the consumer of tangible personal property transferred to a customer as part of the repair to real property and is subject to Wisconsin sales or use tax on the purchase of the tangible personal property transferred.

(6) REPAIRS NOT BY RETAILERS. If a retailer does not repair tangible personal property under a warranty or insurance plan, but instead has another person perform the repairs covered under the warranty or insurance plan, the person's gross receipts from the sale of the repair to the retailer are not subject to Wisconsin sales or use tax provided the retailer gives the person a properly completed resale certificate. The charge for repairs by the other person is exempt as a sale for resale whether or not the original sale of the property to which the warranty or insurance plan relates occurred in Wisconsin. The sales and use tax treatment of the charge by the retailer to the customer or plan provider is the same as provided in subs. (4) and (5).

(7) GOODWILL WORK. A retailer who provides free parts or services or both to a customer under an implied warranty in order to maintain good customer relations, although not required to do so under a sales agreement, maintenance agreement, express warranty, or insurance plan may purchase the parts without Wisconsin sales or use tax as property for resale.

Tax 11.82 Mailing lists and mailing services. Tax 11.82(1)(b) is amended, to reflect the Wisconsin Tax Appeals Commission decision in *A-K Corporation and Profile Publishing Co. dba Miles Kimball vs. Wisconsin Department of Revenue*, which held that mailing lists on magnetic tape are not tangible personal property; and to update language and style. Tax 11.82(1)(c), (2)(a), (2)(b), and (2)(c) are amended, to update language. The text of Tax 11.82(1)(b) is as follows:

11.82(1)(b) A mailing list is tangible personal property, except for written ~~or~~, typed or printed lists of names and addresses and lists stored in machine-readable form, such as microfilm and computer tapes and disks, and the sales and use tax shall apply to the gross receipts from the sale of and the storage, use or other consumption of mailing lists in the form of tangible personal property, including the rental of or the granting of a license to use ~~such~~ those lists. ~~Examples of taxable~~ Taxable mailing lists include, but are not limited to ~~magnetic tapes and~~ mailing lists which are physically attached to the envelopes, such as Cheshire tapes, gummed labels and heat transfers. □

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

Domicile. *Frank Gerlitz vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 25, 1993). The issue in this case is whether the taxpayer abandoned his Wisconsin domicile and established an Illinois domicile for 1985.

The taxpayer moved to Wisconsin in 1971, purchasing a residence in the city of Madison in 1973, where he lived until late 1984. During that period he filed Wisconsin income tax returns as a resident, registered his automobile here, held a Wisconsin driver's license, attended the University of Wisconsin-Madison as a resident, was employed in Wisconsin, held a Wisconsin seller's permit, had a local checking account, and maintained a listing in the Madison telephone directory.

In late 1984, the taxpayer accepted employment in Illinois. He stayed at a hotel in Illinois until February 1985, when he began renting an apartment in Chicago and continued living there throughout 1985. He obtained a telephone at that address, established a bank account in Chicago, and filed an Illinois state income tax return for 1985.

However, while living and working in Illinois in 1985 and thereafter, the taxpayer continued to own the Madison, Wisconsin residence until 1989, continued to maintain his auto registration in Wisconsin at the Madison address at least until 1989, continued to receive mail at that address (it was sent to him in Illinois by tenants), continued to maintain a Madison telephone directory listing at that address at least until 1989, continued to register at the University of Wisconsin-Madison as a resident for tuition purposes until 1990, continued to maintain his checking account at his Madison bank and write checks using the Madison address, and maintained his Wisconsin seller's permit using the Madison address at least until 1986.

In addition, although he apparently never returned to live in Madison, he renewed his Wisconsin driver's license in 1986, using the Madison residence address as his own. He finally sold the Madison residence in 1989, having completed his University of Wisconsin-Madison degree work, and moved to Michigan in 1989.

The Commission concluded that, although residing in Illinois during 1985, the taxpayer did not abandon his Wisconsin domicile and therefore was a Wisconsin domiciliary for purposes of imposition of the Wisconsin income tax. There is virtually no evidence in the record, other than the taxpayer's own testimony and that of his wife, that his Wisconsin domicile was abandoned or that he established a new domicile in Illinois.

The Commission retained jurisdiction of this appeal docket pending determination of the remaining rental loss and business expense issues, which will be scheduled for hearing.

