

— **Exemptions — common or contract carriers — constitutionality.** *Wisconsin Steel Industries, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, June 7, 1996).

This is an appeal from the January 23, 1996 decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 96 (April 1996), page 19.

The taxpayer and the department have stipulated as follows:

1. The taxpayer agrees that it is liable for the full amount of tax due pursuant to the January 23, 1996 decision of the Wisconsin Tax Appeals Commission.
2. The department agrees that it will reduce the interest on the tax due from 18% to 12%, provided the taxpayer makes the required monthly payments until the full amount of tax and interest due is paid in full.

The Circuit Court dismissed this case pursuant to the stipulation. □

— **Service enterprises — bathtub refinishing.** *Ark Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1996, and May 28, 1996). The issues in this case are:

- A. Whether the term “bathroom fixtures,” as used in sec. 77.52(2)(a)10, Wis. Stats., includes bathtubs.
- B. Whether the taxpayer’s re-enameling of bathtubs is a service subject to the sales tax pursuant to sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer is an Illinois corporation whose business activities in Wisconsin were limited to the re-enameling of bathtubs. The taxpayer describes this process as thermal-fusion, and it involves the application of finishing compounds to existing bathtub enamel to create a new surface.

The Commission concluded that:

- A. The term “bathroom fixtures” as used in sec. 77.52(2)(a)10, Wis. Stats., includes bathtubs.
- B. The taxpayer’s re-enameling of bathtubs is a service subject to the sales tax pursuant to sec. 77.52(2)(a)10, Wis. Stats.

Section 77.52(2)(a)10, Wis. Stats., applies the sales tax to certain services performed with regard to tangible personal property. This statute provides that certain items retain their character as tangible personal property regardless of the manner in which they are affixed to real property. Thus, a taxable service performed on one of these specially designated items of tangible personal property would continue to be taxable, even though the items might otherwise be considered real property fixtures.

One category of these specially designated items of tangible personal property is “bathroom fixtures.” When installed, a bathtub is clearly a fixture because it is physically annexed to real property, it is normally adapted to the purpose to which the realty is devoted, and it is typically intended to become a permanent part of the real property.

By looking to its common and approved usage, the Commission determined that the meaning of “bathroom” is a room equipped for taking a bath or a shower. Therefore, any room containing an in-

stalled bathtub is a “bathroom” and the term “bathroom fixtures” used in sec. 77.52(2)(a)10, Wis. Stats., clearly includes installed bathtubs. The re-enameling process falls within the meaning of one or more of the services listed in sec. 77.52(2)(a)10, Wis. Stats.

The taxpayer has not appealed this decision. □

— **Service enterprises — horseshoeing/farrier.** *Mark Espersen vs. Wisconsin Department of Revenue* (Circuit Court for Waushara County, January 3, 1996). This is an appeal from the January 24, 1994 decision of the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 86 (April 1994), page 20.

The issue in this case is whether a farrier’s services are subject to sales tax under sec. 77.52(2)(a)10, Wis. Stats. An exception exists in that section for “services performed by veterinarians.” The issue, then, is whether farriers are veterinarians as the term is commonly understood.

The taxpayer is a farrier, and as such he shoes horses and trims hooves. Some of his work is remedial, some preventative, most to regain or ensure the soundness of the animal. In equine usage “sound” means “not lame.”

The Circuit Court concluded that the taxpayer’s evidence and authority is insufficient to establish that he is exempt from taxation. No definitions of veterinarians are supplied which show that the term is commonly understood to include a farrier.

Section 97.42(1)(n), Wis. Stats., states, in part, that “veterinarian” means a graduate veterinarian of an accredited school of veterinary medi-

cine qualified on the basis of training and experience. Section 453.02(7), Wis. Stats., states "veterinarian means a practitioner of veterinary medicine who is duly licensed by the examining board". The taxpayer does not fall within this class.

The taxpayer has not appealed this decision. The case is pending at the Commission to decide other issues not ruled on in its January 24, 1994 decision. Those issues include possible farming exemptions and the penalties and interest assessed. □

Statute of limitations — nonfilers; Manufacturing — exemption of property consumed or destroyed; Occasional sales. *Zignego Company, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 9, 1996). This is a review of the May 2, 1995 decision of the Wisconsin Tax Appeals Commission, which affirmed the Department of Revenue's assessment against the taxpayer for unpaid sales and use taxes plus interest and penalties. For a summary of that decision, see *Wisconsin Tax Bulletin* 92 (July 1995), page 17.

The issues are:

- A. Whether the Commission incorrectly ruled that a four year statute of limitations had not run on the taxpayer's non-payment of the sales and use taxes in question for the fiscal years running from April 1, 1984 through March 31, 1988.
- B. Whether the Commission incorrectly ruled that the taxpayer was not entitled to a sales tax exemption for its purchase of the ingredients of manufactured concrete.
- C. Whether the Commission incorrectly ruled that the taxpayer is not entitled to the sales tax ex-

emption for its occasional sales and rentals.

The taxpayer is a Wisconsin corporation engaged in the business of road construction, primarily for public entities. The taxpayer manufactures ready-mixed concrete for use in its road paving projects. The taxpayer's construction activity is a real property construction activity, and it is a contractor under sec. 77.51(2), Wis. Stats.

