11.19 Printed material exemptions–A (5-31-98)

11.26 Other taxes in taxable gross receipts and sales price–A (5-31-98)

11.28 Gifts and other advertising specialties–A (5-31-98)

11.32 "Gross receipts" and "sales price" –A (5-31-98)

11.41 Exemption of property consumed or destroyed in manufacturing–A (5-31-98)

11.56 Printing industry–A (3-31-98)

11.68 Construction contractors–A (5-31-98)

11.70 Advertising agencies–A (5-31-98)

11.83 Motor vehicles–A (5-31-98)

Rules Reviewed by Legislative Council Rules Clearinghouse

11.56 Printing industry–A

Rules Being Reviewed Following Publication of Various Notices

1.13 Power of attorney-A

11.03 Elementary and secondary schools and related organizations-A

11.11 Industrial or governmental waste treatment facilities-A

11.12 Farming, agriculture, horticulture and floriculture-A

11.33 Occasional sales-A □

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

Compensation for services
Robert and Joan Sorensen (p. 12)

Domicile
Estate of Konstantine George, and Marion George (p. 12)

Farm loss limitation
David G. and Patricia Stauffacher (p. 13)

Native Americans — reservation of another tribe
Joan LaRock (p. 14)

Penalties — attempt to defeat or evade tax
Thomas B. Shepard (p. 14)

Refunds, claims for — statute of limitations
Kurt H. Van Engel (p. 16)

Homestead Credit

Housing subject to property tax
Jimmy D. Bean (p. 17)

Property taxes accrued — co-ownership
Calvin B. and Sharon M. Gates (p. 17)

Property taxes accrued — more than one unit
Glendora Miller (p. 17)

Corporation Franchise and Income Taxes

Deductions — state franchise or income taxes
Delco Electronics Corporation (p. 18)

Manufacturer's sales tax credit
Wausau Paper Mills Company (p. 19)

Refunds — claims after field audit refund
National Presto Industries, Inc. (p. 19)

Sales and Use Taxes

Construction — exempt entities
Precision Metals, Inc. (p. 20)

Motor vehicls and trailers — payment of tax before registration
Albert Berchanskiy (p. 21)

Motor vehicles — rebates
David and Carole Schenker (p. 22)

Officer liability
Frank A. Calarco (p. 22)

Time-share property
Vacation Owner's Association, Inc. (p. 23)

Withholding of Tax

Officer liability
Kathy J. Keimig (p. 24)

Sales and Use Taxes, and Withholding of Taxes

Officer liability
James M. Callen (p. 25)

Officer liability
Kenneth Higgs and Richard F. Wagner (p. 25)

Officer liability
Scott W. Wolf (p. 26)

INVIDIVUAL INCOME TAXES

Compensation for services. *Robert and Joan Sorensen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 30, 1998). The issue in this case is whether the value of a trip to Cancun, Mexico is properly includable as income by the taxpayers.

Taxpayers Robert and Joan Sorensen are husband and wife. In 1991, Mrs. Sorensen began spending substantial amounts of time at Rode Heating & Cooling in Kenosha, a small business operated by her sister. Mrs. Sorensen testified that she often spent seven hours a day at the business in 1991 and even more time in 1992. However, she was not an owner of the business, and she was not paid for her work. Robert Sorensen also did uncompensated work at his sister-in-law's business - as much as 15 hours per week.

In February 1992, Mrs. Sorensen's sister, Alberta Rode, advised the taxpayers that Rode Heating had earned four places on a group trip to Cancun, Mexico, sponsored by a wholesale distributer which had sold a substantial number of air conditioners to Rode in 1991. The distributor's long-standing practice was to give its customers an "incentive" to purchase by promising them participation in an annual trip based on the amount of their purchases.

Alberta Rode invited the taxpayers to go on the trip with her, together with a "girlfriend" who had worked for Rode Heating in the past. The taxpayers did not learn about the trip until shortly before they went, and they received no tax form from the distributor or Rode indicating either the value of the trip or that they should report the trip as income.

The department audited the distributor, learned of the annual trips, and began to assess taxpayers who had neglected to report the value of the trips as income on their Wisconsin income tax returns. Since the Sorensens did not report the Cancun trip as income, the department subsequently assessed them additional tax and interest, on their joint return, for the trip - purportedly valued at $2,600.

The Commission concluded that the value of the Cancun trip, under the circumstances here, must be counted as income because, in effect, it was compensation for work performed in the past and work anticipated to be performed in the future. The trip was essentially a means by which Alberta Rode thanked and rewarded the Sorensens, for their loyalty and hard work for her business. The trip might have been viewed as a gift if given to relatives or friends who did not do work for her, but here the taxpayers were acting the same as employes, except that they were not paid. Mrs. Rode was acting the same as an appreciative employer would act toward her employes.

The taxpayers have 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. □

Domicile. *Estate of Konstantine George, and Marion George vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, December 23, 1997). This is a judicial review of a May 21, 1997 decision by the Wisconsin Tax Appeals Commission ("Commission"). See *Wisconsin Tax Bulletin* 103 (October 1997), page 13, for a summary of the Commission's decision. The issue is whether Konstantine George was a resident of Wisconsin for income tax purposes for the tax years 1987 through 1991.

Konstantine S. George ("the taxpayer") was born, raised, and educated in Greece. He came to the United States to pursue his medical profession as an orthopedic surgeon and married Marion George, an anesthesiologist. They moved to Wisconsin in 1961. They acquired a home in Elm Grove, and the taxpayer set up a surgery practice in West Allis.

In the early 1980s, the taxpayer developed heart trouble which ultimately forced his retirement from medical practice, gradually from 1986 until by 1988 he was performing only gratuitous services. He maintained his Wisconsin medical license until 1993 and never obtained a medical license. The taxpayer sold his ownership interest in his medical

practice in 1989 and in the building which housed it in 1991.

The taxpayer maintained majority ownership interests in other Wisconsin businesses during the review period, the last of which was sold in 1990. One corporation's annual reports listed a Wisconsin address for the taxpayer until 1991, and one listed a Wisconsin address until September 30, 1989. The taxpayer also maintained ownership of real estate in Milwaukee and Franklin.

The taxpayer purchased a Jeep in Milwaukee, which he registered in Wisconsin for six months in 1991 prior to shipping it to Greece in January 1991.

Apparently, the Georges had been looking into retiring to Florida since the early 1980s. In 1986, the taxpayer acquired financing to construct a condominium in Florida, and he occupied it in early 1987. Commencing in 1987, he received a Florida permanent resident homestead real estate tax exemption.