The taxpayer has not appealed this decision. □

CORPORATION FRANCHISE AND INCOME TAXES

Apportionment — contractors; Losses — 1986 and prior — deductibility. *Towne Realty, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 14, 1993). The issues before the Commission are as follows:

A. Does the apportionment method used by the department in apportioning the income and loss realized by the taxpayer in connection with its performance of long-term contracts for the construction of military housing outside of Wisconsin fail to clearly reflect and/or fairly apportion income and loss in violation of applicable Wisconsin Statutes and the Due Process and Commerce Clauses of the United States Constitution?

B. Is the taxpayer appropriately entitled to a deduction under sec. 71.04(7), Wis. Stats. (1979-80), for advances it made to Woerful Corporation?

C. Are amounts received by the taxpayer as repayment by Eastport, Inc., a wholly-owned subsidiary, for Eastport's share of the income tax liability of the consolidated group of corporations of which Eastport is a member, for which the taxpayer paid the entire tax liability, properly excludable from the taxpayer's Wisconsin apportionable income?

D. Should dividends received by the taxpayer from corporations apportioning less than 50% of their income to Wisconsin be excluded from the taxpayer's Wisconsin apportionable income?

E. Is the taxpayer entitled to a step-up in basis with respect to certain property purchased from Mr. Daniel Tishberg?

F. Did the taxpayer properly utilize the completed contract method of accounting on computing its gain or loss from the Towne Realty of Hawaii Joint Venture?

Towne Realty, Inc., is a Wisconsin corporation, with its principal place of business located in Milwaukee, Wisconsin. The department issued to the taxpayer a notice of additional franchise tax assessment for fiscal years 1979 through 1983 inclusive.

Fiscal years 1975 through 1978 were adjusted to affect the net business loss carryforward which could be utilized by the taxpayer for years subsequent to fiscal year 1978.

The taxpayer has been in existence for nearly 50 years, and during the years 1975 through 1983 has been primarily involved in the business of real estate, real estate development, and contracting, both in Wisconsin and throughout the United States, including Alaska and Hawaii.

In the late 1960s, the taxpayer become involved in government contracting, primarily for the construction of military housing, through joint ventures. Initially, the other joint venturers in these projects were Woerful Corporation, an established construction company, and Miller, Waltz & Diedrich, an architectural firm. These parties joined together to submit bids for military housing construction projects. The joint venture was awarded construction contracts for 12 military facilities located outside Wisconsin.

The military housing projects were awarded in a set dollar amount, requiring the joint venture to deliver a specific "turnkey" product pursuant to plans and specifications. Once construction started, problems inevitably occurred on the projects. The government also requested changes in the type of work done and sometimes imposed standards beyond the scope of the contract. As a result of problems such as these, the joint ventures in which the taxpayer was involved incurred costs in excess of those anticipated when submitting the original bids and, by reason of these additional costs, ended up in disputes with the government on many of the projects. When disputes over additional costs arose, the government required that a formal claim be submitted requesting additional money. Typically the claims were heard by a government panel, and ultimately negotiations would determine the amount, if any, which would be paid on the claim.

As of 1977, the joint venture had claims against the government totalling approximately $17,000,000. The claims against the government were finally resolved, primarily in the fiscal year ending February 29, 1980. All but five of the claims were settled with the government, and the taxpayer sold its interest in the remaining five claims.

The military housing construction projects were not profitable for the joint venture and resulted in substantial losses which caused Miller, Waltz & Diedrich to withdraw early in the process of performing under the contracts, rendered Woerful Corporation insolvent, and nearly bankrupted the taxpayer.

During the late 1970s and early 1980s, the Internal Revenue Code basically permitted three different methods for recognizing income and expenses relating to long-term contracts: the completed contract method under which all revenues and expenses were recognized in the year in which the contract was deemed to be complete; the percentage of completion method under which revenues and expenses from the contract were recognized over the term of the contract to the extent the contract was complete; and any other method that clearly reflected income. The two principal methods used by the taxpayer were the completed contract method and the percentage of completion method.

In the taxpayer's fiscal year ending February 28, 1977, the year the majority of the joint venture military housing construction contracts were considered to be physically complete, the taxpayer had significant losses on the contracts. The Wisconsin apportionment formula applied to the taxpayer's income in that year was very low, around 10-12%, because the denominators of the taxpayer's apportionment factors contained the aggregate of all of the out-of-state payroll, property, and revenue related to the out-of-state, long-term military housing construction contracts for all of the fiscal years ending February 28, 1974, through February 28, 1977. Accordingly, a very small percentage of these significant losses was apportioned to Wisconsin.

