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

Domicile. *Matthias Klingsporn vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 22, 1997). The issues in this case are:

A. Whether the taxpayer abandoned his Wisconsin domicile and established a Florida domicile during the last seven months of 1995.

B. Whether Wisconsin is precluded by 49 U.S.C. § 40116(f)(3) from taxing the taxpayer's compensation as an air carrier employe.

The taxpayer, a permanent resident alien, moved to Wisconsin in 1994 and purchased a house in Franklin, Wisconsin, and an automobile. Both were owned jointly with his girlfriend.

In the Spring of 1995, the taxpayer and his girlfriend broke up, and in June of 1995 he moved in with his aunt in Naples, Florida. His girlfriend moved into an apartment, but sometime later they reconciled and she returned to the Franklin house. The taxpayer continued to live with his aunt, but never paid rent.

At all times relevant to this matter, the taxpayer was employed as an airline pilot for Midwest Express Airline and flew out of Milwaukee, Wisconsin. During the last seven months of 1995, he commuted to Milwaukee from his aunt's house in Naples, Florida. He worked out of Milwaukee about 10 days per month. During 1995, less than 50 percent of his scheduled flight time was in Wisconsin.

During the last seven months of 1995, when it was necessary to stay overnight in Wisconsin, the taxpayer stayed in his Franklin house. He kept many of his possessions in the Franklin house and the last of his possessions were removed only when the house was sold in 1997. He purchased a home in Florida in 1997.

During the last seven months of 1995, when the taxpayer used a car in Florida, he used a car that he owned and kept in Florida. When he used a car in Wisconsin, he used the car that was jointly owned with his girlfriend. Both cars were registered in Wisconsin.

All times relevant, the taxpayer held a Florida's driver's license. However, he lost his license card sometime before he moved back to Florida in 1995. In October 1994 he obtained a Wisconsin driver's license, which he used when he returned to Florida in June of 1995. In May 1996 he obtained a Florida driver's license card that replaced the one he had lost earlier.

The Commission concluded as follows:

A. The taxpayer, who established Wisconsin as his domicile in 1994, did not take sufficient steps to demonstrate that his domicile had changed to Florida during the last seven months of 1995.

   While the taxpayer probably intended to abandon his Wisconsin domicile and establish a Florida domicile in June of 1995, he simply did not take actions necessary to demonstrate this intent. During the last seven months of 1995, he continued to own and periodically reside in his Franklin home, he continued to carry a Wisconsin driver's license, he continued to operate an automobile in Florida that was registered in Wisconsin, and he continued to keep personal possessions in his Franklin home.

B. The taxpayer's income earned during 1995 is subject to the Wisconsin income tax notwithstanding 49 U.S.C. § 40116(f)(3), because Wisconsin was the taxpayer's residence in 1995.

   49 U.S.C. § 40116(f)(3) forbids a state from taxing the compensation paid to an air carrier employe unless one of two conditions is present. The first condition, that the employe spends more than 50 percent of his total scheduled flight time in the taxing state, was not met for 1995. However, the second condition, that the employe is a resident of the taxing state, is met.

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. This decision is provided for informational purposes only. □

State historic rehabilitation credit. *Marc A. and M. Isabel Anderson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 14, 1997). The issue on appeal is whether the doctrine of equitable estoppel should be applied against the department where the taxpayers relied on incorrect advice from another state agency in applying for the state historic rehabilitation credit (SHRC) on their 1993 Wisconsin income tax return.

The taxpayers filed joint 1992 and 1993 Wisconsin income tax returns. On their 1993 Wisconsin income tax return, the taxpayers claimed a SHRC of $3,441 for work performed in 1989 and 1990 on their house.

The department issued to the taxpayers a notice of amount due for additional income taxes for the years 1992 and 1993. The 1992 adjustment was for temporary recycling surcharge, and the taxpayers agree with the adjustment. The 1993 adjustment disallowed the SHRC that the taxpayers claimed on their 1993 Wisconsin income tax return; the taxpayers filed a petition for redetermination to appeal the disallowance of the credit.

The taxpayers purchased their house in 1982. The house was constructed in 1912 and was designed by Arthur Peabody, the first architect of the State of Wisconsin and the first architect of the University of Wisconsin. The house was at one time occupied by Mr. Peabody as his personal residence.

In June 1983, the taxpayers presented a description of the necessary repairs to rehabilitate their house to the Wisconsin State Historical Society as part of a 1983 federal grants-in-aid program for owners of National Registry Properties. This program was unrelated to the SHRC, and the taxpayers' house was not selected for grant funding.

