Atrium was a part of its overall, diversified business. Various funds, facilities, employes, and activities of Port and the Atrium were intermixed, and Port's chief executive officer had responsibility for all major decisions regarding the Atrium, its contracts, brokers, and expenditures.

The taxpayer appealed the decision to the Wisconsin Supreme Court, which denied its petition for review on February 21, 1995. The matter is now final. □

**Insurance companies — addback of exempt or excluded interest and dividends received deduction.** *Heritage Mutual Insurance Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 31, 1995). The issue in this case is whether under sec. 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), the federal reduction in losses incurred, by 15 percent of tax-exempt interest income and 15 percent of the deductible portion of the dividends received, is used to reduce the Wisconsin addition modification for interest received or accrued during the taxable year and dividend income received during the taxable year.

The taxpayer is organized as a Wisconsin mutual insurance corporation under ch. 611, Wis. Stats. The taxpayer is engaged in the business of selling property and casualty liability insurance in Wisconsin.

During the years 1987 and 1988, sec. 71.43(2), Wis. Stats. (1987-88), imposed a franchise tax on the "net income" of insurance companies. Under sec. 71.45(2), Wis. Stats. (1987-88), "net income" was defined as "the federal taxable income as determined in accordance with the provisions of the internal revenue code" with various modifications and adjustments listed in such section of the statutes.

In calculating its Wisconsin taxable income on its initially filed franchise tax returns for the calendar years 1987 and 1988, the taxpayer added back to its federal taxable income 100% of its interest income which was tax exempt under sec. 103 of the Internal Revenue Code of 1986, as amended (the "Code"), and 100% of its dividend income which was deducted pursuant to sec. 243 of the Code, less the allowable dividend deduction under sec. 71.45(2)(a)8, Wis. Stats. (1987-88).

In determining its federal taxable income for 1987 and 1988, as required by sec. 832(b)(5) of the Code, the taxpayer took into account 15% of the tax-exempt interest income received on obligations acquired on and after August 8, 1986, and 15% of deductible dividends received on stock acquired on and after August 8, 1986. A portion of the taxpayer's tax-exempt interest and dividends were received on pre-August 8, 1986 stock and obligations and, therefore, were not required to be included in the taxpayers federal taxable income under sec. 832(b)(5) of the Code.

In preparing its original Wisconsin franchise tax returns for 1987 and 1988, the taxpayer added back 100% of its tax-exempt interest income and deductible dividends less the allowable dividend deduction under sec. 71.45(2)(a)8, Wis. Stats. (1987-88), in calculating its Wisconsin taxable income, which therefore included the tax-exempt interest income and deductible dividends described above.

The taxpayer filed a claim for refund for 1987 and 1988, in which the taxpayer added back to its federal taxable income the tax-exempt interest and deductible dividends only to the extent that such amounts were not used in calculating its federal taxable income and, therefore, did not include the 15% portion of tax-exempt interest income and deductible dividends described above.

The department denied the claim for refund because the statutes require the addback for Wisconsin purposes of 100% of federally exempt interest and dividend income even though 15% of such income was applied to reduce a loss deduction in arriving at federal taxable income pursuant to sec. 832 of the Code.

The Commission concluded that the department improperly determined that sec. 71.45(2)(a)3 and 4, Wis. Stats. (1987-88), requires the addition for Wisconsin franchise tax purposes of the 15% portion of interest and dividend income which never effectively reduced the taxpayer's federal taxable income as carried forward for Wisconsin purposes. To require the addback would tax the same income twice, first as federal taxable income (the Wisconsin starting point), and second as an addition modification.

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

## SALES AND USE TAXES

**Admissions; Landscaping.** *City of Madison vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 12, 1995). The issues in this case are:

A. Whether the taxpayer is liable for sales tax on its receipts for issuance of golf I.D. cards, junior cards, and senior cards.

B. Whether the taxpayer is liable for sales tax on its receipts from special assessments of private landowners for planting trees on the terrace portion of each landowner's property.

The taxpayer is a municipal corporation which was required to hold, and did hold, a seller's permit during the period under review.

The taxpayer sought to recover the costs for its golf courses by charging for their use. The taxpayer sold various golf course admission cards, including annual resident and nonresident passes, on which it collected sales tax, as well as annual resident photo golf I.D. cards — new and renewal — and junior/senior cards, on which no sales tax was collected.

The taxpayer's purpose in issuing the golf I.D. cards was to provide its residents with hassle-free admission to its golf courses as residents, who were thereby entitled to pay lower green fees than nonresidents. Without the resident card, a user was admitted as a nonresident and paid the higher nonresident fees.

The taxpayer planted trees on "terraces" (real estate between the street and sidewalk) of residents of the city. The terraces are subject to public easement and such other appurtenant rules and regulations promulgated pursuant to the taxpayer's police power.

