differences and made it applicable to corporations generally. This nonstatutory provision, 1987 Wisconsin Act 27, sec. 3047(1)(a), directs that calculations reflecting necessary adjustments are to be made "as of the close of [the corporate taxpayer's] taxable year 1986" and are to account for past differences between the federal and state treatment of the same items.

Section 3047(1)(a) permits the taxpayer to recoup (or "avoid omission" of) the excess of the federal deduction for a bad debt reserve over the Wisconsin deduction for the years prior to federalization of the Wisconsin tax law.

Lincoln first became subject to Wisconsin's franchise tax in 1962. Prior to 1962, it could not have taken *any* deduction from its franchise tax liability for additions to its bad debt reserve because it did not owe *any* franchise tax.

Therefore, the Court of Appeals concluded that Lincoln's pre-1962 federal bad debt reserves are not "required to be subtracted" from Lincoln's income "in order to avoid omission" of that pre-1962 bad debt loss reserve deduction. The Commission correctly applied the nonstatutory transition provision, 1987 Wisconsin Act 27, sec. 3047(1)(a), to Lincoln Savings Bank.

The taxpayer has appealed this decision to the Wisconsin Supreme Court. □

SALES AND USE TAXES

Penalties – negligence – incorrect return. *Dolphin Swimming Pool Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 3, 1996). The issue is whether the department properly imposed the negligence penalty pursuant to sec. 77.60(3), Wis. Stats., and is entitled to summary judgment.

As a result of a field audit, the department issued a sales and use tax assessment against the taxpayer for the period of December 1, 1988 through November 30, 1992. The assessment mainly involved sales and use tax on the taxpayer's purchases of tangible personal property used in its construction of new in-ground swimming pools and spas.

The department's reasons for assessing the 25% negligence penalty against the taxpayer include the following:

a. For the years 1989-90 and subsequent years of the audit period, the taxpayer's franchise tax returns incorrectly stated that taxpayer had purchased no tangible personal property without payment of state sales or use tax.

b. The amount of additional use tax that was found in the field audit was approximately three times the use tax the taxpayer had previously reported.

c. Although the taxpayer had routinely self-assessed and paid use tax to the department prior to June 1990, it ceased self-assessing use tax in June 1990.

d. The taxpayer hired professional accountants to prepare its sales and use tax returns for the period of June 1990 through December 1990 and to advise its bookkeeper on filing sales and use tax returns for the audit period subsequent to that.

e. According to information obtained in the audit, the material the taxpayer purchased from vendors for its in-ground pool construction remained constant throughout the audit period, and the vendors remained the same.

f. During the period under review, the taxpayer made sales of tangible personal property to its customers without collecting sales tax.

g. A previous audit of the taxpayer resulted in a significant amount of tax owing, including both use tax on purchases made without payment of sales or use tax and the 25% negligence penalty.

The taxpayer has held a Wisconsin seller's permit since 1972. The current management was not involved until 1987.

From November 1986 until June 1990, the taxpayer's accountant and office manager, Bob Wing, reported use tax on the taxpayer's behalf. Mr. Wing's employment was terminated in June 1990. For the first six months after Mr. Wing's departure, the taxpayer hired a CPA firm to prepare its sales and use tax returns.

The taxpayer relied on the CPA firm for the accurate reporting of use tax and for properly training the taxpayer's bookkeeper. Unknown to the taxpayer's personnel, and for reasons not explained to the taxpayer by the CPA firm, the CPA firm was no longer including in its use tax measure purchases for in-ground swimming pools.

The taxpayer disputes the 25% penalty assessment on several grounds, including that the taxpayer relied on the advice and counsel of a CPA firm in preparing the flawed tax returns, that the taxpayer "did its absolute best in attempting to comply with its sales and use tax obligations," and that the case of *William Pagel vs. Department of Revenue* (Wisconsin Tax Appeals Commission, 1992) supports its position.

(See *Wisconsin Tax Bulletin* 79, page 12, for a summary of this decision.)

The Commission concluded that the department properly imposed the negligence penalty pursuant to sec. 77.60(3), Wis. Stats., and has shown it is entitled to summary judgment as a matter of law.

The law places the filing and reporting obligation on the taxpayer, and any arrangement between the taxpayer and a third party for assistance in fulfilling that obligation must necessarily remain between them. Reliance on third parties was rejected as a defense to the negligence penalty.

As to the applicability of *William Pagel vs. Department of Revenue*, the Commission agreed with the department that the case may be distinguished because it involved withholding taxes and the "willful neglect" language of sec. 71.83(1)(a)4, Wis. Stats., which is not present here, together with an embezzlement which was clearly outside the scope of the bookkeeper's employment.