When the disputes under the contracts were finally settled in fiscal year 1980 and additional revenue was recognized by the taxpayer relating to the contracts, the taxpayer's Wisconsin apportionment formula was in the 80-85% range because the contracts had been completed years before and the apportionment factors in 1980 included none of the payroll, property, or revenue relating to the out-of-state, long-term military housing construction contracts.

The taxpayer paid the operating expenses of the 12 military housing construction joint ventures subsequent to 1977 and reflected Woerful Corporation's proportionate share of those expenses as loans and advances to Woerful. At the end of fiscal year 1980, Woerful owed the taxpayer $2,786,175 for its proportionate share of the military joint venture expenses. The taxpayer expected to be reimbursed for its proportionate share of the expenses at the time the government claims were settled. However, after all the claims were collected, there were no additional funds that Woerful could utilize to repay the advances to the taxpayer. Woerful had no other source of income or financing as of February 29, 1980.

The Commission concluded:

A. The apportionment method employed by the department in apportioning the income and loss realized by the taxpayer in connection with the joint venture long-term military housing construction contracts fails to fairly apportion such income and loss, fails to clearly reflect income, serves to tax income where none exists, attributes to Wisconsin an amount of income out of all appropriate proportion to the business transacted in the state, and leads to a grossly distorted amount.

B. The taxpayer is properly entitled to a deduction under sec. 71.04(7), Wis. Stats. (1979-80), for its fiscal year ending February 29, 1980, for funds advanced by it to Woerful Corporation.

C. Amounts distributed by Eastport, Inc., to the taxpayer constituted dividends and repayment of Eastport's share of federal consolidated tax liability, and no portion of such distributions constituted gain on the sale of Eastport stock.

D. Because the statutory scheme embodied in secs. 71.01(1m) and 71.04(4), Wis. Stats. (1975-77), serves to impose Wisconsin tax on such dividends while exempting from Wisconsin tax dividends paid by corporations who allocate 50% or more of their income to Wisconsin, the statutes 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. No portion of any dividends received by the taxpayer during the period 1982 through 1983 is includable in the taxpayer's Wisconsin apportionable income or the taxpayer's sales factor.

E. The taxpayer is entitled to a step-up in basis on the acquisition of Mr. Daniel Tishberg's joint venture interests.

F. The taxpayer properly treated the revenues and expenses from the Towne Realty of Hawaii Joint Venture under the completed contract method of accounting.

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

SALES AND USE TAXES

Aircraft. *Leeson Electric Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 10, 1993). The substantive issues in this case are:

A. Whether valid, exclusive lease agreements applicable to aircraft existed between the taxpayer and Scott AirCharter ("Scott"), a licensed charter air carrier, at all times during the periods under review.

B. Whether the taxpayer's post-purchase utilization of the aircraft may comprise "storage, use or other consumption" sufficient to trigger use tax imposition under sec. 77.53(1), Wis. Stats.

The taxpayer is a Wisconsin corporation and has held a Wisconsin seller's permit at all times since April 3, 1980. In May 1988, the taxpayer purchased a jet airplane ("the first airplane"). The taxpayer timely reported and paid Wisconsin sales tax on that purchase.

In April 1989, the taxpayer traded in the first airplane and purchased another jet airplane ("the second airplane"). The taxpayer timely reported and paid Wisconsin sales tax on the base price of the second airplane, net of the trade-in allowance.

At all times during the periods at issue, Scott was a duly licensed carrier of persons in inter-state commerce under authority of the laws of the United States pursuant to a Federal Air Carrier Certificate obtained in 1983.

The taxpayer timely reported and paid Wisconsin use tax on repairs and capital improvements to the first airplane and second airplane for the periods November 1989, June 1990, and July 1990.

In December 1990, the taxpayer filed an amended sales and use tax return, claiming a refund of the sales and use tax it had paid on the first and second airplanes and on the repairs and capital improvements to the airplanes.

Additional facts are as follows:

The taxpayer flies in its aircraft to all forty-eight continental states of the U.S., as well as to Canada.

Sometime after the purchase of each of the two subject airplanes, the taxpayer claims to have made agreements with Scott, an air charter company, for Scott to manage and supervise the taxpayer's airplanes and charter them to third parties. The taxpayer's stated purpose in entering into the agreements was to offset the costs of owning aircraft with charter revenue; to make owning an airplane more affordable; and to have someone else handle the details of managing the aircraft.

The taxpayer was by far the most frequent user of the two airplanes, and in eight months during the taxing periods was the airplane's only user.