The taxpayer controlled almost all aspects of the tree planting in the terrace property: the property owner was limited in the choice of tree, if choice was available, in the size of tree, and in the location of the planting. The taxpayer could plant a type of tree it chose in a location it chose, even over the objection of the property owner. The taxpayer's crews did the planting.

The taxpayer enacted ordinances to recover the costs of planting the trees by the issuance and collection of special assessments to the property owners. These special assessments would become liens upon the property if unpaid, similar to real estate taxes.

The taxpayer assessed only an amount calculated to recover its actual costs, including an anticipated 15% loss factor for trees which had to be replaced later.

The Commission concluded:

A. The taxpayer's receipts for issuance of resident golf cards are taxable. The facts show no other purpose or purposes for which the resident golf cards were issued than to allow the purchasers of such cards to be admitted to the taxpayer's golf courses as residents, with attendant rate privileges.

B. The taxpayer's receipts from tree planting activities are taxable. Section Tax 11.05(2)(p) and (s), Wis. Adm. Code, expressly include receipts from tree sales and landscaping services by governmental units as taxable under sec. 77.52(2)(a)20, Wis. Stats.

The taxpayer has not appealed this decision. □

**Auctions.** *Terry Locke vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 11, 1995). The issue in this case is whether the taxpayer's gross receipts from auction sales held in 1991 are subject to sales tax.

Since 1982, the taxpayer, as a sole proprietor, has been engaged in the business of making sales at auction of tangible personal property owned by others.

The taxpayer sells at auction mostly household goods belonging to the estates of deceased persons. However, on occasion he sells business assets, such as equipment of restaurants that have gone out of business. In 1987 he applied for and was issued a seller's permit, which he held in 1991.

During the early years of his business, the taxpayer conducted the bulk of his auction sales at the homes where the goods were located. As the years progressed, his method of operations changed from holding the sales in homes to conducting them in rented spaces in local commercial locations. Usually the taxpayer held his auctions on weekends, after advertising the previous week.

During the first eight months of 1991 he conducted 16 of his 20 auction sales at a ballroom. During the last four months of 1991, the taxpayer conducted 12 of his 14 auctions in an empty store located in a mall.

The sales tax at issue is from auction sales made at the ballroom and at the mall.

The Commission concluded that the taxpayer's receipts in 1991 from auction sales held at commercial locations in Wisconsin are subject to sales tax under the provisions of sec. 77.52(1), Wis. Stats., and sec. Tax 11.50(3)(a), Wis. Adm. Code. Gross receipts from sales of tangible personal property are subject to sales tax under sec. 77.52(1), Wis. Stats., unless specifically exempt. The taxpayer has failed to bring himself within the terms of an express provision granting exemption.

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

**Statute of limitations — nonfilers; Manufacturing — exemption of property consumed or destroyed; Occasional sales; Penalties — negligence — failure to file.** *Zignego Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 2, 1995). The issues are:

A. Whether the statute of limitations prevents the department from assessing sales and/or use tax against the taxpayer for the period of April 1, 1984 through March 31, 1988.

B. Whether the taxpayer is entitled to a sales and use tax exemption pursuant to sec. 77.54(2), Wis. Stats., for the materials it purchased which became ingredients or component parts of tangible personal property the taxpayer manufactured or which lost their identity in the taxpayer's manufacture of ready-mixed concrete which the taxpayer incorporated into real property improvements.

C. Whether the taxpayer's sales and rental of tangible personal property and the rendering of certain services by the taxpayer are exempt from sales and use tax as occasional sales within the meaning of sec. 77.54(7)(a), Wis. Stats.

D. Whether the taxpayer's failure to file sales and use tax returns was due to reasonable cause and not due to neglect.

The taxpayer is a Wisconsin corporation which is primarily engaged in the business of real property construction of roads and highways, primarily for the State of Wisconsin and Wisconsin municipalities. The taxpayer also sold some of its equipment and machinery and rented out some of its equipment and machinery (without an operator), primarily to other contractors, and provided some non-real-property-construction services, primarily repairs.

As part of the taxpayer's road and highway construction activities, the taxpayer manufactures ready-mixed concrete which it incorporates into its paving projects. Ready-mixed concrete is manufactured by mixing together cement, aggregate (i.e., crushed stone or gravel), water, and other ingredients either in a machine known as a batch plant or in specially designed trucks. After the mixing process, the ready-mixed concrete is in a semi-liquid form and constitutes tangible personal property. The ready-mixed concrete in the semi-liquid state is transported in either dump trucks or in the special ready-mix trucks to the taxpayer's construction sites, where it is poured into forms, is finished by the taxpayer's employes, and dries and hardens, forming the concrete road surface or curb and gutter. The ready-mixed concrete is incorporated into real property by the taxpayer. The title to the resulting real property improvement, including the concrete road surface, curb and gutter made from the ready-mixed concrete, does not pass to the owner of the real estate prior to the time that the ready-mixed concrete is affixed to and becomes part of the real estate.

