

certificate, or certificate of exemption should not be used when purchasing without tax if a retailer has a direct pay permit on file for the purchaser.

(5) **SERVICES AND PROPERTY NOT SUBJECT TO DIRECT PAY.** (a) **Services.** Gross receipts subject to tax from sales of services under the following Wisconsin statutes are subject to Wisconsin sales or use tax, regardless of whether the purchaser holds a direct pay permit:

1. Section 77.52(2)(a)1, Stats., relating to furnishing rooms or lodging.

2. Section 77.52(2)(a)2, Stats., relating to admissions to amusement, athletic, entertainment or recreational events, devices or facilities.

3. Section 77.52(2)(a)5, Stats., relating to telecommunications services.

4. Section 77.52(2)(a)9, Stats., relating to parking.

5. Section 77.52(2)(a)12, Stats., relating to cable television system services.

6. Section 77.52(2)(a)20, Stats., relating to landscaping services.

(b) **Property.** Gross receipts from the sale, lease or rental of the following tangible personal property are subject to Wisconsin sales or use tax, even though the purchaser holds a direct pay permit:

1. Tangible personal property transferred to a purchaser in connection with the sale of landscaping services subject to tax under s. 77.52(2)(a)20, Stats.

2. Motor vehicles, boats, snowmobiles, mobile homes not exceeding 45 feet in length, trailers, semitrailers, all-terrain vehicles or aircraft.

3. Food, food products and beverages described in s. 77.54(20)(b), Stats.

4. Meals, food, food products and beverages subject to tax under s. 77.54(20)(c), Stats.

(c) **Exemptions.** Although not eligible to be purchased without Wisconsin sales or use tax using a direct pay permit, the taxable services and tangible personal property described in sub. (5)(a) and (b) may be purchased without Wisconsin sales or use tax if a resale, farm-

ing, manufacturing or other exemption applies. Documentation required to purchase without tax, as provided in s. Tax 11.14, is required.

(6) **SELLER'S LIABILITY.** A retailer is not liable for sales or use tax on gross receipts from the sale of tangible personal property or taxable services, except those described in sub. (5)(a) and (b), to a person who has provided the retailer with the appropriate information under sub. (4)(a), until the retailer has been notified by the person or the department that the person's direct pay permit has been:

(1) **Revoked.** A direct pay permit is considered revoked on the date the holder receives the department's notice of revocation.

(2) **Cancelled.** A direct pay permit is not considered cancelled until the last day of the person's taxable year in which the permit is received by the department. □



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

Credits — taxes paid to other states

Income attribution

Penalties — fraud

Paul G. and Judith I. Beck
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Nonresidents — allocation of income

Thomas J. Flynn (p. 19)

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Corporation Franchise and Income Taxes

Apportionment — air carriers — interstate

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Extension of time — additional assessments and refunds

Paramount Farms Incorporated
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Sales and Use Taxes

Construction contractors — use tax

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R-K Towing, Inc. (p. 23)

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John Grall, et al. (p. 24)

Temporary Recycling Surcharge

Temporary recycling surcharge — constitutionality

Love, Voss & Murray (p. 25)

INDIVIDUAL INCOME TAXES

— Credits — taxes paid to other states; Income attribution; Penalties — fraud. *Paul G. Beck and Judith I. Beck vs. Wisconsin Department of Revenue* (Court of Appeals, District I, October 7, 1994).

This is an appeal from an order of the Circuit Court for Milwaukee County, which dismissed the taxpayers' petition for review of a Wisconsin Tax Appeals Commission decision, because it was not timely filed. The Commission ruled in a decision dated February 23, 1993, that the taxpayers were entitled to credit for taxes paid to Illinois, that income paid to their minor daughters was properly attributable to the taxpayers, that estimated taxes and a doomsday payment paid in the names of the daughters may be credited to the taxpayers, and that a 50% penalty imposed against the taxpayers was proper. See *Wisconsin Tax Bulletin* 82 (July 1993), page 16, for a summary of the Commission decision.

The Court of Appeals concluded that the Circuit Court's dismissal of the late-filed petition for review was proper.

The taxpayers appealed the Court of Appeals decision to the Wisconsin Supreme Court, which denied the petition for review. □

— Nonresidents — allocation of income. *Thomas J. Flynn vs. Wisconsin Tax Appeals Commission* (Circuit Court for Dane County, February 25, 1994). The Circuit Court noted in its decision that the respondent should have been Wisconsin Department of Revenue rather than Wisconsin Tax Appeals Commission.

This is a judicial review of a decision by the Wisconsin Tax Appeals Com-

mission (Commission). See *Wisconsin Tax Bulletin* 85 (January 1994), page 17, for a summary of that decision. The issues are:

- A. Whether the taxpayer's signing bonus was subject to Wisconsin tax.
- B. Whether the days spent pursuing off-season conditioning activities were duty days for purposes of apportioning income to Wisconsin.