In September 1989, the taxpayers had the roof replaced on their house at an estimated cost of $10,063. Beginning in September 1990 and ending in October 1990, the taxpayers had the exterior of their house painted at an estimated cost of $3,700. Both of these amounts were included by the taxpayers in the computation of the SHRC they claimed on their 1993 Wisconsin income tax return.

Before the taxpayers had either the roof replaced on their house in 1989 or the exterior of their house painted in 1990, they did not obtain prior approval of the rehabilitation project from the State Historical Society.

In 1989 and 1990, the taxpayers' house was designated as historic property. The property is located in the University Heights area of Madison.

The taxpayers did not claim on their 1989 Wisconsin income tax return a SHRC for the costs they incurred as a result of replacing the roof on their house.

The taxpayers did not claim on their 1990 Wisconsin income tax return a SHRC for the costs incurred as a result of painting the exterior of their house.

The taxpayers did not amend their 1989 or 1990 Wisconsin income tax returns.

The Legislature enacted the SHRC in 1988. The SHRC was available only for taxable years 1989 and 1990, for projects begun after December 31, 1988, and was limited to costs incurred after the State Historical Society approved the rehabilitation plan.

The Legislature made several changes to the SHRC in 1989. These changes applied retroactively to taxable years beginning on or after August 1, 1988. Prior approval of the rehabilitation plan by the State Historical Society continued to be a requirement under the revised law.

In 1991, the Legislature repealed sec. 71.07(9r)(b)7, Wis. Stats., thereby eliminating the prior approval requirement for the SHRC for taxable years beginning on or after January 1, 1991.

In August 1993, the Legislature recreated sec. 71.07(9r)(b)7, Wis. Stats., reinstating the prior approval requirement for the SHRC for taxable years beginning on or after January 1, 1993.

Sometime between March 25, 1993, and November 30, 1993, the taxpayers were informed by James Sewell of the State Historical Society that they could claim the SHRC retroactively, even though they had not obtained prior approval. At the time, Mr. Sewell was unaware that the law had been changed in August 1993 to require prior approval for 1993 SHRC claims. Mr. Sewell did not learn of this change until June 1994.

On November 30, 1993, the taxpayers submitted to the State Historical Society an Historic Preservation Certification Application form for the SHRC. The taxpayers' application was approved on April 5, 1994, and a copy of the approval was included in the taxpayers' 1993 Wisconsin income tax return claiming the SHRC.

The taxpayers had already paid for the costs of replacing the roof on their house as well as the painting of the exterior of their house in 1989 and 1990, before they received the advice from Mr. Sewell about the retroactive tax credit.

Upon learning that the State Historical Society had provided incorrect information to the public from January 1, 1993, to May 13, 1994, concerning the prior approval requirement for tax years beginning on or after January 1, 1993, the department adopted a policy that projects begun before January 1, 1991 (the effective date of the *repeal* of the prior approval requirement), required prior approval to qualify for the SHRC; projects begun in tax years beginning on or after January 1, 1991, and before January 1, 1993, did *not* require prior approval; and projects begun in tax years beginning on or after January 1, 1993, required prior approval. In addition, taxpayers who incurred rehabilitation expenses *after* being told by the State Historical Society that prior approval was not necessary were granted the credit by the department based on those expenditures.

Consistent with this policy, under the date of January 6, 1995, Secretary of Revenue Mark Bugher wrote a letter to State Senator Peggy Rosenzweig stating that taxpayers who followed incorrect instructions from the State Historical Society and submitted their plans for approval after beginning the rehabilitation work "may qualify for the tax credit."

The elements of equitable estoppel are (1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reliance thereon by the other, either in action or non-action, and (4) which is to his detriment.

The Commission found several reasons why the taxpayers' claim of estoppel must be denied. First, the action by the State Historical Society is not action by the department, against whom estoppel is asserted.

Second, the only "detriment" to the taxpayers as a result of Mr. Sewell's incorrect advice was the inconvenience of completing and filing the necessary forms to claim the credit. The actual rehabilitation expenditures were made in 1989 and 1990, several years *before* the advice from Mr. Sewell on which they base their estoppel argument. Thus, those expenditures could not have been made in reliance on the 1993 advice from Mr. Sewell. Because the taxpayers did not obtain the prior approval of the State Historical Society as required by the law in effect at the time they incurred the rehabilitation expenditures, it seems clear that they decided to proceed *regardless* of the availability of the SHRC.