The concrete is manufactured by mixing together cement, aggregate (crushed stone or gravel), water, and other ingredients in a batch plant or in trucks. The final product is ready-mixed concrete which is in a semi-liquid state and constitutes tangible personal property. The taxpayer manufactured only the concrete it needed to fulfill its real property construction contracts.

During the period under review, all of the taxpayer's construction contracts were with government entities which are exempt from sales and use taxes.

The taxpayer purchased the ingredients for its concrete. These ingredients became component parts of or lost their identity in the manufacture of the concrete. The taxpayer did not pay any Wisconsin sales or use tax on these ingredients. However, it did pay sales tax on other materials used in its projects, such as cement, hardware, and piping.

The taxpayer also engaged in a number of sales or rentals of equipment or services for the fiscal years 1984-85 through 1991-92. The taxpayer did not hold a seller's permit, and did not charge or pay any sales tax on these transactions. The taxpayer concedes that two of the transactions, involving the rental of trucks, were not eligible for the occasional sale exemption.

The Circuit Court concluded as follows:

- A. The Commission's decision on this issue is reversed. The four year statute of limitations had run on the taxpayer's non-payment of the sales and use taxes in question for the fiscal years running from April 1, 1984 through March 31, 1988. The legislature has expressly provided extensions to the four year statute of limitations in cases where sales and use tax returns were not filed, but should have been, only where the failure to file was with the intent of evading or defeating the tax. No such intent has been demonstrated here.
 - B. The Commission's decision on this issue is affirmed. The taxpayer was not entitled to a sales tax exemption on its purchase of the ingredients of manufactured concrete. The purpose of the sales and use tax system is to make everything taxable at the retail level unless specifically exempted. Contractors and subcontractors are consumers of tangible personal property used by them in construction activities.
- Whether contractors purchase raw materials and use them, as is, in their construction projects or whether raw materials are purchased for "manufacture" into other materials which are, in turn, used in construction projects, is not relevant to the determination of whether the tax applies.
- C. The Court remanded this issue to the Commission for further consideration. If the Commission determines that the taxpayer was required to have a seller's permit and lost exemptions as a result,

it must adequately explain the basis for this position in law and fact.

The taxpayer has appealed the decision to the Court of Appeals, relative to Issue B. The department has appealed the decision to the Court of Appeals, relative to Issue A.

SALES TAXES AND WITHHOLDING TAXES

Personal liability. *William Drilias vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 31, 1996). The matter is before the Wisconsin Tax Appeals Commission (Commission) on remand by the Dane County Circuit Court (Circuit Court). For a summary of the Circuit Court's remand decision, see *Wisconsin Tax Bulletin 94* (October 1995), page 18.

The Circuit Court found no support in the record for the Commission's conclusion that the taxpayer did not voluntarily and intentionally act to prefer other creditors over the government. The Commission was instructed on remand to:

- A. Make explicit what evidence supports its factual findings that the taxpayer complied with the entire installment agreement until he lost control and authority of the corporation.
- B. Decide whether the installment agreement changed the corporation's obligation to prefer the department to other creditors and, if so, whether the department is estopped from asserting liability against the taxpayer.

C. Decide what legal conclusion results from the department's collection efforts as regards the taxpayer's duty to pay (1) the withholding taxes covered by the installment agreement, (2) the withholding taxes not covered by the installment agreement, and (3) the sales taxes.

D. Make explicit which party must bear the burden of proof and by which standard the evidence is to be judged.

On remand, the Commission concluded as follows:

A. The taxpayer "intentionally" and "wilfully" failed to pay over taxes within the meaning of sec. 71.20(5)(a), Wis. Stats. (withholding tax) and sec. 77.60(9), Wis. Stats. (sales tax).

The record shows that the taxpayer, as president of the corporation, paid other creditors while not paying to the department the taxes which were due before he lost control due to the corporation's bankruptcy. The corporation breached the express language of the installment agreement with the department, which required the corporation to file current returns and pay the tax as it became due.

B. The department is not estopped from asserting liability against the taxpayer.

When the taxpayer failed to make current tax payments, the corporation defaulted and its rights (and the taxpayer's, if he had any) under the installment agreement were forfeited. The

taxpayer has shown no action or inaction by the department which reasonably induced reliance by the taxpayer to the taxpayer's detriment.

C. The department's collection efforts or lack thereof are immaterial to the taxpayer's personal liability for withholding taxes under sec. 71.20(5)(a), Wis. Stats., which contains no requirement that the department pursue collection against the delinquent corporation as a condition of the imposition of personal liability.

The department acted reasonably and properly within the meaning of sec. 77.60(9), Wis. Stats., by filing an amended bankruptcy claim with respect to the corporation's sales taxes due November 20, 1984 and January 20, 1985.

D. The "burden of proof" is placed on the department; the evidence is judged according to that standard.

If the department presents clear and satisfactory evidence that the individual was indeed a "responsible person" and preferred other creditors over the department, then the burden appropriately shifts, and the assessed individual must show otherwise by clear and satisfactory evidence.

The taxpayer has appealed this decision to the Circuit Court.