In February 1987, he registered to vote in Florida and voted in subsequent elections there, not in Wisconsin. He acquired a Florida driver's license in 1987, but he also retained his Wisconsin driver's license. He made charitable contributions to Florida entities in 1987, 1988, and 1989.

The taxpayer did not file annual Florida individual intangible tax returns during the review period, even though forms prepared by his accountant indicated that he had tax liabilities of $89 for 1987, $279 for 1988, $26 for 1990, and $100 for 1991. He filed the returns for years following 1991. During the review period, the taxpayer divided his time among Florida, Wisconsin, Greece, and Colorado. The time spent in Florida per year during the years from 1987 through 1991 ranged from 35% to 48% while time spent in Wisconsin ranged from 16% to 23%.

When in Wisconsin, the taxpayer stayed in the Elm Grove home which continued to be Marion George's residence and in which he continued to have a joint ownership interest with her. For the years 1987 through 1991, the Georges filed joint nonresident and part-year resident tax returns. The address listed for each return was the taxpayer's Florida address. For 1987, all of his W-2 and W-2P forms listed Wisconsin addresses. For 1988, a single W-2 form listed a Wisconsin address. For 1989, one W-2 form and one W-2P form listed Florida addresses.

The Circuit Court concluded that the Commission correctly determined that Konstantine George was a resident of Wisconsin for income tax purposes for the years 1987 through 1991.

The taxpayers have not appealed this decision. □

Farm loss limitation. *David G. and Patricia Stauffacher vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 31, 1995, and March 4, 1998). This matter was heard in two parts. In a decision dated August 31, 1995, limited to the issue of whether the taxpayers were, during the period under review, engaged in a farming business for purposes of sec. 71.05(6)(a)10, Wis. Stats., the Tax Appeals Commission ("Commission") determined that the taxpayers were so engaged and therefore subject to the farming business loss limitations contained in the statute. See *Wisconsin Tax Bulletin 95* (January 1996), page 23, for a summary of that decision.

The issue before the Commission with respect to this decision is to what extent, if any, the activities and deductions at issue which resulted in the claimed losses can be properly characterized as other than part of the farming business and therefore not subject to the statutory loss limitations imposed by the department. The following additional findings of fact were presented at the hearing relating to this decision.

Prior to the period under review, and prior to moving into the building on the taxpayers' rural farm property, the operations of Golden Forest, including production of mushroom spawn and of the particulate logs, were conducted in a combination warehouse and office facility in the City of Madison. With the help of an entrepreneur named Alan Zech, Frank Vojtik helped develop the Golden Forest business plan and then served as its full-time operations manager, reporting to Dr. Leonard during the period under review.

During 1987 and 1988, Golden Forest made expenditures for

research at the University of Wisconsin and at the U.S. Forest Products Laboratory. These research expenditures were deducted on Golden Forest's income tax returns, and totaled $133,136 for 1987 and $21,414 for 1988. These expenditures were incidental to and in pursuit of Golden Forest's business of producing and marketing Shiitake mushrooms for profit.

With respect to the farm loss limitation issue, the Commission concluded that all of the activities and expenditures of Golden Forest Limited Partnership, which resulted in the losses claimed by the taxpayers and disallowed by the department, were incurred in the operation of a farming business. The taxpayers have not shown that any portion of the activities or expenditures of Golden Forest Limited Partnership may be characterized as something other than "incurred in the operation of a farming business" as that phrase is defined in sec. 71.05(6)(a)10, Wis. Stats.

The taxpayers have appealed this decision, as well as the decision dated August 31, 1995, to the Circuit Court. □

Native Americans — reservation of another tribe. *Joan La Rock vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 11, 1998). The issue in this case is whether an unmarried Indian member of one tribe who is living and working on the reservation of another tribe is subject to the Wisconsin income tax, when the reservation is located within the state of Wisconsin.

The taxpayer is an enrolled member of the Menominee Indian Tribe of Wisconsin. She resides on land owned by the Oneida Tribe of Indians of Wisconsin ("the Oneida Tribe"). The land is part of the Oneida Indian Reservation, located in the state of Wisconsin. The taxpayer has resided on Oneida Reservation land for more than 10 years and has been employed by the Oneida Tribe for more than five years.

The taxpayer married an enrolled member of the Oneida Tribe, with whom she had four children, two of whom still reside with her at their residence on the Oneida Reservation. The children are enrolled members of the Oneida Tribe. The taxpayer was divorced in 1993.

The taxpayer timely filed a 1994 Wisconsin income tax return. On that return, she claimed a deduction of her federal adjusted gross income, based on her status as a member of a federally-recognized Indian tribe. As a result of this deduction, the taxpayer claimed a refund from the department.

The department disallowed the deduction and issued an assessment against the taxpayer. She filed a petition for redetermination, which was denied in a notice issued April 3, 1996. Thereafter she timely appealed to the Commission.

The Commission concluded that Wisconsin may impose an income tax on the taxpayer, an unmarried Indian who is an enrolled member of the Menominee Indian Tribe but lives and works on the Oneida Indian Reservation, because she is not a member of the Oneida Tribe.

The taxpayer has not appealed this decision. □

Penalties — attempt to defeat or evade tax. *Thomas B. Shepard vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 10, 1998). The issue in this case is whether the department has met its burden of proof to impose a 50% penalty against the taxpayer on his underpayment of income tax in 1981, 1982, and 1984, and a 100% penalty against him for his underpayment of income tax in 1991, 1992, and 1993, on account of his failure each year to make a timely report with "intent to defeat or evade the income tax assessment required by law."

The taxpayer is a Milwaukee businessman who has been active for a number of years in the restaurant business. In September 1985, the department sent the taxpayer a letter, informing him that it was unable to locate his 1981 to 1984 Wisconsin individual income tax returns, and requesting that he file the returns if he had not already done so.

After a follow-up in January 1986, the department issued an estimated assessment against the taxpayer in March 1986, in the amount of $13,747, for failure to file Wisconsin individual income tax returns for any of the years 1981 through 1984.

After a series of subsequent contacts regarding this matter, the department sent a letter to the taxpayer in January 1989, informing him that the department also had not received Wisconsin individual income tax returns from him for the years 1985 through 1987. In May 1989, the department issued an estimated assessment against the taxpayer for 1985, 1986, and 1987 taxes in the amount of $12,985, for failure to file income tax returns for any of those years.

Again after numerous subsequent contacts, a Special Tax Agent of the department wrote to the taxpayer in July 1992, informing him that his Wisconsin income tax file had been referred to the Intelligence Section for special investigation of possible criminal violations of Wisconsin tax laws, for failure to file Wisconsin individual income tax returns for the years 1981 through 1991, inclusive.