Even if the Commission could somehow impute Mr. Sewell's advice to the department, the Commission would not consider the inconvenience to the taxpayers in filing a SHRC claim to be an "unconscionable" result sufficient to apply estoppel and grant a tax credit for which the taxpayers and other taxpayers similarly situated would not otherwise qualify.

Finally, although insufficient information was presented at the hearing concerning the particular facts addressed in Secretary Bugher's letter, the letter appears to be entirely consistent with the department's policy, which recognized the unfairness and financial harm which could result from denying the credit *where taxpayers incurred the rehabilitation*

expenditures in reliance on the Historical Society's incorrect advice. Such was *not* the case with the taxpayers.

Therefore, the Commission concluded that the department properly disallowed the state historic rehabilitation credit claimed by the taxpayers on their 1993 Wisconsin income tax return. The taxpayers failed to show the elements necessary for application of equitable estoppel against the department to allow the state historic rehabilitation credit claimed by the taxpayers on their 1993 Wisconsin income tax return.

The taxpayers have not appealed this decision. □

HOMESTEAD CREDIT

Household income - gross pension or annuity. *Faye P. Goocher vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 23, 1997). The issue in this case is whether a nontaxable distribution of $2,175.39 is a gross pension or annuity, which must be included as part of the claimant's "household income" in calculating her 1995 homestead credit.

The claimant was employed by the Prudential Insurance Company of America ("Prudential") over a 12-year period ending in 1989. In 1995, she withdrew $4,000 from an account she had with her former employer. This $4,000 "distribution" was broken down by Prudential as follows: $1,824.61 was categorized as a taxable distribution, and $2,175.39 was categorized as a nontaxable distribution because it was her "employee contribution."

The claimant thereafter applied for a 1995 Wisconsin homestead tax credit. The department adjusted the claim to include the nontaxable portion of the distribution, as gross pension or annuity.

The claimant contended that the $2,175.39 of the $4,000 she withdrew from the Prudential Investment Plan, now called the Employee Savings Plan, should now be treated like savings withdrawn from a bank, and it should not be treated as a pension or annuity. The department argued that Prudential filed a Form 1099-R to report the distribution to taxing authorities. This form is used to report "Distributions From Pensions, Annuities, Retirement or Profit-Sharing Plans, IRAs, Insurance Contracts, etc."

The Commission concluded that the distribution from Prudential's Employee Savings Plan, which consisted of the claimant's voluntary, after-tax contributions to the Plan, is not a pension or annuity and thus is not part of "household income" for the calculation of her homestead tax credit.

The department has not appealed this decision.

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SALES AND USE TAXES

Exemptions - telephone company central office equipment. *Ameritech Mobile Communications, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 2, 1997). This is an appeal from the Circuit Court's November 22, 1996 decision. See *Wisconsin Tax Bulletin* 103 (October 1997), page 20, for a summary of that decision. *Wisconsin Tax Bulletin* 96 (April 1996), page 19, provides a summary of the December 21, 1995 decision of the Wisconsin Tax Appeals Commission that the taxpayer appealed to the Circuit Court. The issue in this case whether the taxpayer's cell site equipment is exempt from Wisconsin sales and use taxes under sec. 77.54(24), Wis. Stats.

The taxpayer is a corporation in the business of providing cellular telephone services in Wisconsin and elsewhere. The taxpayer's cellular system in Wisconsin consisted of three components: 1) the mobile units used by the taxpayer's customers; 2) company-owned facilities known as "cell sites," one of which was located in each of the taxpayer's eighteen service areas; and 3) a single, company-owned Mobile Telephone Switching Office (MTSO).

The taxpayer's mobile units can only communicate with cell sites. The cell sites then relay signals to the MTSO which connect the mobile unit to another mobile unit or land line customer.

Section 77.54(24), Wis. Stats., provides that "gross receipts from the sale of and the storage, use or other consumption of apparatus, equipment and electrical instruments, other than station equipment, in central offices of telephone companies, used in transmitting traffic and operating signals" are exempt from sales tax.

The Wisconsin Tax Appeals Commission held that the term "central office" had a clear meaning in the technical parlance of the telecommunications industry. The cell site equipment was not in "central offices" and, therefore, was not exempt from sales and use tax. The Circuit

Court affirmed the Commission's decision.