During the period under review, the taxpayer manufactured only the ready-mixed concrete it needed to fulfill its real property construction contracts, and all of the ready-mixed concrete the taxpayer manufactured was used in its own real property construction activities and was installed by the taxpayer in fulfilling its real property construction contracts. All or substantially all of the construction contracts in which the taxpayer used the ready-mixed concrete were with entities such as the State of Wisconsin and municipalities, sales to which are exempt from the sales and use tax pursuant to sec. 77.54(9a), Wis. Stats.

During the period under review, the taxpayer purchased cement, aggregate, and other ingredients for its manufacture of ready-mixed concrete. The ingredients, including the cement and aggregate, became component parts of or lost their identity in the taxpayer's manufacture of ready-mixed concrete.

The taxpayer had not paid any Wisconsin sales or use tax on the ingredients prior to the department's issuing a notice of assessment. The taxpayer did not use any resale certificates or other exemption certificates when purchasing any of the ingredients.

The taxpayer paid sales tax on purchases of other materials and ingredients (such as cement, hardware, piping, etc.) it bought from Wisconsin vendors and incorporated into the real property improvements it made.

The taxpayer did not hold a Wisconsin seller's permit at any time during the period under review, nor did the taxpayer charge any sales tax on any of its sales or rentals, file any sales and use tax returns, or pay any sales or use tax directly to the department during that period. The taxpayer did not have any exemption certificates for the rentals, sales, and services.

The machinery and equipment the taxpayer sold and rented to others was purchased by the taxpayer and used regularly by the taxpayer in its own real property construction activities. The parts involved in the alleged taxable sales were purchased by the taxpayer and resold to its employes.

Some of the rentals were for use of the taxpayer's machinery and equipment by other contractors at the construction sites where the taxpayer was also working, since the taxpayer wanted to keep the construction job moving in order to continue to perform its contracts and avoid delays due to other contractors' machinery and equipment breakdowns or lack of equipment. Other rental equipment was used by the lessee in some location other than on the taxpayer's construction site. The services (generally repairs) were performed in the taxpayer's shop.

The taxpayer concedes that the rental of a water truck and the rental of a dump truck are subject to the Wisconsin sales tax since the occasional sale exemption does not apply to these types of motor vehicles.

The amount and number of the taxpayer's sales and rentals of, and services to, tangible personal property during the period under review ranged from 2 to 9 sales and from $476 to $30,470 per fiscal year.

The Commission concluded:

A. The department's assessment is not barred by the 4-year statute of limitations in sec. 77.59(3), Wis. Stats., where the taxpayer failed to file the required sales and use tax returns.

B. The taxpayer is not entitled to the "ingredients" exemption under sec. 77.54(2), Wis. Stats., because it is the end consumer of the tangible personal property incorporated by it in real property improvements.

C. The taxpayer's miscellaneous sales and rentals of tangible personal property and its incidental sales of repair services do not qualify for the occasional sales exemption under sec. 77.54(7)(a), Wis. Stats.

D. The taxpayer was negligent in failing to file the required Wisconsin sales and use tax returns. The Commission was provided no factual basis to find the reasonable cause contended by the taxpayer.

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

## GIFT TAXES

**Gift tax — foregone interest.** *Alyssa Alpine, Edith Phillips, and Eileen Cohen vs. Wisconsin Department of Revenue.* (Wisconsin Tax Appeals Commission, March 9, 1995). The issue in this case is whether the interest foregone on an interest-free demand loan made between family members and certain trusts set up for the benefit of their heirs constitutes an assessable gift for purposes of Wisconsin gift tax law as it existed in the years 1979-1984.

Alyssa Alpine ("Alyssa") was a minor at all times during the years 1979 through 1984 ("the period under review"). During the years 1977-83, three trusts were established for the benefit of Alyssa. During the period under review, Alyssa's grandmother, Eileen Cohen ("Eileen"), and her great-grandmother, Edith Phillips ("Edith"), made a number of interest-free demand loans to the trusts. Neither Alyssa, Eileen, nor Edith intended that any foregone interest should have been deemed to have constituted a gift to Alyssa and, accordingly, did not report the foregone interest associated with the loans on any gift tax reports.

In March 1991, the department issued Notices of Gift Tax Assessment to Alyssa, for gift taxes attributable to additional taxable gifts of foregone interest alleged to have been made to Alyssa by Edith and Eileen, under the loans previously discussed. The department also issued "Donor copies" of the Notices of Gift Tax Assessment to Edith and Eileen, in which it asserted against them joint and several liability for the taxes alleged due.

The Commission concluded that there was no authority for the department to issue the assessments under review. It held that for the years 1982 through 1984 the department acted after the statute of limitations operated to bar additional assessments of gift tax, and that for all other transfers the department lacked the authority to assess a) because there was no clearly completed gift, b) because the department failed to nonacquiescence in at least one case where no taxable gift was found under similar circumstances before the Commission, and c) because Wisconsin gift tax regulations concerning foregone interest are virtually nonexistent.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the portion of the decision dealing with the statute of limitations. □