	1985		1986	
	UPSCO	DOR	UPSCO	DOR
Income before apportionment	$199,438,191	$199,438,191	$339,642,250	$339,642,250
Arrivals & departures factor	0.707789%	6.167805%	0.81660%	4.437488%
Revenue tons factor	1.93375%	1.93375%	1.872719%	1.872719%
Originating revenue factor	2.312998%	2.312998%	2.062386%	2.062386%
Average factor	1.651846%	3.471393%	1.583922%	2.790864%
Wisconsin income	$3,294,441	$6,923,283	$5,379,667	$9,478,953

The use of the raw number of arrivals and landings rather than a factor based on takeoff and landing weight increased UPSCO's income apportioned to Wisconsin for 1985 and 1986 by 110% and 76%, respectively.

The department's determination involved an assessment of franchise taxes for the years 1985 through 1988, in the amount of $527,399, based on an adjustment to the arrivals and departures factor in the taxpayer's apportionment formula. UPSCO does not take issue with the department's franchise tax assessment for the years 1987 and 1988 because in those years UPSCO's disproportionate use of the Expediters in Wisconsin was less dramatic and the weighted and unweighted factors were therefore less disproportionate.

On appeal the Commission observed that the average tax variance over the 4-year assessment period is .75 percent, and for the two years actually in dispute (1985 and 1986) the average variance is about 1.5 percent. On this basis, the Commission concluded that UPSCO had not met its burden of establishing that the Tax 2.46 formula produces a grossly distorted tax result or an attribution of UPSCO's income to Wisconsin which is out of all appropriate proportions.

UPSCO also claimed that by not allowing a weighted average to be used in the arrivals and departures factor the department abused its discretion. UPSCO reached this result by looking to the language of sec. 71.25(11) and (12), Wis. Stats.

UPSCO's last argument was based on the fact that the department interpreted Rule Tax 2.46 as requiring weighted arrivals and departures until 1980. However, in *Republic Airlines, Inc. v. Wisconsin Department of Revenue*, Case No. 80 CV 0954, August 26, 1981, Dane County Circuit Court Judge Edwin Wilke held that the clear and unambiguous language of Rule Tax 2.46 "forecloses the 'weighting' of interstate air carrier 'arrivals and departures' on any basis, including aircraft carrier capacity." The department did not appeal that decision and therefore, under sec. 73.015(2), Wis. Stats., the department was deemed to have acquiesced in the decision and is now bound by it.

The Circuit Court concluded that the use of an unweighted arrivals and departures factor is reasonably related to UPSCO's income and does not violate the Commerce or Due Process Clauses.

In addition, the Circuit Court agreed with the result reached in *Republic Airlines*, and concluded that the language of Rule Tax 2.46 does not provide for weighted arrivals and departures. Rule Tax 2.46 provides that the first element of the apportionment formula is "the ratio which the aircraft arrivals and departures within this state ... bears to the total aircraft arrivals and departures within and without this state..." In other words, Rule Tax 2.46 describes a ratio of the raw number of Wisconsin flights to the raw number of total flights. It is more reasonable to read "aircraft arrivals and departures" as referring to actual aircraft takeoffs and landings rather than takeoff and landing weight.

The taxpayer has appealed this decision to the Court of Appeals. □

Dividends received deduction. *Colgate-Palmolive Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 26, 1995). The issues in this case are:

A. Whether the department erroneously disallowed dividend deductions for CPL Industries, Inc., and Hill's Pet Products, Inc., for 1986.

B. Whether the department erroneously refused to allow the taxpayer an additional fourth factor, the "intangible factor," in its apportionment factor computation, and whether the standard three-factor

apportionment formula properly reflects the taxpayer's Wisconsin taxable income.

C. Whether Wisconsin's Rule Tax 3.03(3), Wis. Adm. Code, discriminates against out-of-state dividend payors in violation of the Equal Protection and Commerce Clauses of the United States Constitution.

Colgate-Palmolive Company is a Delaware corporation organized in 1923 and is primarily engaged in the manufacture of health care and household products. The taxpayer is the parent company of numerous domestic corporations with which it files a federal consolidated return. The taxpayer is also the parent of controlled foreign corporations generally in the same lines of business from which it derives royalties and dividend income.

During the audit period, January 1, 1986, through December 31, 1988, the taxpayer did not operate any facilities in Wisconsin. The taxpayer did maintain inventories in a public warehouse which ceased in 1988.

During the first half of 1986 and prior years, the taxpayer owned 100% of the stock in two subsidiaries, CPL Industries, Inc., and Hill's Pet Products, Inc. During 1986, these two subsidiaries were merged into the taxpayer so that the companies were divisions of the taxpayer for the second half of 1986. The operations of the companies prior to the liquidation were separately reported on the parent's consolidated federal return for 1986. Operations for the second half of 1986 were combined with the taxpayer as separate divisions of the company and designated as Hill's Pet Products, Inc., and CPL Industries, Inc.

No one owned stock in CPL Industries, Inc., and Hill's Pet Products, Inc., during the second half of 1986.