In April 1995, the taxpayer was charged criminally in Milwaukee County Circuit Court, with three counts of failure to file Wisconsin individual income tax returns for 1991, 1992, and 1993. The taxpayer pled guilty and was found guilty by the Milwaukee County Circuit Court on the three counts. He was sentenced in November 1995.

On June 28, 1995, the taxpayer filed Wisconsin individual income tax returns with the department for the years 1981 through 1984, 1987 through 1989, and 1991 through 1994, inclusive. In February 1996, the department issued a Notice of Amount Due in the amount of $46,218, for tax years 1981, 1982, 1983, and 1984. The Notice included additional tax of $13,370 for 1981, 1982, and 1984, as well as 50 per cent penalties for those years, of $6,685. On the same date, the department issued a Notice of Amount Due in the amount of $35,354, for tax years 1991, 1992, 1993, and 1994. The Notice included additional tax of $12,616 for 1991, 1992, and 1993, as well as 100 per cent penalties for those years, of $12,616.

The amounts of the six penalties are not in dispute. In April 1996, the taxpayer filed petitions for redetermination with the department, objecting to the 50 per cent and 100 per cent penalties. The department rejected the taxpayer's position on the penalty issues, and the taxpayer filed timely petitions for review with the Commission.

The taxpayer testified that he did not file state income tax returns in the 1991 to 1993 period because he was afraid that the department would close down or otherwise jeopardize his new business ventures in order to collect back taxes. He testified that he put some of his income during this period back into his business ventures. His income during this period was $97,131 for 1991, $245,974 for 1992, and $101,291 for 1993.

The Commission concluded as follows:

A. The taxpayer's failure to file state income tax returns for 1981, 1982, 1983, and 1984 until June 1995, plus his disregard of a doomage assessment and other official notices, failure to appear at three tax hearings and respond to multiple letters and telephone calls from the department, and many unkept promises to make payments and file returns, fully support a determination that he intended to defeat the tax assessments required by law, subjecting him to the 50% penalty in former sec. 71.11(6), Wis. Stats., for underpayment of tax in 1981, 1982, and 1984.

B. The taxpayer's failure to file state income tax returns for 1991, 1992, and 1993 until June 1995, after he had pled guilty to three counts of "wilfully" failing to file required tax reports for these years, plus his admissions that he was afraid to file returns because they would disclose his substantial income and energize the department to pursue his past non-filings and tax delinquencies, possibly disrupting his new business and preventing him from putting his money back into his business, fully support a determination that he intended to defeat the tax assessments required by law, subjecting him to the 100% penalty in sec. 71.83(1)(b)1, Wis. Stats., for his underpayment of tax in 1991, 1992, and 1993.

The taxpayer has not appealed this decision. □

Refunds, claims for — statute of limitations. *Wisconsin Department of Revenue vs. Kurt H. Van Engel* (Circuit Court for Milwaukee County, February 17, 1998). The department sought review of an April 24, 1997 decision of the Wisconsin Tax Appeals Commission ("Commission"), which allowed the taxpayer's refund claims for 1988 and 1989 to be applied to assessments for 1990, 1991, and 1992, under the equitable recoupment doctrine.

In May 1988, the taxpayer, a Milwaukee businessman, was notified that he was the target of a federal criminal investigation. Although the charges against him were subsequently resolved through the federal legal system, he was, in 1991, indicted by the United States for federal tax crimes. After learning he was the target of a federal criminal investigation and on the advice of counsel, the taxpayer did not file returns for a number of years, including Wisconsin returns for 1988 through 1992. He believed that if he was to timely file his returns he would be confronted with a real hazard of self-incrimination. Although he did not file returns, he did make estimated payments to the State of Wisconsin for each of the years in question.

In March 1995, after the federal criminal proceedings had concluded, the taxpayer filed state income tax returns for 1988 through 1992 with the department. By the time he filed these returns, more than four years had lapsed since the unextended dates when his 1988 and 1989 returns were due. On his 1988 tax return, the taxpayer claimed a refund of $97,562, which he asked to be applied to his 1989 tax; for 1989, he claimed a refund of $71,532 to be applied to his 1990 tax; for 1990, he claimed a refund of $72,625 to be applied to his 1991 tax; for 1991, he claimed a refund of $55,450 to be applied to his 1992 tax; and for 1992, he claimed a refund of $62,890. As a result of adjustments allowed by the department to the taxpayer's 1987 return, the refunds claimed have been reduced. Prior to the adjustment, the refunds for 1988 and 1989 together totaled $169,094.

In August 1995, the department notified the taxpayer that the claims for refund for 1988 and 1989 were rejected, because the returns were filed more than four years after the original due date. Nothing in the record reflects that any communication included a notice that the taxpayer had a right to seek a redetermination of the department's decision or to appeal to the Commission. In fact, the taxpayer did not seek a redetermination of the August 1995 letter.

Subsequently, the department determined deficiencies in the amount of $18,890 for 1990, 1991, and 1992 and issued a notice of assessment in September 1995. The department denied the taxpayer's petition for redetermination, and in July 1996 he sent to the Commission a petition for review covering 1988, 1989, 1990, 1991, and 1992. In that petition, he requested, since "overpayment credits from 1988 and 1989 are in excess of the total tax, interest and penalty balance due . . .," that the credits offset the balance due. On April 24, 1997, the Commission issued its decision which requires the department to offset a portion of the untimely refund claims filed by the taxpayer against the assessments for 1990 through 1992.

The department argued on appeal that the Commission acted in excess of its powers, i.e. outside of its jurisdiction, in applying the equitable recoupment doctrine. It asserted that the Commission has no authority to grant refund claims made more than four years after the "unextended date . . . on which the tax return was due." The department further argued that even if there is jurisdiction to apply the equitable recoupment doctrine, it was improperly applied in this case because even though the taxpayer made estimated payments to cover his tax liability, he did not file timely any tax return for the years 1988 to 1992.

The Circuit Court concluded that the Commission properly determined the relative equities of the parties and properly applied the equitable recoupment doctrine. The Circuit Court agreed with the Commission's finding that 1988 through 1992 is "the tax period involved," and these years are part of the "same transaction" for tax purposes.

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

HOMESTEAD CREDIT

Housing subject to property tax. *Jimmy D. Bean vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 12, 1998). The issue in this case is whether a person who lives in property which is exempt from property taxes is eligible for homestead credit.

