(1)(intro.) TAXABLE GROSS RECEIPTS. Taxable services and sales of tangible personal property of commercial photographers and others providing photographic services, including video taping, include gross receipts from:

(1)(a) Taking, reproducing and selling photographs and video tapes.

(1)(e) Reproducing copies of documents, drawings, photographs, video tapes or prints by mechanical and chemical reproduction machines, blue printing and process camera equipment.

(2)(a) Gross receipts subject to the tax include charges for photographic and video materials, time and talent.

(3)(a)(intro.) Commercial photographers and others providing photographic services, including video taping, may purchase, without paying sales or use tax, any item which will be resold or which becomes a component part of an article destined for sale if a properly completed resale exemption certificate is given the seller. ~~Such~~ These items include:

(3)(a)2. ~~Film~~ Video tapes and film, including colored transparencies and movie film, in which the negative and the positive are the same, and are permanently transferred to a customer as part of the taxable photographic service.

(3)(b)(intro.) Photographers and others providing photographic services, including video taping, are required to pay tax when purchasing tangible personal property which is used, consumed or destroyed in providing photographic services. ~~Such~~ These items include:

(3)(b)3. Film, other than exempted in ~~sub. (3)~~ par. (a)2.

(3)(b)8. Video tape, other than exempted in par. (a)2.

(3)(c) If a photographer or other person providing photographic services, including video taping, gives a resale certificate for property to a seller and then uses the property for a taxable purpose, the photographer or other person providing photographic services shall be liable for use tax at the time the property is first used in a taxable manner. □

Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

INDIVIDUAL INCOME TAXES

Nonresidents — entertainers and professional athletes. *Wisconsin Department of Revenue vs. James L. Kern, Bryan E. Haas, Danny W. Darwin, Hilda Darwin, and Edgardo Romero* (Circuit Court for Dane County, March 4, 1992). The department appeals an order of the Wisconsin Tax Appeals Commission. The issue in this case is the proper method of allocating the taxpayers' total baseball compensation to the State of Wisconsin for Wisconsin income tax purposes.

The department challenges the validity of the Commission's decision on three grounds: first, the decision and order is affected by an error of law, under sec. 227.57(5), Wis. Stats; second, the decision and order is not supported by substantial evidence in the record; and third, the decision and order is arbitrary and capricious.

Each of the taxpayers (except Hilda Darwin, wife of Danny Darwin), was a professional baseball player, employed by the Milwaukee Brewers Baseball Club, Inc. (Brewers), a member club of the American League of Professional Baseball Clubs. The Brewers played all of their "home" games in Milwaukee, Wisconsin. All of their "away" games were played outside of Wisconsin. Preceding each regular playing season, the Brewers conducted a "spring training" camp in the State of Arizona. Each of the taxpayers was a nonresident of Wisconsin for income tax purposes.

The department contended that a baseball player's salary is paid only for his regular season play and, therefore, allocated the taxpayers' salaries to Wisconsin on the basis of the ratio of regular season days in Wisconsin to total regular season days, without taking into account the spring training/exhibition season. Conversely, it is the taxpayers' contention that a player's salary must be allocated to Wisconsin on the basis of the ratio of days in Wisconsin to total days of service, including the spring training/exhibition season.

The Commission determined as a matter of law that the phrase "duty days" in the formula used to compute income tax owed by nonresident professional athletes under sec. Tax 2.31, Wis. Adm. Code, conflicted to an extent with the statutory provisions of secs. 71.02 and 71.04(1)(a), Wis. Stats. Therefore, the Commission modified the formula to comport with the statutory "situs of the service" provisions and the term "service" in the players' contracts.

The Commission held that the department's application of sec. Tax 2.31, Wis. Adm. Code, under the circumstances, was in error and held that the taxpayers' compensation must be allocated to the State of Wisconsin on the ratio of days in Wisconsin to total days of service, including the spring training/exhibition season.

The Circuit Court concluded that the Commission's conclusions of law were reasonable in light of relevant statutory and contractual provisions, and that the Commission's decision and order is supported by substantial evidence in the record and was not arbitrary and capricious.