The taxpayer received dividends prior to the liquidation of CPL and Hill's Pet Products, Inc., in 1986. The taxpayer did not own 80% of the stock of CPL and Hill's Pet Products, Inc., for the entire year 1986.

For 1986, 1987, and 1988, the taxpayer's taxable year began on January 1 and ended on December 31.

The taxpayer has conceded Issue B, pertaining to the department's disallowance of an "intangible factor" in apportioning the taxpayer's Wisconsin income.

Both parties requested that a decision on Issue C, the constitutionality of Rule Tax 3.03(3), Wis. Adm. Code, and companion sec. 71.26(3), Wis. Stats. [formerly sec. 71.04(4)], be held in abeyance pending a final appellate determination in *NCR Corp. v. WDOR*, WTAC Docket Nos. I-8669 and 87-I-359 (February 10, 1992).

The Commission concluded as follows:

A. The department properly disallowed the taxpayer's 1986 deduction for dividends received from CPL Industries, Inc., and Hill's Pet Products, Inc., pursuant to sec. 71.04(4), Wis. Stats. (1985-86), and Rule Tax 3.03(4), Wis. Adm. Code. The taxpayer failed to meet its burden of bringing itself clearly within the permissible deduction language of the statute and administrative rule. The language requires stock ownership in the payor corporation *during the entire taxable year in which the dividends are received.* There is no dispute that there was no stock ownership during the second half of 1986 because the payor corporations ceased to exist.

B. The department properly disallowed the taxpayer's "intangible" apportionment factor.

C. According to the stipulation of the parties, the constitutional issue concerning Rule Tax 3.03(3), Wis. Adm. Code, and sec. 71.04(4), Wis. Stats. (1985-86), shall be held in abeyance for further determination by the Commission following the final outcome on appeal of *NCR Corporation v. Wis. Dept. of Revenue*, WTAC Docket Nos. I-8669 and 87-I-359 (February 10, 1992), now pending before the Wisconsin Court of Appeals.

Neither the department nor the taxpayer has appealed this decision. □

Transition rules — federalization. *Lincoln Savings Bank, S.A., f/k/a Lincoln Savings & Loan Association vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, October 19, 1995). The taxpayer filed a timely petition for review of a January 12, 1995, decision of the Wisconsin Tax Appeals Commission (Commission). The Commission affirmed a redetermination by the department assessing additional franchise taxes and interest of $23,147.44 for 1987-1990. See *Wisconsin Tax Bulletin* 91 (April 1995), page 13, for a summary of the Commission decision.

The sole issue before the Circuit Court is a question of law calling for an interpretation of Section 3047(1)(a) of 1987 Wisconsin Act 27 (the Section).

The parties agree that the Section "federalized" the Wisconsin income and franchise tax law, so that a corporate taxpayer's federal net taxable income would become its Wisconsin net taxable income for years beginning in 1987, subject to other modifi-

cations which are not germane to this case. The Section requires federalized adjustments to any items of income, loss, or deduction.

The taxpayer federalized its deduction for bad debt reserve (basis), by adjusting upwards its cumulative Wisconsin basis so that it equaled its cumulative federal basis for all years prior to 1987. The adjustment added $1,016,114 to the taxpayer's Wisconsin basis as of December 31, 1986. The addition to basis was used as a deduction over the tax years 1987 through 1990, pursuant to the five-year rule in the Section. The department challenged this, arguing that the taxpayer had carried no Wisconsin basis for tax years prior to December 31, 1961, because it was not subject to a Wisconsin franchise tax prior to 1962. The department regarded this federalized basis adjustment as a windfall for the taxpayer and concluded that the Legislature never intended to have federalization apply to a zero bad debt reserve in the years the taxpayer was not subject to Wisconsin franchise tax.

The Circuit Court concluded that the taxpayer complied with the adjustment requirements of the Section as written. It rejected the department's interpretation that federalized adjustments be taken only for years in which a taxpayer was subject to a Wisconsin franchise tax. The Court found no language in the Section suggesting that the federal basis is to be altered under any set of circumstances, which is required by the Commission's decision, that it could disregard the pre-1962 federal basis because there was no corresponding state basis.

The department has appealed this decision to the Court of Appeals. □

SALES AND USE TAXES

Admissions — boat operator's receipts. *LaCrosse Queen, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, August 10, 1995). This is a review of the January 11, 1995, decision of the Wisconsin Tax Appeals Commission (Commission), which affirmed the determination of the Department of Revenue that the gross receipts of the taxpayer are subject to tax. For a summary of that decision, see *Wisconsin Tax Bulletin* 91 (April 1995), page 14.

The issue is whether the taxpayer's receipts from excursion trips on the Mississippi River are subject to sales tax. The taxpayer relies on the "exemption" set forth in sec. 77.54(13) Wis. Stats., which exempts from sales tax the gross receipts from sales of and storage, use, or other consumption of commercial vessels and barges of 50-ton burden or over, primarily engaged in interstate or foreign commerce or commercial fishing.

The matter of tonnage is not at issue; the matter of primary engagement in interstate commerce is at issue.