The Commission held that the issue of the signing bonus was not timely raised, but alternately that the signing bonus was personal service income taxable in the same manner as salary. With respect to the off-season conditioning issue, the Commission held that the days spent outside Wisconsin in the off-season conditioning program were not duty days to be used in the formula for apportioning income taxable for Wisconsin tax purposes.

The Circuit Court affirmed the Commission on both issues, concluding as follows:

- A. The signing bonus was taxable as Wisconsin income. Wisconsin regulations (sec. Tax 2.31(4)(a), Wis. Adm. Code (1991)) in effect for the years at issue, 1984 and 1985, require that the signing bonus income be apportioned as Wisconsin income in the same manner as salary for personal services. The Court noted that sec. Tax 2.31, Wis. Adm. Code, was repealed effective July 1, 1993, for reasons not asserted to be connected with the issues of this case. It was not necessary to address the issue of whether the signing bonus issue was timely raised.

- B. The taxpayer's days spent at off-season conditioning were not

duty days for which he was compensated under his player contract. While the contract did require him to participate in the official pre-season training camp, club meetings, and practice sessions, the conditioning program was not a requirement. The contract required the taxpayer to maintain excellent physical condition, but it did not compensate him for his work in accomplishing that requirement, nor did it specify the means for conditioning.

The taxpayer has not appealed this decision. □

— Tax Appeals Commission — class action claims. *Wisconsin Department of Revenue vs. J. Gerard and Delores M. Hogan, et al.* (Circuit Court for Dane County, November 12, 1994). The sole remaining issue for the Circuit Court to decide in this case is whether the Tax Appeals Commission (Commission) had the authority to certify a class of Wisconsin taxpayers who paid tax on certain federal employees' retirement benefits (the class).

The Commission certified the class in October 1992 and granted summary judgment to the class on May 27, 1993 (see *Wisconsin Tax Bulletins* 80 (January 1993), page 19, and 82 (July 1993), pages 16 and 18, for summaries of those and related decisions). The department maintained that the Commission lacked statutory and other legal authority to certify a class action in tax cases. The department appealed the May 27, 1993 Commission decision regarding the class certification issue on July 29, 1993, after the Commission's June 29, 1993 denial of the department's petition for rehearing.

The Circuit Court dismissed the department's petition for review, deciding that the petition was not filed timely. The Court concluded that the Commission's actions of October 1992 and February 1993 were final and were required by statute to be appealed within 30 days in order to give the Circuit Court subject matter jurisdiction. The Court further concluded that the Commission's oral decision of May 27, 1993 had to be appealed within 30 days of the decision, and that the department's petition for rehearing was not authorized by statute. The appeal of July 29, 1993 was not timely.

In addition to dismissing the department's petition for review as untimely, the Circuit Court also remanded the matter to the Commission for further proceedings implementing and finalizing its summary judgment, including the issue of determination of appropriate attorney fees and costs to class counsel.

The department is appealing this decision to the Court of Appeals. □

CORPORATION FRANCHISE AND INCOME TAXES

— Apportionment — air carriers — interstate.

United Parcel Service Co. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 30, 1994). This appeal challenges the validity of the express language of Wisconsin Administrative Code Rule Tax 2.46, enacted pursuant to sec. 71.25(10)(c), Wis. Stats. (1987-88), as applied to the taxpayer for the taxable years 1985 and 1986.

United Parcel Service Co. (UPSCO) is a Delaware corporation which, together with affiliated corporations, provides a nationwide and international air transportation service for small packages of not more than 70 pounds each. UPSCO is an air carrier authorized by the appropriate authorities of the United States government to provide air transportation throughout the United States. The parties agree that during the years at issue UPSCO transacted business within Wisconsin and derived income from such business activity.

As an air carrier, UPSCO is a "public utility" for purposes of the Wisconsin franchise tax. Section 71.25(10)(b), Wis. Stats. (1987-88). The department has adopted a specific rule regarding apportionment of the income of interstate air carriers. Wisconsin Administrative Code Rule Tax 2.46 provides that such income should be apportioned using a three-factor formula consisting of (1) the ratio of aircraft arrivals and departures; (2) the ratio of revenue tons handled in the state to total revenue tons; and

(3) the ratio of originating revenue within the state to total revenue.

The apportionment factors for the years at issue as reported by UPSCO were as follows:

	1985	1986	1987	1988
Arrivals and Departures	0.7074%	0.8167%	2.190790%	0.854274%
Revenue Tons	1.9334%	1.8727%	0.501680%	0.697180%
Originating Revenue	2.3638%	2.0588%	2.057230%	0.390908%
Apportionment Factor	1.6682%	1.5827%	1.583233%	0.647454%

For the years 1985 and 1986, UPSCO's records did not include information regarding Wisconsin and total revenue tons. Accordingly, in filing its Wisconsin tax returns for those years, UPSCO substituted a factor consisting of the number of packages originating in Wisconsin divided by the total number of packages. The department accepted the substitution of revenue pieces for revenue tons in 1985 and 1986.