Jimmy D. Bean ("the claimant") has resided for a number of years as a renter in an apartment located at 1033 West Atkinson Avenue, Milwaukee. For 1992, 1993, 1994, and 1995, he claimed homestead credits. These credits, which were initially granted, were later disallowed, because the claimant lived in tax-exempt housing for all 12 months in each of these years. The property in question is exempt from property taxes; its owner is a religious order.

A person who lives in property which is exempt from property taxes is not eligible for homestead credit unless the owner of the property makes payments in lieu of taxes under sec. 66.40(22), Wis. Stats. No payments in lieu of taxes are made on the property at issue.

The Commission concluded that the claimant was not eligible for homestead credits for 1992, 1993, 1994, and 1995.

The claimant 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. □

Property taxes accrued — co-ownership. *Calvin B. and Sharon M. Gates vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 5, 1998). The issue in this case is whether the full amount of property taxes may be claimed for computing homestead credit, when the homestead is co-owned with others.

Sharon M. Gates ("the claimant") moved to Franksville, Wisconsin, from Michigan in June 1993. She purchased her mother's portion of a duplex - this portion being 43 per cent of the property.

The property in question needed repairs, so the claimant sought to borrow money to pay these expenses. She was advised by a local banking officer to add the names of her two children to her deed, because her income was too low to qualify for a home equity loan. She quit-claimed her interest in the property to "Sharon M. Gates, Judith K. Zywicki & James A. Behr, Jr., as tenants in common with William R. & Rita L. Cieszynski, Scott W. Cieszynski & Bonnie J. Cieszynski" in a document recorded in November 1994.

In February 1996, the claimant filed for a homestead credit, claiming a property tax payment of $1,479.40. To substantiate her claim, she submitted a copy of her property tax bill, which indicated that the "Net Property Tax Before Lottery" on the duplex was $3,236.96. A lottery credit of $106.02 was then subtracted, leaving a tax of $3,130.94, before ineligible special charges. The claimant's 43 per cent share was $1,346.30.

The Commission concluded that the correct amount of property tax which may be claimed is one-third of $1,346.30, or $448.76. The one-third limitation is derived from sec. 71.52(7), Wis. Stats. Since the claimant's two children were not members of her household, only one-third of the tax she paid on the property may be claimed.

Wisconsin tax rules also permit the claimant to list as a "rent" payment 25 per cent of the remaining two-thirds of the property tax she paid. This "rent" would amount to approximately $225.00. Adding these two amounts yields a total less than the amount required for a person with the claimant's income to qualify for the credit. As a result, no homestead credit is allowed.

The claimant 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. □

Property taxes accrued — more than one unit. *Glendora Miller vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 12, 1998). The issue in this case is whether the claimant

is entitled to additional homestead credit for 1995.

Glendora Miller ("the claimant") is the owner of a duplex located on North 28th Street in Milwaukee. She resides in one part of the duplex; her daughter resides in the other part of the duplex.

The claimant applied for homestead credit for 1995. She reported $12,912 in income and $720.95 in property taxes. After the department calculated her homestead credit as $68, the claimant objected that the credit was too low. The department recalculated the credit based on new information about her income (she received rent income in 1995) and new information about her living situation (the property is a duplex and she resides in one part of the duplex). This calculation showed that the claimant was not entitled to any credit for 1995.

The Commission concluded that even though the claimant pays all the property taxes on her duplex, under sec. 71.52(7), Wis. Stats., she is entitled to claim only that portion of the property tax payment (one-half) which corresponds to **her** residence. In addition, the evidence shows that the claimant inadvertently failed to report any rent payments from the other half of the duplex for 1995. Hence, the department's determination that the claimant was entitled to $68 in homestead credits was actually more generous than the law allowed. She does not qualify for additional homestead credit for 1995.

The claimant 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. □

CORPORATION FRANCHISE AND INCOME TAXES

Deductions — state franchise or income taxes. *Delco Electronics Corporation vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, March 20, 1998). The taxpayer appealed the Wisconsin Tax Appeals Commission's decision that the Michigan single business tax was not deductible by a corporation from its gross income in calculating its liability under the Wisconsin franchise tax. See *Wisconsin Tax Bulletin* 103 (October 1997), page 15, for a summary of the Commission's decision.

The taxpayer, Delco Electronics Corporation ("Delco"), is a subsidiary of General Motors Corporation ("GM") and is engaged in the business of manufacturing automotive electronics. It has plants in Wisconsin, Michigan, and Indiana and engages in business in those and other states. During the years under review, 1986 through 1989, Delco incurred a liability for the Michigan single business tax (MSBT), a form of value added tax (VAT). Delco's Michigan tax was included in the returns of its parent, GM, as provided by Michigan law. For the period under review, Delco claimed its estimated MSBT as a deduction on its federal corporate income tax returns.

Delco timely filed Wisconsin franchise tax returns, claiming in them a deduction for the MSBT equal to the amounts claimed in its federal returns. The department disallowed the deduction for the MSBT.

For 1986, sec. 71.04(3), Wis. Stats., permitted businesses to deduct from its tax base certain other taxes paid by the business except that "[t]axes imposed by this or any other state or the District of Columbia on or measured by all or a portion of net income, gross income, gross receipts, or capital stock are not deductible."

Commencing with tax year 1987, the legislature "federalized" the state corporate tax scheme so that, in general, the corporate franchise and income tax calculation would track the federal corporate income tax scheme. However, Wisconsin adopted several substantial modifications to the federal scheme. Among these was sec. 71.26(3)(g), Wis. Stats., which stated that "Section 164(a)(3) [of the Internal Revenue Code] is modified so that state taxes and taxes of the District of Columbia on or measured by all or a portion of net income, gross income, gross receipts or capital stock are not deductible."

The Circuit Court concluded that because the Michigan single

business tax is manifestly and substantially different from income and gross receipts taxes, it cannot be on or measured by all or a portion of income or gross receipts in the sense intended by the Wisconsin statutes. Therefore, the Court reversed the Commission's decision.

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

Manufacturer's sales tax credit. *Wausau Paper Mills Company vs. Wisconsin Department of Revenue* (Circuit Court for Marathon County, December 2, 1997). The taxpayer appealed the decision of the Wisconsin Tax Appeals Commission upholding a ruling of the department. The department had ruled that the electricity used in the taxpayer's waste treatment plant is not "consumed in manufacturing." Therefore, the sales and use tax paid by the taxpayer on the electricity consumed in the operation of its wastewater treatment plant is not eligible for the manufacturing sales tax credit against the Wisconsin franchise tax. For a summary of the Commission's decision, see *Wisconsin Tax Bulletin* 102 (July 1997), page 15.