The Circuit Court affirmed the decision of the Commission. The vessel is not primarily engaged in interstate commerce. It is engaged in a local, state recreational activity which originates in Wisconsin and terminates in Wisconsin. The only contact with non-Wisconsin geography is the slap of a wave on the hull of the boat as it meanders on the Mississippi River. The fact that many of the passengers have addresses outside the State of Wisconsin does not justify a conclusion that the commerce of the vessel is anything other than intrastate.

The taxpayer has appealed this decision to the Court of Appeals. □

Auctions. *Terry R. Locke vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, September 7, 1995). This is an appeal of the Wisconsin Tax Appeals Commission's decision dated January 11, 1995. For a summary of that decision, see *Wisconsin Tax Bulletin* 92 (July 1995), page 17.

The issue in this case is whether the taxpayer's gross receipts from auction sales held in 1991 are subject to sales tax.

The taxpayer has been conducting business since 1982 as G&L Auction Service. None of his 1991 auctions of household goods occurred at his or G&L's business address; 28 out of 34 of his 1991 auctions were either at a ballroom or in an empty store. These were public places, not the property owner's premises.

During 1991, the ballroom and store were rented as needed, without entering into any leases for the facilities. Other than the auctions, the taxpayer did not conduct any of his other business (correspondence, telephone calls, storage of records, etc.) at the public facilities. The taxpayer held a seller's permit issued by the department for years before and during the year in question.

While the taxpayer's auctions were on-going during 1991, their scheduling varied. In March and May, he conducted only one auction each month; in April, July, and September, he held four or five auctions. Most of the auctions took place on weekends. About mid-week before each public-place auction, the taxpayer would take out newspaper ads to inform potential buyers of the place and date of the auctions.

The taxpayer claims he is exempt from sales tax on his auction receipts at public places because he fits within

certain rules governing taxable auction receipts found in the Wisconsin Administrative Code (emphasis added):

> Tax 11.50(3)(a): Taxable receipts from auctions include gross receipts from: Auction sales held *regularly* at an *established place of business*, such as an auction house or auction barn. The household goods exemption does not apply to these sales.
>
> Tax 11.50(4)(a): Gross receipts from the following auction sales are exempt: Auction sales of household goods or personal farm property which are *not held at regular intervals*. The following auctions are generally held on the property owner's premises ...

The Circuit Court concluded that the taxpayer's receipts from auction sales held at the ballroom and empty store are subject to sales tax.

The taxpayer's auctions at the ballroom and empty store were held at "an established place of business." The taxpayer's purpose in renting these public places was the holding of auctions. The distinction being made in Tax 11.50(4)(a) appears to be between private homes or non-auction-related business locations and spaces allotted specifically for auctions.

The taxpayer argues that these public places are not "his" place of business.

There is no mandate that the place of business be owned or even usually occupied by the auctioneer. The **dedication** of a location other than the property owner's home as an auction site is a sufficiently commercial undertaking to justify imposition of the tax. It is only the sale at the owner's home or the rare or isolated sale at a different site that is intended to be exempted from taxation.

If the taxpayer's auction sales are found to occur "regularly," and at "an established place of business," they then fall squarely within the parameters of Tax 11.50(3)(a). The word "regular" can mean "uniform" but it can also mean "steady." Certainly the auctions being discussed happened on a steady basis.

The taxpayer has not appealed this decision. □

TEMPORARY RECYCLING SURCHARGE

Temporary recycling surcharge. *Wolf River Ventures, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 4, 1995). The issue in this case is whether the department appropriately assessed the taxpayer for an additional temporary recycling surcharge and interest due for the 1991 tax year, where the taxpayer's tax year ended on April 30, 1991, and where the Wisconsin Legislature subsequently amended the recycling surcharge statutes in August of 1991, creating a recycling surcharge for any tax-option corporation with net income, to be initially applicable for taxable years ending after April 1, 1991, and before April 1, 1992.

Prior to and during 1991, the taxpayer was engaged in business as a Wisconsin corporation and had elected to be treated as a small business corporation for federal income tax purposes under sec. 1362 of the Internal Revenue Code. From late 1990 through April 1991, the taxpayer ceased its business operations, liquidated its assets, and made its last cash distribution on April 26, 1991.

The taxpayer originally filed a final federal income tax return for the short period fiscal year ended May 15, 1991. Later, the taxpayer's certified public accountant declared in correspondence to the department dated August 29, 1994, that the appropriate short period fiscal year-end should correctly have been noted as April 30, 1991.

On August 22, 1994, the department issued a notice of amount due to the taxpayer, assessing an additional temporary recycling surcharge and interest due of $1,279.

The Commission concluded that the department appropriately assessed the taxpayer for an additional temporary recycling surcharge and interest due for the tax year ended on April 30, 1991. Section 77.94, Wis. Stats., as amended by 1991 Wisconsin Act 39, renders the revised surcharge determination language clearly applicable to qualifying entities, tax-option corporations included, whose tax years ended between April 1, 1991, and April 1, 1992. The department and the Commission are duty bound to apply the legislature's clear and unambiguous statutory enactments to the letter, however unfair those enactments may seem to those affected.

The taxpayer has not appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. The decision is provided for informational purposes only. □