-leaseback transactions with two banks. In both cases, the taxpayer putatively purchased office equipment from the banks and simultaneously entered into putative leases whereby the taxpayer leased the equipment back to the banks. In each case the taxpayer made a down-payment and signed a note for the balance, to be paid in monthly installments; the lease portion of each transaction provided that the bank was to pay the taxpayer rent in exactly the same amount as the monthly installment payment from the taxpayer to the bank.

The motivations for both transactions were the parties' desires to take advantage of the so-called Safe Harbor provisions of the Internal Revenue Code (sec. 168(f)(8), IRC), which at the time allowed one taxpayer to in effect sell certain tax benefits it couldn't utilize fully to another taxpayer who could. By selling the equipment to the taxpayer, the banks were able to realize some immediate cash in lieu of the unusable depreciation deductions; and by virtue of its becoming the putative owner of the equipment, the taxpayer deducted on its federal returns the depreciation expenses and interest expenses (on the notes to the bank) and reported rental income (from the lease payments of the banks to it).

On August 1, 1983, the taxpayer became an S-corporation, and the parties terminated the leases. At termination, the taxpayer "sold" the equipment to the banks, in each case for the then unpaid balances the taxpayer owed on the notes. Apparently, no cash changed hands at termination — the "sales" prices were paid by the purchasing banks cancelling the notes representing the taxpayer's debts to the banks.

At the time the transactions were first consummated in November 1981, the favorable tax consequences of these sorts of transactions were recognized at both the federal and state levels. However, by legislation which went into effect May 1, 1982, but which retroactively applied to 1981, Wisconsin excluded federal safe harbor leasing provisions from the Wisconsin definition of "internal revenue code" — seemingly ending the state's tax recognition of favorable federal safe harbor treatment. It was this legislation that resulted in the department's assessment against the taxpayer, disallowing the taxpayer's depreciation deductions for 1982 and 1983, disallowing the taxpayer's interest expense deductions, disregarding the taxpayer's rental income receipts from the banks, and in effect apparently imputing the down-payments as income to the banks, yet not recognizing any corresponding adjustment allowing the taxpayer to deduct the down-payments as the cost of buying the tax benefits.

The taxpayer argued that irrespective of the legislative change, the department erred in not recognizing the transactions as actual, bona-fide purchases, sales, and leaseback of equipment, and in treating the transactions as a purchase and sale of tax benefits. Alternatively, the taxpayer argued that even if the treatment of the initial sales was correct and did involve the taxpayer's purchase of tax benefits, the treatment was incomplete, because it failed to recognize, and give the taxpayer an adjustment for, the expense the taxpayer incurred in acquiring the tax benefits. There are two sub-issues involved in its alternative argument; (1) in what year should this adjustment be made, and (2) what is the amount of the adjustment?

As to the taxpayer's primary argument, the department countered that the treatment given in the assessment was exactly what the statutory change called for; on the taxpayer's alternative argument, the department took the position that the losses resulting from the loss of the rights to tax benefits are not deductible, because the losses were not recognized on the taxpayer's books.

The Commission concluded as follows:

1. The department's treatment is supported by the terms of the transaction documents, which reveal that the transactions cannot be characterized as true leases, and that the transactions were the purchase and sale of tax benefits.

2. The taxpayer did suffer losses in the sense that its rights to the federal tax benefits became worthless or were abandoned before the cost of obtaining those rights was recovered. The proper way to treat the transactions is to view them as capital transactions, each involving the FY 1982 purchase of a non-income-producing, intangible asset, the beneficial use of the asset for FYs 1982 and 1983, and the subsequent abandonment of the asset, culminating in a FY 1984 loss to the extent the asset was unutilized. Thus the taxpayer's loss would all be realized in FY 1984 when the loss occurred, and the loss would equal the original cost of the benefits minus the sum of the net investment tax credits and net depreciation deductions used in FYs 1982 and 1983.

The case was remanded to the department to calculate the 1984 loss in accordance with the principles expressed in this opinion; the assessments for 1982 and 1983 were affirmed.

The taxpayer and the department have not appealed this decision.

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INHERITANCE TAXES

Residuary bequests. *Estate of Emily Pierron, et al vs. Wisconsin Department of Revenue*, (Court of Appeals, District I, June 26, 1990). Holy Family Convent of Manitowoc, Wisconsin, St. Camillus Health Care Center, Inc., Sacred Heart Roman Catholic Church, and St. John's De Nepomuc Roman Catholic Church (collectively, the charities) appeal from an order of the Circuit Court of Milwaukee County, which determined that their residuary bequests under the will of Emily Pierron are subject to inheritance tax. The Circuit Court determined that only $1,000 of each bequest is exempt from taxation under sec. 72.17(4)(c), Wis. Stats. The charities claim that the full amount of the residuary bequests is exempt from inheritance tax pursuant to sec. 72.15(1)(a)2, Wis. Stats.