The only adjustments at issue in this appeal are the adjustments to the arrivals and departures factor for the years 1985 and 1986.

During the years at issue, UPSCO operated seven different types of aircraft. These aircraft and their maximum payloads were as follows:

Fairchild Expediter	4,450 pounds
Boeing 727-100	45,830 pounds
Boeing 727-200	58,500 pounds
Boeing 757	86,000 pounds
Douglas DC8-71CF	94,000 pounds
Douglas DC8-73CF	110,000 pounds
Boeing 747-123BF	220,000 pounds

During the years 1985 through 1988, UPSCO's use of its various aircraft for flights to or from Wisconsin was as follows:

	1985	1986	1987	1988
Fairchild Expediter	5,457	4,808	2,136	508
Boeing 727-100	358	118	40	42
Boeing 727-200	0	346	118	6
Boeing 757	0	0	0	2
Douglas DC8-71CF	38	146	230	138
Douglas DC8-73CF	0	11	116	400
Boeing 747-123BF	0	0	12	0
Total Flights	5,853	5,429	2,652	1,096

During the same period, UPSCO's overall use of its various aircraft was as follows:

	1985	1986	1987	1988
Fairchild Expediter	20,110	25,708	19,218	16,126
Boeing 727-100	40,458	38,562	34,892	27,300
Boeing 727-200	*	10,522	12,886	12,070
Boeing 757	0	0	2,554	16,516
Douglas DC8-71CF	28,646	15,876	16,634	21,484
Douglas DC8-73CF	*	26,156	28,388	28,846
Boeing 747-123BF	<u>5,682</u>	<u>5,520</u>	<u>6,480</u>	<u>5,954</u>
Total Flights	94,896	122,344	121,052	128,296

* The national figure for 1985 combines all 727s and all DC-8s.

In preparing its 1985 and 1986 tax returns, UPSCO calculated the arrivals and departures factor by dividing the actual Wisconsin and total takeoff and landing weight of aircraft by the actual total takeoff and landing weight of aircraft. UPSCO prepared the returns in this manner because it believed that a factor based on unweighted arrivals and departures distorted its Wisconsin business activity and income. In the 1985 return, an incorrect figure was used for Wisconsin takeoff and landing weight. Correcting that error, and carrying out the division to six decimal places, the arrival and departure factors sought by UPSCO are as follows:

	1985	1986
Wisconsin Takeoff and Landing Weight	18,794,259	32,002,297
Total Takeoff and Landing Weight	2,655,347,050	3,918,679,971
Ratio	0.707789 %	0.816660 %

In preparing its 1987 and 1988 tax returns, UPSCO did not weight the arrivals and departures factor by takeoff and landing weight because it did not believe that any distortion created by the unweighted factor was sufficient to justify a departure from the standard factor.

Pursuant to his interpretation of Tax 2.46, Wis. Adm. Code, the auditor removed takeoff and landing weight from the computation of these factors. Accordingly, the arrival and departure factors computed by the auditor were based on actual arrivals and departures in each year, as follows:

	1985	1986
Wisconsin Arrivals and Departures	5,853	5,429
Total Arrivals and Departures	94,896	122,344
Ratio	6.167805 %	4.437488 %

UPSCO's charges for transporting an air package are a function of the level of service, the weight of the package, and the destination. There are three levels of service: Next Day Air letters (limited to documents), Next Day Air packages (up to 70 pounds), and Second Day Air packages.

There is a single rate for Next Day Air letters anywhere in the United States. For Next Day Air packages, rates vary with weight. One rate schedule applies to all packages transported within the 48 continental states and Hawaii, another to packages to and from Puerto Rico and Alaska, and a third to packages to and from Japan. Similarly, for Second Day Air packages, rates vary with weight with one rate schedule applying to all packages transported within the 48 continental states, a second to packages to and from Alaska and Hawaii, and a third to packages to and from Japan.

The average weight of air packages picked up and delivered in any geographical region is uniform. Similarly, the distribution of the levels of service and the destinations of packages do not vary significantly by the geographical origin of packages. Accordingly, the dollar amounts that UPSCO receives from its customers, both overall and within any particular geographical area, is a function of the number of packages transported. Similarly UPSCO's expenses, both overall and within any particular geographical area, are a function of the number of packages transported.

The Commission concluded that Wisconsin Administrative Code Rule Tax 2.46 is a proper exercise of authority under sec. 71.25(10)(c), Wis. Stats. (1987-88). As applied to the taxpayer by the department, Tax 2.46 does not attribute income to Wisconsin which either is out of all appropriate proportion to the taxpayer's business transacted here or leads to a grossly distorted result.

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