The Commission disagreed with the taxpayer's argument that its record prior to the 1987 management change should not be considered in determining whether the negligence penalty should apply.

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

Service enterprises – bathtub refinishing. *Thaddeus J. Hartlaub, d/b/a Worldwide Refinishing Systems vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 6, 1996). The issue is whether the department properly determined the taxpayer's bathtub and other refinishing services to be taxable services.

The taxpayer is in the business of bathtub refinishing, and he also refinishes ceramic tile, sinks, and tub surrounds. A typical job involves replacing the worn surface of a bathtub with a new polyurethane finish. The refinished surface is acid and scratch resistant, and is warranted by the taxpayer for five years, with a longer life expectancy as long as abrasive cleaners are not applied to it. This life expectancy is comparable to that of a new bathtub, but the cost of the taxpayer's refinishing is usually $300 or less, compared with $1,000 or more for a new bathtub.

The Commission concluded that the department properly determined the taxpayer's refinishing services to be taxable. The taxpayer's services are not "capital improvements" within the exception language in sec. 77.52(2)(a)10, Wis. Stats.

Because the taxpayer claims his services fall within the exemption of the imposition language of the statute, he must clearly show that his services constitute a capital improvement to the underlying real property. He has not done so. The taxpayer did not show that his refinishing services result in any increase in real estate value.

The taxpayer appealed this decision to the Circuit Court but subsequently withdrew his appeal.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the portion of the decision which provides that the capital improvement exception in sec. 77.52(2)(a)10, Wis. Stats., applies to the repair, service, alteration, fitting, cleaning, painting, coating, towing, inspection, and maintenance of property deemed to have retained its character as tangible personal property. □

Time-share property. *Telemark Development, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 28, 1996). The issue is whether the taxpayer's sales of time-share condominium units for flexible use are subject to sales tax.

The taxpayer is a Wisconsin corporation in the business of developing and selling time-share condominium units at the Telemark Resort complex near Cable, Wisconsin. Telemark Resort is a 1,600-acre resort complex consisting of a hotel, convention facilities, the taxpayer's time-share condominium development, and numerous recreational facilities.

Telemark Interval Owners Association ("TIOA") is a Wisconsin nonstock corporation and is a membership organization of the owners of the taxpayer's time-share units. Purchasers of the taxpayer's time-share units automatically become members of TIOA. TIOA is responsible for the management of the taxpayer's time-share development.

During the period under review (October 1, 1988 through September 30, 1992), the taxpayer sold its time-share units to the public.

Purchasers of the taxpayer's time-shares receive a fee simple interest in furnished residential units that can be occupied by the purchaser or the purchaser's transferee for certain weeks each year. The year is divided into 52 "unit weeks." The first unit week of each year begins on the first Sunday of the calendar year and ends on the succeeding Sunday. Remaining unit weeks are defined in the same manner.

Telemark rules provide, in part, that the unit weeks in every condominium unit are segregated into guaran-

teed use periods and flexible use periods.

A real estate transfer fee was paid to the Bayfield County Register of Deeds on each of the deeds filed with respect to the sale of time-share units at issue. No sales tax was paid on the sale of time-share units at issue, and the taxpayer did not hold a Wisconsin seller's permit during the period under review.

In order for the department to impose the sales tax on the transactions at issue, it must demonstrate that (1) the use of the time-share units was not fixed as to unit or starting time at the time of sale, and (2) the sales were to transients.

The Commission concluded that the sales at issue are properly subject to the sales tax imposed by sec. 77.52(2)(a)1, Wis. Stats. Under this statute, the sales tax is imposed upon the furnishing of lodging to transients through the sale of time-share property if the use of the rooms or lodging is not set at the time of sale as to starting day or lodging unit.

The Telemark rules explicitly provide that purchasers of time-share units during flexible use periods are not guaranteed a specific unit during a specific week at the time of purchase. Flexible use purchasers must reserve units with the TIOA for their desired particular units and weeks on a first come-first serve basis. Such purchasers are simply guaranteed the right to use an unspecified unit for one or more weeks during the 47 unit weeks within the flexible use period. Purchasers of time-share units during the flexible use periods do not receive the right to use a particular unit at a particular time at the time of the sale. Therefore, the first element of the statute is met.