The department has not appealed this decision. □

CORPORATION FRANCHISE AND INCOME TAXES

Allocation of income — business income; Statute of limitations. *Port Affiliates, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 10, 1992). The issues in this case are:

A. Whether the department's assessment against the taxpayer for 1984 was barred by the four-year statute of limitations.

B. Whether the taxpayer's 1984-87 "investment" portfolio income was apportionable.

C. Whether the taxpayer's 1984-87 office building losses were apportionable.

For most of 1984 and all of 1985, the activities of the taxpayer, a Wisconsin corporation, included operating a Wisconsin-based manufacturing business, managing and maintaining an office building adjacent to the manufacturing facility, operating a boathouse marina located in Florida, and managing an investment portfolio.

Late in 1985, the taxpayer transferred its manufacturing and marina operations to a newly-formed, wholly-owned subsidiary, but retained ownership of the manufacturing facility and leased it to the subsidiary. In connection with the transfer, the taxpayer also agreed to provide certain management services to the subsidiary. At the same time, the duties of physical maintenance of the office building were transferred to employes of the subsidiary.

After 1985, the taxpayer's activities included continuing to manage the investment portfolio, continuing to manage (but not directly maintain) the Wisconsin office building, owning and leasing the Wisconsin manufacturing plant, and providing some management services to the manufacturing subsidiary.

In 1984 the taxpayer's CEO conducted his corporate responsibilities almost entirely through his Wisconsin office, but in 1985-87 he conducted his corporate responsibilities mainly through his Florida office, though

also through his Wisconsin office to a relatively minor degree.

The department received the taxpayer's 1984 return on March 18, 1985, and mailed the assessment notice on March 17, 1989. The taxpayer received the notice on March 20, 1989.

The taxpayer argues that both the investment portfolio and office building income are non-apportionable; the portfolio income, because the taxpayer's investment activities were conducted by a separate arm of the business, and the income earned from those activities was never, with one inconsequential exception, used to support any of the taxpayer's other operations or activities; and the rental income, because the office building was nonbusiness property in that its operation was not a part of any of the taxpayer's "regular" business operations.

The department contends that both portfolio and rental income are apportionable. Portfolio income is apportionable, the department claims, because the portfolio activity was an integral part of, and unitary with, the rest of the taxpayer's businesses, and apportionability does not depend on whether investment returns are used to support the rest of the business. Similarly, the office rental income is apportionable, because the real estate was also part of the taxpayer's unitary business.

The Commission concluded as follows:

A. The department's assessment notice was given in time and not barred by the four-year statute of limitations because the notice was mailed within four years of receiving the return.

B. The portfolio income is apportionable, because in all years the income was business income, and because the income arose in part from activities in Wisconsin.

C. The 1984-87 rental income was apportionable, because the rental income was business income, and because the income arose from activities in Wisconsin.

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

Apportionment — factors; Dividends — deductible dividends; Foreign source income. *NCR Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 27, 1992). The taxpayer petitioned the Wisconsin Tax Appeals Commission (Commission) for a rehearing of its February 10, 1992, decision. For a summary of the February 10, 1992, decision, see *Wisconsin Tax Bulletin* 76, April 1992.

In its February 10, 1992, decision, the Commission held, among other things, as follows:

A. Sums labelled as "dividends" which the taxpayer received in 1975-79 from its unitary foreign subsidiaries ("inside source dividends") were not true passive dividends, but transfers of active business income that originated from within a unitary business.

B. The "concentration exemption" Wisconsin allowed corporate payees which received dividends from corporations 50% or more concentrated in Wisconsin did not in 1975-79 operate to exempt any fictitious inside source "dividend," even those from Wisconsin concentrated payors. Thus, the exemption did not constitute unlawful **facial** discrimination against the taxpayer in respect to the 1975-79 inside source "dividends" which it received from non-Wisconsin concentrated sources.

C. There was no **non-facial** discrimination against the taxpayer, since there was no evidence that the department allowed the exemption to other taxpayers receiving inside source dividends.

D. As to the 1980 inside source dividends the taxpayer received from non-Wisconsin concentrated subsidiaries, however, Wisconsin had, in violation of the equal protection clause, discriminated against the taxpayer by taxing part of its dividends while wholly exempting the similar dividends received by parents of Wisconsin concentrated subsidiaries.

In its petition for rehearing, the taxpayer argues that the Commission erred in reaching its conclusions that there was neither facial nor non-facial discrimination as to the 1975-79 inside source dividends.