The taxpayer is a Wisconsin corporation engaged in the business of the manufacturing of fine printing and writing papers in Wausau, Wisconsin. In its manufacturing process, the taxpayer uses water from the Wisconsin River and the Village of Brokaw which is used as a mixing and transportation medium for the raw materials as well as other manufacturing uses.

In accordance with federal and state environmental standards, the taxpayer must treat the water used in the manufacturing process in is wastewater treatment plant before discharge into the Wisconsin River. The water is removed throughout the manufacturing process, collected by a series of U-drains and closed sewers, and then conveyed from the paper production areas to a sump pump at the head end of a wastewater treatment plant. This plant is adjacent to, but separate and distinct from, the rest of the taxpayer's manufacturing facilities. The use of water is crucial to the paper making process and hence the wastewater treatment plant is essential to the taxpayer's business.

The taxpayer consumes electricity in the operation of the wastewater treatment plant and pays sales and use tax on it under ch. 77, Wis. Stats. The taxpayer contends that the electricity used in its wastewater treatment plant qualifies for the manufacturer's sales tax credit under sec. 71.28(3)(b), Wis. Stats. However, after a field audit, the department disallowed those credits.

The Circuit Court found that sec. 71.28(3), Wis. Stats., is clear and unambiguous. The legislature adopted the popular understanding of "manufacturing" in determining eligibility for the tax credit. The significant contributive factor test is consistent with that traditional and popular understanding of the term.

The argument that the wastewater treatment plant is now legally required and hence a part of the manufacturing process would expand the traditional and popular understanding of what constitutes a manufacturing process. While it is a reasonable legal interpretation, it is not the best interpretation consistent with the legislative intent.

The principal and primary utility of the wastewater treatment plant is not as a significant contributive factor in the production of the end product of the manufacturing process. Instead, its principal and primary utility is to treat the wastewater after it has made its contribution to that process. The treated water does not make a contribution to the manufacturing process but instead is legally discharged into the Wisconsin River.

The Circuit Court concluded that the fuel and electricity expended in the wastewater treatment plant is not "consumed in manufacturing" and hence is not entitled to the tax credit of sec. 71.28(3), Wis. Stats.

The taxpayer has not appealed this decision. □

Refunds — claims after field audit refund. *National Presto Industries, Inc., vs. Wisconsin Department of Revenue* (Court of Appeals, District III, December 23, 1997). The Department of Revenue appealed an order reversing a Wisconsin Tax Appeals Commission's ruling dismissing for lack of jurisdiction National Presto Industries, Inc.'s petition for

review. The department raises two issues: whether (1) National Presto's petition for redetermination was timely under sec. 71.88, Wis. Stats., and (2) a taxpayer can file a refund claim under sec. 71.75(5), Wis. Stats., within two years of a field audit that resulted in a refund. See *Wisconsin Tax Bulletin* 101 (April 1997), page 14, for a summary of the Circuit Court's decision.

National Presto was the subject of an income/franchise tax audit by the department culminating in a document referred to as a notice of field action, dated November 4, 1992, and covering the years 1985, 1986, and 1987. National Presto did not file a petition for redetermination with respect to the notice, but accepted a refund check reflecting a 1987 overpayment minus a 1985 and 1986 underpayment. Approximately 22 months later, on or about September 13, 1994, National Presto filed with the department a letter and attached 1985 tax form 4X, claiming a refund for 1985.

By letter dated November 10, 1994, the department notified National Presto that its refund claim was barred by sec. 71.75(4), Wis. Stats., and was rejected. The letter was sent by ordinary mail and included no explanation of the taxpayer's appeal rights. National Presto did not understand the letter to constitute a statutory denial of its claim and that prompt action was required to appeal it.

Seven months later, on June 13, 1995, National Presto wrote the department objecting to the conclusions reached in the department's November 10, 1994, letter. Through July 17, 1995, the department and National Presto exchanged letters which essentially claimed the other was incorrect in its interpretation of Wisconsin tax law. National Presto ultimately filed a petition with the Tax Appeals Commission.

The Commission granted the department's motion to dismiss, concluding that National Presto failed to file its petition for redetermination within 60 days from the rejection of its refund claim and that its original claim for refund was not timely filed. The Circuit Court reversed the Commission and remanded to the Commission for a decision on the merits.

National Presto contended that the time limits under sec. 71.88(1), Wis. Stats., were not triggered because the department failed to include in its denial of National Presto's claim the notice of appellate rights, as required by sec. 227.48, Wis. Stats. National Presto also argued that equitable estoppel prevented the department from applying the sec. 71.88(1), Wis. Stats., time limits because its failure to include notice of appellate rights is inconsistent with its publications and practices.

The Court of Appeals concluded that sec. 227.48, Wis. Stats., does not apply; no specific statute or regulation requires that the department notify the claimant of appellate rights under the circumstances presented here; and a rational basis exists to deny National Presto equitable relief. Therefore, the Court of Appeals reversed the Circuit Court order without reaching the broader second issue.

The taxpayer has not appealed this decision. □

SALES AND USE TAXES

Construction — exempt entities. *Precision Metals, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 7 and May 13, 1998). The issue decided in the partial summary judgement of January 7, 1998, is whether the taxpayer acted as a contractor or subcontractor engaged in real property construction activities for purposes of sec. 77.51(2), Wis. Stats., and is thus liable for use tax on its purchase of raw materials.

The taxpayer's primary business is that of custom manufacturing and selling hollow metal frame products. The taxpayer submitted three separate bids to the City of Milwaukee Housing Authority ("Housing Authority") to supply the prime door and hardware at each of three housing projects. The taxpayer also submitted three separate bids to install the prime door and hardware at each of the three housing projects. A bid bond was also submitted by the taxpayer for each of the six bids submitted to the Housing Authority.

The Housing Authority acted as a general contractor. The taxpayer was awarded all six bids. To fulfill each of the supply contracts, the taxpayer purchased

raw materials and then used these materials to manufacture property that it delivered to various housing projects at times determined by the Housing Authority. To fulfill each of the installation contracts, the taxpayer installed the property it previously manufactured and delivered to the housing projects at the direction of the Housing Authority.

The taxpayer presented manufacturer's exemption certificates and paid no sales tax on any of the raw materials it purchased and used in the manufacture of the property supplied to the Housing Authority. The department assessed use tax, interest, and penalties on the cost of raw materials used by the taxpayer to manufacture property that it supplied to the Housing Authority.

Section 77.51(2), Wis. Stats., provides that "'Contractors' and 'subcontractors' are the consumers of tangible personal property used by them in real property construction activities and the sales and use tax applies to the sale of tangible personal property to them. . . . A contractor engaged primarily in real property construction activities may use resale certificates only with respect to purchases of property which the contractor has sound reason to believe the contractor will sell to customers for whom the contractor will not perform real property construction activities involving the use of such property."