Section 77.52(2)(a)1, Wis. Stats., defines "transient" as any person residing for a continuous period of less than one month in a motel, hotel or other furnished accommodations available to the public. The time-share units are sold only in one-week intervals (as opposed to month-long intervals), and even if someone purchased four consecutive unit-weeks, there is no guarantee that the purchaser would be able to use the four unit-weeks continuously. Therefore, the only inference that can be drawn is that all of the sales have been to persons that will reside for a continuous period of less than one month. Therefore, the second element of the imposition statute is met.

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

FUEL TAXES

Assessments – authority; Assessments – statute of limitations. *Jones Oil Company, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, October 8, 1996). The taxpayer seeks judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission) dated December 12, 1995, and the January 24, 1996 denial of the taxpayer's petition for rehearing. See *Wisconsin Tax Bulletin* 96 (April 1996), page 21, for a summary of the Commission's decision.

The taxpayer seeks reversal of the Commission's order affirming the department's assessments for special fuel tax and for general aviation fuel tax against the taxpayer, or a new trial at which the taxpayer could introduce evidence to support its claim that it is not subject to the tax assessments in question. The record does not reflect the date on which the taxpayer attempted to serve the department by mail.

An affidavit submitted to the Circuit Court by the department in opposition to the taxpayer's petition for judicial review indicated that a copy of a petition for review in this case was forwarded to the department by regular mail, that no copy of the petition was received by the department by either personal delivery or by certified mail, and that the department did not admit service with respect to the petition for review in this case. The department maintains that the taxpayer's failure to strictly comply with the service requirements of sec. 227.53(1)(c), Wis. Stats., deprives the Circuit Court of both subject matter and personal jurisdiction in this matter.

The Circuit Court concluded that it does not have the power to disregard the specific statutory requirements for commencing this judicial review proceeding, and that the taxpayer has failed to invoke the subject matter and personal jurisdiction to commence the judicial review proceeding. The Circuit Court therefore dismissed the petition for review.

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

DRUG TAXES

Drug tax – constitutionality. *State of Wisconsin vs. Darryl J. Hall* (Wisconsin Supreme Court, January 24, 1997). This is a review of a decision of the Court of Appeals dated September 14, 1995. The taxpayer challenges the constitutionality of the drug tax stamp law ("the stamp law"). The taxpayer was convicted and sentenced to two consecutive three-year sentences under the stamp law, and, concurrently, two consecutive 30-year sentences for delivery of cocaine base convictions. The delivery convictions and their 30-year sentences are not at issue in this case.

This case presents three issues:

A. Whether sec. 139.89, Wis. Stats., a part of the stamp law, unconstitutionally compels self-incrimination.

B. If so, whether sec. 139.91, Wis. Stats., the confidentiality provision of the stamp law, on its face, provides the taxpayer with protection as broad as the protection offered by the privilege against self-incrimination.

C. If not, whether the confidentiality provision may be construed in a manner which provides protection coextensive with the privilege.

The taxpayer contends that two requirements of the stamp law violate his privilege against self-incrimination: (1) the purchase requirement; and (2) the requirement that tax stamps must be affixed to a dealer's drugs. He argues that these requirements violate his privilege in two ways: (1) by requiring a dealer, when purchasing stamps, to provide incriminating information that may be used by prosecutors against him in a criminal proceeding; and (2) by providing vital evidence in a prosecutor's case against a dealer who complies with the statute and affixes the stamps to illicit drugs, because such acts show both knowledge that the items are controlled substances, and intent to possess controlled substances.

The second issue is whether the confidentiality provision of the stamp law, on its face, provides protection as broad as the protection offered by the privilege against self-incrimination. The privilege against self-incrimination may not properly be asserted if other protection is granted which is so broad as to have the same extent in scope and effect as the privilege itself. The State of Wisconsin ("the State") argues that the stamp law's confidentiality provision provides such coextensive protection against self-incrimination.

The third issue is whether the confidentiality provision may be construed in a manner which provides protection coextensive with the privilege against self-incrimination. The State argues that the language of the stamp law should be construed to provide direct immunity, and that it should also be construed to provide taxpayers with protection against derivative use of incriminating information.

The Wisconsin Supreme Court concluded as follows:

A. The drug tax stamp law unconstitutionally compels self-incrimination, absent some preexisting statutory confidentiality or immunity provision providing protection equivalent to that of the Fifth Amendment.

B. While providing some protection, the stamp law, on its face, fails to provide the taxpayer with protection coextensive with the privilege against self-incrimination.

C. Section 139.91, Wis. Stats., plainly and unambiguously provides direct, but not derivative use immunity. Consequently, the statute may not be construed to provide the taxpayer with protection coextensive with the privilege against self-incrimination.

At this time it is not known whether the State will appeal this decision to the United States Supreme Court. □