For the first airplane, the taxpayer produced an unsigned and undated copy of a purported lease agreement with Scott which had handwritten notes and changes thereon. It was never shown conclusively that any lease agreement was ever finalized or signed by the taxpayer for that first airplane. Correspondence from Scott to the taxpayer demonstrates that key provisions of the written agreement alleged to have been observed by those parties concerning the first airplane were being negotiated or were yet to be finalized at the correspondence dates, months after the purchase of the first airplane.

For the second airplane, the taxpayer did not enter into a written lease agreement with Scott until almost two months after the purchase of the aircraft. The lease document was entitled "Aircraft operating and Lease Agreement." The agreement had a term of one year; there were no executed, written extensions of the agreement.

The taxpayer paid Scott an annual management/supervision fee in monthly payments to supervise and manage the two airplanes. The monthly payments were referred to at various times on the monthly Aircraft Financial Summaries prepared by Scott as "hangar fee," "management fee," and "supervision and management."

The taxpayer allowed Scott to charter the aircraft to others, for its standard charter rates, when the taxpayer did not plan to use the planes, with the taxpayer receiving 85% of the gross revenues generated by the charters or a minimum of $1,500.00 per day and Scott receiving 15% of the charter revenues.

In the agreements with Scott, the taxpayer also agreed to pay for any taxes, fees, assessments, fines, and penalties on the aircraft, as well as the costs and expenses of the operation, maintenance, modification, repair, and inspection of the two aircraft, including parts, equipment, and flight manuals. The agreements called for the taxpayer to pay Scott an annual fee for employment of a two-man crew to cover all of Scott's costs for the pilots, including salaries, benefits, and expenses. The pilots were technically Scott's employes.

There was a provision in the agreements which provided that selection of the taxpayer's designated crew members was subject to the "expressed approval" of the taxpayer. Scott did not hire any pilot without the taxpayer's "expressed approval." Chris Doerr, president of the taxpayer corporation, became involved in such activities as interviewing, reviewing resumes, taking test rides with pilot applicants, and discussing various applicants with Douglas Scott of Scott AirCharter.

Clauses in both written agreements offered by the taxpayer allowed the taxpayer a preemptive right over third party chartering engagements if the taxpayer chose to utilize the aircraft during that time slot. Testimony by Mr. Scott indicated that these clauses were frequently ignored in practice.

The Commission concluded that:

A. The agreements offered by the taxpayer were not valid, exclusive leases of the aircraft for all periods under review. The taxpayer's purchases of the two airplanes were not solely for rental or lease under sec. Tax 11.29(2)(a), Wis. Adm. Code.

B. The taxpayer "used" both of the aircraft on a repeated and continuing basis for its own business purposes during the period under review, rendering the full purchase price of the aircraft and repair or maintenance expenses subject to use tax under secs. 77.51(22)(a) and 77.53(1), Wis. Stats.

The taxpayer has not appealed this decision. □

Exemptions — commercial vessels and barges. *Wisconsin Department of Revenue vs. Washington Island Ferry Line, Inc.* (Circuit Court for Dane County, December 6, 1993). This is an appeal from a decision by the Wisconsin Tax Appeals Commission (Commission). For a summary of that decision, see *Wisconsin Tax Bulletin* 82 (July 1993), page 27. The issue is whether the taxpayer's purchases of a vessel and related accessories, attachments, parts, lubricants, and fuel during the years 1986-1990 qualify for sales and use tax exemption under sec. 77.54(12) or (13), Wis. Stats.

The taxpayer operates a ferry line consisting of 5 vessels. The boats move wholly within Wisconsin, traversing the five mile distance between mainland Door County and Washington Island. The island's winter population of 650 quadruples in the summer, primarily because of visitation by tourists. Its limited commercial industry includes gift shops, motels, hotels, and sightseeing railroads, all of which reflect its tourist base.

The taxpayer is the sole means of transportation to and from the island, carrying not only people and their vehicles, but any freight required by the island population, e.g. fuel, food, building materials. It holds state and federal licenses to operate as a common carrier.

The Circuit Court concluded that the Commission's decision that the taxpayer operates primarily in interstate commerce and qualifies for exemption on its purchases of a vessel, accessories, etc., was reasonable. Greater than 50% of all passengers and vehicles carried by the taxpayer originate outside Wisconsin. This group represents over 90% of the taxpayer's revenues. Because most of the freight also is characterized as interstate, the ferry takes in somewhat more than