The taxpayer claimed that it acted as a manufacturer when it submitted bids to the Housing Authority, and its bids on the installation contracts were separate and distinct from its bids on the supply contracts. The taxpayer asserts that the Housing Authority was the general contractor and the consumer of the property supplied.

The Commission concluded that the taxpayer is liable for use tax under sec. 77.51(2), Wis. Stats., because it acted as a contractor or subcontractor engaged in real property construction activities with regard to the six contracts with the Housing Authority.

The taxpayer and the department reached an agreement with respect to remaining issues, and both parties signed a stipulation in May 1998. The Commission affirmed the stipulation on May 13, 1998. The case is closed. □

Motor vehicles and trailers — payment of tax before registration. *Albert Berchanskiy vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1998). The issue in this case is whether the department correctly assessed the taxpayer sales tax on an amount higher than the taxpayer's claimed purchase price of an automobile.

The taxpayer purchased a 1987 Honda Accord from a private party seller. Upon titling and registering the vehicle with the Wisconsin Department of Transportation, the taxpayer listed a purchase price of $1,200. The taxpayer paid Wisconsin sales tax based on that amount.

The department contacted the seller, requesting information about the selling price of the automobile. The seller responded that the automobile had been sold for $3,300 to the taxpayer. The department assessed the taxpayer the additional sales tax, interest, and penalty on the difference.

Upon reflection, the seller acknowledged that his recollection of a cash payment of $3,300 was not accurate, but he insisted that he would not have sold the vehicle for less than $3,000. The seller had purchased the vehicle for $4,338 less than one year before selling the vehicle to the taxpayer. The seller listed a selling price of $3,200 in the newspaper advertisement. The taxpayer did not provide any proof of his purchase price of the vehicle.

The Commission modified the determination of the department to reflect a sale price of $3,000. The Commission acknowledges that the sale may have been for less than $3,000; however, it has no basis for picking a lesser figure based on the evidence presented.

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. □

Motor vehicles — rebates. *David and Carole Schenker vs. Wisconsin Department of Revenue* (Wisconsin tax Appeals Commission, March 11, 1998). The issues in this case are:

A. Whether the definition of "gross receipts" set forth in sec. 77.52(4)(c)1, Wis. Stats., includes amounts received by a retailer from a manufacturer in the form of a manufacturer's rebate or employe discount.

B. Whether amounts received by a retailer from a manufacturer in the form of a manufacturer's rebate or employe discount are excluded from the definition of "gross receipts" by sec. 77.51(4)(b)1, Wis. Stats., as cash or term discounts.

The taxpayers purchased two vehicles on separate occasions from Burtness Chevrolet, Inc. ("the dealer"). On each purchase, the dealer computed the amount due as follows: cash price of auto, less trade-in allowance, plus applicable sales tax (on trade difference), plus license and title fees, less manufacturer's rebate and employe discount. The taxpayer paid the amount computed by the dealer for the automobiles.

The taxpayers filed a Buyer's Claim for Refund of Wisconsin state and county sales taxes. The refund claimed was for sales tax paid on the portion of the purchase price of the two motor vehicles represented by the manufacturer's rebates and employe discounts. The department denied the taxpayers' claim for refund.

The Commission concluded that the department was correct in denying the taxpayers' claim for refund:

A. The definition of "gross receipts" for purposes of the sales tax includes manufacturer's rebates and employe discounts where the manufacturer of the tangible personal property sold compensates the retailer for the amount of the rebate and discount allowed (sec. 77.51(4)(a) and (c)1, Wis. Stats.).

B. Manufacturer's rebates and employe discounts are not cash or term discounts excluded from the definition of gross receipts where the manufacturer of the tangible personal property sold compensates the retailer for the amount of the rebate and discount allowed.

The taxpayers have appealed this decision to the Circuit Court.

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. □

Officer liability. *Frank A. Calarco vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent sales taxes of Dimicelli's Charthouse, Inc. ("the corporation") under sec. 77.60(9), Wis. Stats.

The taxpayer was hired by the corporation during the last week of May 1993 to manage the restaurant portion of its operation. As of May 28, 1993, the taxpayer had sole check-writing authority for the corporation. Until he resigned, the taxpayer signed checks on behalf of the corporation.

The taxpayer resigned from the corporation no later than August 29, 1993. The corporation continued to operate; however, after he resigned, the taxpayer was not involved in any of the corporation's affairs. The taxpayer signed all of the corporation's checks during August 1993. When the taxpayer resigned, he reasonably believed that there would be operating funds available to pay the corporation's August 1993 sales tax liability at the time the payment for that month was due.

The taxpayer did not manage the bar operations of the corporation and was only tangentially involved in the bar operations. Ultimate decisions concerning restaurant and bar operations were made by one of the corporation's owners, Frank Dimicelli, including decisions concerning which creditors and vendors were to be paid. During the summer of 1993, Dimicelli died.

The Commission concluded that the taxpayer was not a responsible person under sec. 77.60(9), Wis. Stats., and was not personally liable for the unpaid sales taxes.

The taxpayer can be held liable for the sales tax obligations of the corporation if the following elements are met: 1) the taxpayer had **authority** to direct payment of the corporation's taxes, 2) the taxpayer had a **duty** to pay the corporation's taxes, and 3) the taxpayer **intentionally breached his duty** to pay the corporation's taxes.

The taxpayer's last day of employment was no later than August 29, 1993, and the sales tax payment at issue was due on September 20, 1993. The taxpayer no longer had the **authority** to pay these taxes at the time that the sales taxes were due to be paid. A person who does not have authority to pay sales taxes when the sales taxes are due to be paid cannot be held liable for their non-payment under sec. 77.60(9), Wis. Stats.

The department has not appealed this decision. □

Time-share property. *Vacation Owner's Association, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 3, 1998 and April 2, 1998). The issues in the case are:

A. Whether the taxpayer is liable for the sales tax on the proceeds from sales of time-share property sold, under sec. 77.52(2)(a)1, Wis. Stats.

B. Whether the taxpayer is liable for sales tax on its receipts from members in the form of conveyance and maintenance fees associated with time-share units sold on or after August 9, 1989, under sec. 77.51(4)(c)6, Wis. Stats.

C. Whether the taxpayer is liable for sales tax on its receipts from members in the form of conveyance and maintenance fees associated with time-share units sold prior to August 9, 1989, under sec. 77.52(2)(a)1, Wis. Stats.