In its March 27, 1992, decision, the Commission denied the petition for rehearing, concluding that in 1975-79, Wisconsin was legally obliged to avoid the kind of double taxation the taxpayer alleges would have occurred without the concentration exemption; and that the parent of a Wisconsin-concentrated subsidiary would have secured relief even if the concentration exemption had never existed. Thus the discrimination the taxpayer claims existed in 1975-79 did not statutorily arise until 1980.

In regard to non-facial discrimination, the Commission concluded that without evidence or a showing of a pre-1980 practice or pattern of the department treating fictitious inside source dividends as real dividends, the Commission can only assume that the department would have treated all inside source dividends equally, irre-

spective of whether they had a Wisconsin origin.

The taxpayer has appealed this March 27, 1992, decision to the Circuit Court. The department had previously appealed the February 10,1992, decision to the Circuit Court. □

Extension of time — additional assessments and refunds. *Paramount Farms Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the department's assessment dated February 20, 1987, was barred by applicable statutes of limitation or by an extension agreement dated September 28, 1982.

The taxpayer is a Wisconsin corporation in the business of farming. The department began an audit of the taxpayer on September 8, 1982.

On September 28, 1982, at the department's request, an extension agreement was entered into. This agreement provided that the periods in which the department may give notice of additional assessment or refund, for the years 1976 to 1981, be extended to and include three months after receiving the final results of the Internal Revenue Service's (IRS) audit of those years.

The taxpayer signed an assessment agreement with the IRS on September 28, 1982, for the years 1976 and 1977. In November 1984, the IRS issued its findings regarding the years 1981 through 1983. The taxpayer did not accept these findings and entered into extension agreements to permit adjustments for 1981 through 1983. On April 22, 1987, the IRS accepted an assessment agreement for 1981 through 1983.

The final results of the IRS audit of 1981 though 1983 were received by the department on or about October 31, 1988.

The Commission concluded that the extension agreement between the taxpayer and the department clearly and expressly extends the time the department may issue an additional assessment to and including three months after receiving the final results of the IRS audit of these years.

The extension agreement did not require the department to issue a piecemeal assessment for any one of the six years involved when it had sufficient information to do so; but clearly allowed the department to wait until receiving the final results of the federal audit for the entire period covered by the audit before acting.

The department's assessment was not barred by either the applicable statute of limitations or by the extension agreement.

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

Nexus. *Wisconsin Department of Revenue vs. William Wrigley, Jr., Co.* (U.S. Supreme Court, June 19, 1992). The issue in this case is whether the taxpayer's activities in Wisconsin fell outside the protection of P.L. 86-272, 15 U.S.C. sec. 381, which prohibits a state from taxing the income of a corporation whose only business activities within the state consist of "solicitation of orders" for tangible goods, provided that the orders are sent outside the state for approval and the goods are delivered from out-of-state. The U.S. Supreme Court reversed the judgment of the Wisconsin Supreme Court and held that the taxpayer's activities in Wisconsin exceeded those protected under 15 U.S.C. sec. 381. See *Wisconsin Tax Bulletins* 50, 55, 59, 66, and 71 for summaries of prior decisions in this case.

Based in Chicago, William Wrigley, Jr., Co. (Wrigley) sells chewing gum nationwide through a marketing system that divides the country into districts, regions, and territories. During 1973-1978, the Midwestern district included a Milwaukee region, covering most of Wisconsin and parts of other states. The district manager for the Midwestern district had his residence and company office in Illinois, and visited Wisconsin only six to nine days each year, usually for a sales meeting or to call on a particularly important account.

The regional manager of the Milwaukee region resided in Wisconsin, but Wrigley did not provide him with a company office. He had general responsibility for sales activities in the region, and would typically spend 80-95% of his time working with the sales representatives in the field or contacting certain "key" accounts.

The remainder of the regional manager's time was devoted to administrative activities, including writing and reviewing company reports, recruiting new sales representatives, and evaluating their performance. He would preside at full-day sales strategy meetings for all regional sales representatives once or twice a year.

The manager from 1973 to 1976, John Kroyer, generally held these meetings in the "office" he maintained in the basement of his home, whereas his successor, Gary Hecht, usually held them at a hotel or motel. Mr. Kroyer also intervened two or three times a year to help arrange a solution to credit disputes between the Chicago office and important local accounts. Mr. Hecht testified that he never engaged in such activities, although Wrigley's formal position description for regional sales manager continued to list as one of the as-