The issue in this case is whether Emily Pierron intended that bequests to the charities as provided in her will be for the performance of a religious purpose or services for her, her deceased parents and husband, or whether she intended the bequests to be unfettered by any conditions or requirements.

The Court of Appeals concluded that the wording in Emily Pierron's will demonstrated her "request" that masses be said, and that having already bequeathed $200 for masses, it would be unreasonable to conclude the she intended the expenditure of $186,288.56 for the same services. The decedent's will unambiguously provided for masses and then for an unconditional gift of the residuary. Her expression of a request or wish for additional masses does not mandate performance, which would bring the residuary within the embrace of inheritance taxation. Thus, the bequests to the charities under the will of Emily Pierron are exempt from inheritance taxes under sec. 72.15(1)(a)2, Wis. Stats.

The department has not appealed this decision.

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SALES/USE TAXES

Cable TV — installations. *Alton Cable Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 9, 1990). In October 1987, the department issued to the taxpayer an assessment of additional sales and use taxes, with interest and penalties thereon for the years 1981-85. The additional tax due was primarily the result of sales tax on installations. Delinquent interest and the 25% penalty under sec. 77.60(3), Wis. Stats., as well as late filing fees under sec. 77.60(2), Wis. Stats., were imposed.

The taxpayer, a Wisconsin corporation, was organized in 1980. From 1981 to 1985, it engaged in the installation of cable TV "drops" for operators of cable television transmission systems. The taxpayer had not reported or remitted the tax on installation, based on its belief that the cable transmission companies were liable for the taxes.

Almost all of the services involved above ground line installations of various types including aerial drops, FM installations, subpole, universal drops, and midspans. There may have been a few underground installations, but they would have been de minimus. No breakdown of underground work was provided to the department. Services provided by the taxpayer were those of a contractor billed to the cable transmission companies and comprised the basis for the department's determination of the gross receipts base for sales tax purposes. The taxpayer did not provide the department with any exemption certificates taken from the cable transmission companies.

The taxpayer failed to appear at the Commission's hearing either by corporate officer or by representative.

The Commission held that the department's assessments are presumed to be correct in the absence of any evidence as to their incorrectness and concluded that the taxpayer's installations of various above ground cables were taxable services described in sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer has not appealed this decision.

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Telecommunication services — access charges. *GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company, vs. Wisconsin Bell, Inc. and State of Wisconsin* (Wisconsin Supreme Court, May 15, 1990). GTE Sprint Communications Corporation, now U.S. Sprint Communications Company, appeals a judgment of the Circuit Court of Milwaukee County which denied U.S. Sprint's motion for summary judgment seeking to have declared unconstitutional the retail sales tax imposed upon the transfer of origination and termination services ("access services"), pursuant to secs. 77.51(14)(m) and 77.52(2)(a)4, Wis. Stats. (1985-86). The first question is whether the tax violates the equal protection clauses of either Article I, Section I of the Wisconsin Constitution or the Fourteenth Amendment, Section I of the United States Constitution. If not, the second question is whether the tax violates the commerce clause of Article I, Section 8 of the United States Constitution.

U.S. Sprint contends that secs. 77.51(14)(m) and 77.52(2)(a)4, Wis. Stats., violate equal protection because the tax only applies to purchases of access services by inter-LATA carriers. (Note from Editor: In a decision dated January 11, 1988, the Circuit Court of Milwaukee County held in the case of *Wisconsin Bell, Inc. v. Schneider Communications, Inc. v. Department of Revenue*, that the term interexchange carrier as used in sec. 77.51(13)(p) and (14)(m), Wis. Stats., referred to facilities based carriers only and did not include resellers. Thus, charges for access services to resellers are not subject to sales and use tax.)

U.S. Sprint argues there is no rational basis for the legislature's classifying inter-LATA carriers separately from local exchange carriers and resellers for the purpose of taxing the transfer of access services.

U.S. Sprint and the State agree that the legislature enacted sec. 77.51(14)(m), Wis. Stats., to offset the expected loss of revenue caused by a ruling which concluded that neither inter-LATA carriers nor resellers were liable to pay the tax for the purchase of access services. The legislature responded by amending the definition of a "sale" to include the purchase of access services by an inter-LATA carrier.

The Court concluded that to tax the transfer of access services to inter-LATA carriers but not the same transfer to local exchange carriers and resellers denies inter-LATA carriers the constitutional guarantee of equal protection of the laws. The Court, therefore, declared unconstitutional the tax imposed upon the transfer of access services to an inter-LATA carrier pursuant to secs. 77.51(4)(m) and 77.52(2)(a)4, Wis. Stats.

Wisconsin Bell, Inc. and the State of Wisconsin have not appealed this decision.

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TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. 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

Homestead Credit

Farmland Preservation/Tax Relief Credits

Corporation Franchise or Income Taxes