The taxpayer is a Wisconsin nonstock corporation with its principal place of business in Oconomowoc, Wisconsin. The taxpayer was in the business of managing certain time-share property within a complex. The taxpayer also sold a small number of time-share units.

During the period under review, the taxpayer did not collect or pay to the department any sales or use tax on its: 1) sale of time-share property, 2) collection of conveyance fees, or 3) collection of maintenance fees. The time-share property managed and sold consisted of time-share units that are commonly referred to as flexible use time-share units.

Use of a member's time-share property was contingent on that member's making a timely reservation. Members were designated a "unit type" rather than a specific unit number. Members were issued the right to use the time-share property during a "season" rather than a specific week or any other date. A conveyance fee was paid by members to the taxpayer, who placed these fees in a fund that was to be used to pay expenses associated with time-share property managed by the taxpayer. Members paid maintenance fees on an annual basis to be used for: 1) operation, repair, maintenance, and improvement of time-share property; 2) administration of the taxpayer's vacation plan; and 3) reimbursing the taxpayer's expenses to manage the time-share property. A member could not reserve or occupy a time-share unit if the member was not current on the member's maintenance fee obligation.

The Commission concluded as follows:

A. The taxpayer is liable for sales tax on the proceeds from the sale of time-share property sold during the period at issue.

B. The taxpayer is liable for sales tax on the amounts it received from members in the form of conveyance fees and maintenance fees associated with time-share units that were sold on or after August 9, 1989.

C. The taxpayer is not liable for sales tax on the amounts it received from members in the form of maintenance fees associated with time-share units that were sold before August 9, 1989.

The payment of a one-time conveyance fee is part and parcel of the sales price of the time-share property. Therefore, this fee is taxable under sec. 77.52(2)(a)1, Wis. Stats. In addition, all conveyance fees at issue fall within the definition of "gross receipts" found in sec. 77.51(4)(c)6, Wis. Stats., because

such charges are associated with the time-share property that is taxable under sec. 77.52(2)(a)1, Wis. Stats.

Maintenance fees are "gross receipts" because they are charges associated with time-share property as provided in sec. 77.51(4)(c)6, Wis. Stats. Section 77.52(2)(a)1, Wis. Stats., was amended effective August 9, 1989, to apply to the sale of flexible use time-share property. Time-share property sold before August 9, 1989 is not time-share property that is taxable under sec. 77.52(2)(a)1, Wis. Stats. Maintenance fees charged for time-share property that was sold prior to August 9, 1989 do not fall within the definition of gross receipts in sec. 77.51(4)(c)6, Wis. Stats.

The taxpayer has not appealed the decision. The department did not appeal the decision but has adopted a position of nonacquiescence regarding the application of sec. 77.54(18), Wis. Stats., to maintenance fees charged in connection with time-share units sold prior to August 9, 1989.

The department maintains that modification on or after August 8, 1989, of any written contractual document or agreement "by which the seller is unconditionally obligated to provide the service or property for the amount fixed under the contract" within the meaning of sec. 77.54(18), Wis. Stats., subjects the seller of such services and property to sales taxation as of the date of modification of the contractual document or agreement. The department also maintains that, with respect to time-share units sold prior to August 9, 1989, sec. 77.54(18), Wis. Stats., subjects the payer of any maintenance fees for periods on or after August 9, 1989, to use tax even if such a contractual document or agreement is not modified. □

WITHHOLDING OF TAX

Officer liability. *Kathy J. Keimig vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 6, 1998). The issue in this case is whether the taxpayer is a responsible person under sec 71.83(1)(b)2, Wis. Stats.

The taxpayer owned all of the stock of Family Care Center, SC. ("the company") and was a member of the company's board of directors. During the period under review, the taxpayer was president and vice-president of the company. The taxpayer was also employed by the company as a physician, and was a signatory on the company's checking and savings accounts. At all times, the taxpayer had the authority to hire and fire employes of the company.

Prior to the period under review, the taxpayer hired an office manager to handle the business finances of the company. After the taxpayer discovered that the office manager had not paid certain state and federal tax obligations (including state withholding tax payments), the taxpayer took charge of paying the company's accounts payable. The taxpayer continued to favor other creditors over the company's obligation to remit withholding tax payments.

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

During the period under review, the taxpayer was the company's sole shareholder and served as president and vice-president. Therefore, as a matter of law, the taxpayer had *authority* to pay the company's taxes. The taxpayer's *duty* to pay the amounts owed to the department arose as soon as she became aware of the company's withholding delinquency. Once a person with authority to pay taxes learns that amounts are owing, that person has a *duty* to make sure such taxes are paid. The taxpayer concedes that after she became aware of the company's tax delinquency, she caused the use of the company funds to pay creditors while the amounts owed to the department went unpaid. This is sufficient to show that the taxpayer *intentionally breached her duty* to pay taxes owed to the department.

The taxpayer has not appealed this decision. □

SALES AND USE TAXES, AND WITHHOLDING OF TAXES

Officer liability. *James M. Callen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 25, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent withholding and sales taxes of Packline USA, Inc. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats.

The taxpayer became a 5% stockholder of the corporation in May 1994. He also became a member of the corporation's Board of Directors and received a contract to serve as the sole advertising agent of the corporation for a commission based on sales. When the corporation experienced financial problems in 1994, the taxpayer invested an additional $135,000 in the corporation in the form of a loan to the principal stockholder. When the corporation continued to face financial problems, the taxpayer agreed to assume the position of president of the corporation and to cosign all checks with the corporation's principal stockholder. The taxpayer was also made a member of a 3-person executive committee to make corporate decisions. The taxpayer became aware of the corporation's delinquencies in withholding and sales and use taxes at this time (July 1994).

The taxpayer served as president until September 1994, when he resigned. During the time that he served as president, the corporation continued to operate, but no withholding or sales taxes were remitted to the department. During that time the taxpayer cosigned checks to employes and other creditors drawn on both the payroll and non-payroll checking accounts. The corporation went out of business at the end of 1994.

The Commission concluded that the taxpayer is a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats., and that he is personally liable for the unpaid withholding and sales taxes up to the time that he resigned as president in September 1994. The taxpayer had the **authority** and the **duty** to pay the corporation's withholding and sales taxes that were due prior to his resignation, and the taxpayer **intentionally breached that duty**. He is not personally liable, however, for the taxes which became due after he resigned.

The taxpayer served as the president and had **authority** to direct corporate decisions and to control what payments were made to creditors from July 1994 through September 1994, which included sales and withholding tax delinquencies from earlier in 1994. There is no evidence of **authority** after September 1994 when the taxpayer resigned as president. The taxpayer *can* be held personally liable for any subsequent estimated assessments issued by the department against the corporation due to the taxpayer's failure to see to the timely filing of actual returns while he was president and *did* have **authority**.