The Court of Appeals affirmed the Commission, concluding that the Commission reasonably held that the taxpayer's cell site equipment was not exempt from taxation.

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

Occasional sales. *Zignego Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 29, 1997). This case was remanded to the Commission in a May 22, 1997, decision of the Court of Appeals, to decide the remaining issue regarding a sales tax exemption for occasional sales. See *Wisconsin Tax Bulletin* 103 (October 1997), page 21, for a summary of the Court of Appeals decision.

The department advised the Commission that it no longer wished to further litigate this issue. The Commission therefore dismissed the matter, and the case is closed.. □

Time-share property. *Telemark Development, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, July 22, 1997). This is an appeal of a Wisconsin Tax Appeals Commission decision dated October 28, 1996. See *Wisconsin Tax Bulletin* 101 (April 1997), page 17, for a summary of the Commission decision. The issues in the case are:

A. Whether the Commission correctly interpreted and applied sec. 77.52(2)(a)1, Wis. Stats.

B. Whether sec. 77.52(2)(a)1, Wis. Stats., is constitutional under the Equal Protection and Uniformity of Taxation Clauses of the United States and Wisconsin Constitutions.

The taxpayer is a Wisconsin corporation in the business of developing and selling time-share condominium units. The taxpayer's sales of time-share units can be classified in two categories: 1) units with guaranteed use periods; and 2) units with flexible use periods. The difference between these two types of time-share units lies in the way they may be used by their owners.

Owners of the "guaranteed use period" units are entitled to the "exclusive use, possession, and occupancy of a unit during the specific Unit Weeks identified in the purchase agreement." Owners of "flexible use period" units are "entitled to exclusive use, possession, and occupancy of a unit...pursuant to a reservation executed by or on behalf of the Management firm."

The taxpayer seeks reversal of the Commission's decision that the sales are properly subject to sales tax as 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 Circuit Court concluded as follows:

A. The Commission correctly interpreted and applied sec. 77.52(2)(a)1, Wis. Stats. The sales of these units are subject to Wisconsin sales tax. All the required elements of sec. 77.52(2)(a)1, Wis. Stats., are met in order for sales tax to be imposed:
   1. The units were available for sale to the general public.
   2. The taxpayer furnished rooms or lodging through the sales of time-share property, and the use of the rooms or lodging was not fixed at the time of sale as to the starting day.
   3. The sale of the time-share units at issue was to transients as defined in this statute, because the occupancies sold were for periods of only a week at a time.

B. Section 77.52(2)(a)1, Wis. Stats., withstands the taxpayer's challenge to its constitutionality. The Equal Protection Clause was not violated by the statute because the sales tax is imposed on **all** time-share units in Wisconsin that do not have a fixed starting date, and, therefore, the taxpayer alone is not injured by this statute. The Uniformity of Taxation Clause provides that direct taxes on property shall be uniform; the sales tax on a time-share unit is not a direct tax on property and is thus not subject to the uniformity clause.

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

SALES TAXES AND WITHHOLDING TAXES

Officer liability. *David J. Ruppel vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 12, 1997). The issue in this case is whether the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats.

The taxpayer was a full-time employe of Truck Equipment and Service Co., Inc. of Waukesha, Wisconsin from 1980 until mid-April 1994. The taxpayer was vice president and general manager of the company for the periods under re-

view. Although he was not treasurer of the company, he did have full check-signing authority; and his name was one of only two names on the signature cards for three separate business checking accounts that the company had with a Waukesha bank. The only other name on the signature cards was the president of the company, who listed his residence as Florida. The company treasurer had no check-signing authority for the three business checking accounts.

The taxpayer was responsible for day-to-day operations of the company. He signed payroll checks, checks for other creditors, and checks for tax obligations, as well as tax returns and tax forms.

Although the company incurred several months of liabilities for sales taxes and withholding taxes in 1992 and 1994, reported some of these liabilities to the department, and was notified by the department of one of the liabilities, the company continued to issue dozens of checks on its business accounts. These checks were issued to officers, employes, and creditors of the company. The taxpayer personally signed at least some of these checks. The company reported business losses; however, its business checking accounts received substantial deposits of money during the period under review. The company failed to extinguish its growing liability to the department with these deposits or the other money in its accounts.

The Commission concluded the taxpayer was a responsible person under both sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats. The taxpayer had the authority and the duty to pay the company's withholding and sales tax liabilities, but he intentionally breached his duty.