The taxpayer knew of the corporation's tax delinquencies. Knowing that such tax problems existed, the taxpayer was **duty-bound** to address them upon assuming the presidency, even though he believed that the major stockholder had assumed responsibility for the unpaid taxes which accrued while the major stockholder was president. The taxpayer did not see to the payment of those taxes or the current taxes as he was **duty-bound** to do. The taxpayer paid at least $35,000 to creditors other than the department while he was president and cosigning corporate checks. This establishes his **intentional breach of duty**.

The taxpayer has not appealed this decision. The department has not appealed the decision but has adopted a position of nonacquiescence in regard to the part of the decision that concludes that personal liability does not attach until a failure to pay occurs, i.e. when the return is due. The effect of this action is that the decision regarding this issue is not binding in cases other than this case. □

Officer liability. *Kenneth Higgs and Richard F. Wagner vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 11, 1998). The issue in this case is whether the taxpayers are responsible persons who are liable for the delinquent withholding and sales taxes of the Fourth Street Corporation ("the corporation") under sec. 71.83(1)(b)2, Wis.

Stats. and sec. 77.60(9), Wis. Stats.

The Milwaukee Turners Foundation, Inc. ("the Turners") is a tax exempt, non-profit organization prominent in Milwaukee for many years. In 1969, the Turners created the corporation as a for-profit corporation to operate a restaurant and bar in a historic building owned by the Turners. In 1991, the Turners board recruited, nominated, and elected the taxpayers to serve as president and vice-president and on the corporation's board without compensation. Both taxpayers accepted their positions with the corporation with the belief that they were volunteers in an honorary capacity and with the understanding that they would not be involved in the day-to-day business operations of the corporation.

Taxpayer Wagner joined taxpayer Higgs in setting up a special tax account to pay back taxes. He personally wrote numerous checks on that tax account. He admitted he knew about actions taken by taxpayer Higgs to address the corporation's adversities. Taxpayer Higgs was the principal officer of the corporation, with full check-signing authority on both its regular checking account and its tax account.

The Commission concluded that the taxpayers are both responsible persons under secs. 71.83(1)(b)2 and 77.60(9), Wis. Stats., and that they are personally liable for the unpaid withholding and sales taxes. The officers of a corporation have a legal **duty** to see that the corporation's taxes are timely paid. Both taxpayers had **authority** to pay taxes, understanding of the obligation to pay taxes, and **intentionally breached their duty** to pay the taxes due. The fact the taxpayers were volunteers does not excuse them from personal liability.

The taxpayers have not appealed this decision. □

Officer liability. *Scott W. Wolf vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 3, 1998). The issue in this case is whether the taxpayer is a responsible person who is liable for the delinquent sales and withholding taxes of Truck Equipment & Service Co, Inc. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats.

The taxpayer was employed by the corporation from June 1994 through May 1995 as its general manager and vice-president. The taxpayer was hired by the president, who resides primarily in Florida. In June 1994, the taxpayer was added to the signature card on the corporation's checking account. The taxpayer became aware of the corporation's delinquency in withholding and sales and use taxes in June 1994, upon which the taxpayer called the department to negotiate payment arrangements. An installment agreement, which included staying current on all withholding and sales and use taxes accruing after the date of the agreement, was made between the department and the taxpayer, who was the corporation's primary contact. The corporation did not comply with the terms of the agreement.

From June 1994 until March 1995, the taxpayer signed checks on behalf of the corporation, paying the corporation's creditors and employes. The taxpayer signed some, if not all, of the corporation's withholding tax deposit reports. The taxpayer also signed some of the corporation's sales and use tax returns. After the corporation's checking account was closed in March 1995, the taxpayer paid the employes in cash. The taxpayer also negotiated with many of the corporation's creditors in an effort to settle debts owed by the corporation.

The Commission concluded the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats. and sec. 77.60(9), Wis. Stats., and was personally liable for the corporation's unpaid withholding and sales taxes. The taxpayer had the **authority** and the **duty** to pay the corporation's withholding and sales and use taxes, and the taxpayer **intentionally breached that duty**.

The taxpayer served as the vice-president and had **authority** to make financial decisions for the corporation. The taxpayer was a signatory on the corporation's checking account, signed the corporation's checks, and negotiated payment arrangements with the department as well as other creditors.

When the taxpayer learned that the corporation had an unpaid tax obligation, he had a **duty** to see that it was paid. The taxpayer learned of the tax delinquencies no later than June 1994. From that point, as a person with **authority** to direct the payment of taxes, the taxpayer had a **duty** to make sure that they were paid. The taxpayer favored other creditors and suppliers over the corporation's obligations to the department. This establishes that the taxpayer **intentionally breached his duty** to direct payment of taxes to the department.

The taxpayer has not appealed this decision. □

Tax Releases

"Tax releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. Unless otherwise indicated, tax releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.

The following tax releases are included:

Corporation Franchise and Income Taxes

1. Basis in Tax-Option (S) Corporation Stock When Losses in Excess of Basis Were Claimed in Closed Years (p. 27)

2. Wisconsin Tax Treatment of Limited Service Health Organizations (LSHOs) (p. 28)

3. Years in Which a Wisconsin Net Business Loss Carryforward May Be Used (p. 29)

Sales and Use Taxes

4. Boat Launching Fees (p. 31)

5. Common and Contract Carrier Exemption (p. 31)

6. House Watching Services (p. 37)

7. Iced Coffee (p. 38)

CORPORATION FRANCHISE AND INCOME TAXES

1 Basis in Tax-Option (S) Corporation Stock When Losses in Excess of Basis Were Claimed in Closed Years

Statutes: Sections 71.33 and 71.365, Wis. Stats. (1995-96)

Background: Under secs. 1366 and 1367 of the Internal Revenue Code (IRC), a shareholder's federal basis in stock of an S corporation is increased by income items and decreased by expense and loss items which flow through from the S corporation to the shareholder. A shareholder's basis in stock and loans to the corporation may not go below zero. Any expense or loss item which is not deductible by the shareholder due to the basis limitation may be carried over indefinitely by the shareholder and allowed as a deduction when the shareholder has sufficient basis to deduct the expense or loss item.

Section 71.365, Wis. Stats. (1995-96), provides that the adjusted basis of a shareholder in the stock and indebtedness of a tax-option (S) corporation shall be determined in the manner prescribed by the Internal Revenue Code for a shareholder of an S corporation, except that the nature and amount of items affecting that basis shall be determined under ch. 71, Wis.