As vice president and general manager of the company, empowered to write checks and determine payment of bills, the taxpayer had the **authority** to oversee and discharge the company's tax liabilities. As a company officer and the person in charge of day-to-day operations, he had the **duty** to pay the company's taxes. The taxpayer filed sales and withholding tax reports with his signature, and he signed at least one check to the Wisconsin Department of Revenue.

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

WITHHOLDING TAXES

Officer liability. *Michael A. Pharo vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 9, 1997). The issue in this case is whether the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats.

The taxpayer was the secretary of Protective Services, Inc. ("the corporation") and a member of its Board of Directors, with authority to sign corporate checks. He signed payroll checks and other corporate checks to creditors during the period under review (1991-1993). The taxpayer was also the corporation's registered agent. He supervised corporate employes in 1991, and he knew that the corporation was required to remit withholding taxes to the Wisconsin Department of Revenue ("the department") during the period under review.

The corporation did not timely file its withholding tax reports (Form WT-7) for the years ending 1991, 1992, and 1993. The taxpayer filed the corporation's WT-7 forms for 1991 and 1992 on April 10, 1994, when he held the office of vice president.

The taxpayer claims he had no responsibility for the filing and payment of withholding taxes and that the responsibility for filing and payment was with the individual who was president and treasurer during the period under review.

The Commission concluded the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., and was personally liable for the unpaid withholding taxes. The taxpayer had the **authority** and the **duty** to pay the corporation's withholding taxes, and the taxpayer **intentionally breached that duty**.

The taxpayer was a corporate officer and director with check-signing *authority* during the entire period under review. He also had constructive knowledge with its attendant *duty* because of his ongoing role as an officer with knowledge of the corporation's financial affairs. The taxpayer knew that the corporation had a withholding tax obligation because it had employes who were paid wages. He wrote payroll checks, which put him on notice that withheld taxes should be remitted to the department. He knew this and failed to inquire further to determine if the withholding taxes had been paid.

As an officer and director of the corporation who signed payroll and other checks to creditors, the taxpayer was duty-bound to determine whether the taxes were being paid and, if not, to see that they were or immediately resign to avoid being held personally liable thereafter. He did neither.

Consistent interpretations of both state and federal officer liability statutes have held that all that is

necessary to prove *intentional breach of duty* is to show that there was a decision to use corporate funds to pay other creditors with knowledge of taxes being due. The taxpayer paid several other creditors, including wages to employes, with knowledge that withholding taxes were due.

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

FUEL TAXES

Officer liability. *Jeffrey P. Mach, Sr. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 17, 1997). The issue in this case is whether the taxpayer is a responsible person under sec. 78.70(6), Wis. Stats.

The taxpayer owned 49% of Mach's Truck Stop, Inc. ("the corporation"), while his father owned the remaining 51%. The taxpayer apparently never received a certificate for his shares of stock. He was the corporation's vice president and one of its directors. The taxpayer held these positions when he signed the Wisconsin Corporation Annual Report for 1990-91 as vice president. He never took any steps to resign either as an officer or as a director, and was listed as holding both positions for 1991-92 on the Wisconsin Corporation Annual Report for that year.

The taxpayer was authorized to sign checks drawn on bank accounts of the corporation. He was also responsible for hiring and supervising the corporation's general manager. The taxpayer was aware of the corporation's financial difficulties, its inability to make special fuel tax payments, and the fact that some creditors were being paid while the department was not.

The taxpayer argued that he had never had an active role in the corporation and that he never assumed actual ownership or executed authority in the corporation, thus he could not be held personally liable as a responsible person within the meaning of the statute.

The Commission concluded that the taxpayer was a responsible person under sec. 78.70(6), Wis. Stats., and was personally liable for the unpaid special fuel taxes The taxpayer had the **authority** and the **duty** to pay the company's special fuel tax payments.

As an officer and director of the corporation, the taxpayer was *authorized* to disburse corporate funds during the period under review. In addition he had *authority* over those whom he hired to write checks and file the special fuel tax reports.

As a corporate officer with the requisite *authority* and knowledge that the taxes were unpaid, the taxpayer was *duty-bound* to see to it that they were paid. This he failed to do. The taxpayer cannot be absolved of this *duty* simply because he delegated check-writing and tax filing duties to his employes.

Even had the taxpayer not been an owner, as he claimed, he would still be liable for the taxes as an officer with the **authority** and **duty** to pay the special fuel taxes. Ownership is not required for personal liability to attach.

The taxpayer has not appealed this decision. □