

## **Report on Litigation**

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin each decision indicates whether the case has been appealed to a higher Court.

two children, Samantha and Theodore Heilman, both born on November 18, 1981.

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### Withholding of Taxes

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Susan F. Heilman ("Susan") is petitioner with David with regard to an assessment for 1992. Susan and David were married from October 1986 to February 1995, when they were divorced.

On January 23, 1984, Sally and David were granted a Judgment of Divorce. The Final Stipulation, incorporated into the Judgment of Divorce, stated that David shall pay \$250.00 per month to Sally as and for family support. The Stipulation also stated that for tax purposes the family support payments shall be taxable to the recipient and deductible by the payor.

On May 9, 1989, the amount of monthly family support was raised to \$375.00. The Judgment of Divorce was again amended on March 4, 1992, by the Family Court Commissioner, to set child support at 25% of gross income but not less that \$57.50 per week. Other than those two amendments, no changes to the divorce judgment have been filed with any court.

David claimed an alimony deduction for 1992, 1993, and 1994. Sally did not report the receipt of alimony income in any of those years.

In October 1996, the department sent Sally an assessment notice, which asserted that she had failed to report alimony payments for 1992, 1993, and 1994. Sally timely petitioned for redetermination, the petition was denied, and she timely appealed to the Commission.

### INDIVIDUAL INCOME TAXES

Alimony. Sally A. Heilman, David W. Heilman, and David W. and Susan F. Heilman vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 8, 1998). The principal issue in this case is whether payments made by David Heilman to Sally Heilman in 1992, 1993, and 1994 were "family support payments" – deductible each

year as alimony by David and includable each year as income by Sally, under Sections 71 and 215 of the Internal Revenue Code — or whether the payments were "child support" — not deductible as alimony or includable as income, under the same sections.

Sally A. Heilman ("Sally") and David W. Heilman ("David") were married from October 1974 to January 1984. They are the parents of

In November 1996, the department sent David an assessment for 1993 and 1994, which added back his alimony deductions for those two years. The notice explained in part that since there was a disagreement between him and his former spouse concerning the taxability of the income/expense, an assessment in the alternative was being issued, in order to resolve the disagreement. The assessment found several other problems with David's returns, including his filing as a single person when he was still married.

David timely petitioned for redetermination, his petition was denied, and he timely appealed to the Commission.

In October 1996, the department sent to David and Susan an assessment notice for 1992. The assessment related to their deduction of alimony payments made to Sally for that year. David timely petitioned for redetermination, his petition was denied, and he timely appealed to the Commission. Susan was also listed as a petitioner because the assessment involved a jointly filed return.

The Commission concluded that the Family Court Commissioner's 1992 modification of the 1984 divorce judgment did not convert David Heilman's periodic "family support" payments to his former wife Sally (which were tax deductible) into "child support" payments (which were not deductible), because the modification did not expressly provide that David Heilman's tax status was being changed and that his payments would be affected by revised Sections 71 and 215 of the Internal Revenue Code, as required by Section 422(e)(2) of Public Law 98-369.

The Commission reversed the portion of the assessments against

David and Susan Heilman relating to the disallowance of the alimony deductions. It affirmed the portion of the assessments against David Heilman relating to other issues, including his filing as a single person while he was still married. The Commission also affirmed the assessment against Sally Heilman, which added previously omitted alimony income.

Neither the department nor the taxpayers have appealed this decision.  $\square$ 

Farm loss limitation. David G. Stauffacher, et al. vs. Wisconsin Department of Revenue, et al. (Circuit Court for Dane County, August 19, 1998). The Wisconsin Tax Appeals Commission ("Commission") issued a decision in this case on March 4, 1998. See Wisconsin Tax Bulletin 110 (July 1998), page 13, for a summary of that decision.

On April 2, 1998, the taxpayers filed a petition for review of the Commission decision, in Dane County Circuit Court. On April 8, 1998, they personally delivered a copy of the summons and petition for judicial review to the Commission, and a copy was also received by the Department of Revenue on April 8, 1998.

A motion to dismiss was filed by the department, on the basis that the taxpayers did not file and serve upon the department a copy of the summons and petition within 30 days of service of the decision of the Commission. The department argues that because the taxpayers failed to serve the appropriate agencies within thirty days, the Circuit Court has lost subject matter jurisdiction.

The Circuit Court concluded that because the taxpayers failed to file the petition for review and serve it upon the Department of Revenue within 30 days after the decision of the Commission was issued, the Circuit Court has no competency to proceed. The action was therefore dismissed.

The taxpayer has not appealed this decision.  $\Box$ 

# INDIVIDUAL INCOME TAXES AND SALES AND USE TAXES

Motor vehicles and trailers. David L. Benson d/b/a
Eau Claire Auto Exchange West, and
David L. and Cheri K. Benson vs.
Wisconsin Department of Revenue
(Wisconsin Tax Appeals Commission, August 13, 1998). The issues in this case are:

- A. Whether sales and use tax adjustments made by the department on the taxpayers' purchases and sales of motor vehicles are correct.
- B. Whether income tax adjustments made by the department on the taxpayers' purchases and sales of motor vehicles are correct.
- C. Whether certain expenses, including expenses for office, travel, parts, repairs, insurance, utilities, property tax, buy backs, attorney fees, and property taxes, were correctly disallowed by the department.
- D. Whether the taxpayer received unreported income from warranty work.
- E. Whether the taxpayer's non-asset purchases are subject to use tax.
- F. Whether the department correctly assessed use tax on dealer plates.
- G. Whether the department correctly assessed use tax on the taxpayer's purchase of a boat.

The taxpayers operate a used automobile dealership. The department made sales, use, and income tax assessments, many of which related to the taxpayers' sales and purchases of numerous motor vehicles, for periods covering 1989-1992. In December of 1996, the parties resolved the amounts owed to the department for 1991-1992 with regard to income tax.

The department made sales tax adjustments on motor vehicles relating to purchase and sales prices, trade-in amounts, and collecting, reporting, and remitting sales tax. Income tax adjustments on motor vehicles were made for purchase and sales prices, trade-in amounts, adjustments to the basis of vehicles, and claiming a loss for a junked vehicle that was never owned by the taxpayer.

The department assessed the taxpayers income tax on certain expenses claimed. The department also assessed the taxpayers income tax on warranty work, assuming an annual income of \$1,000 from such work. In settling years 1991-92, the taxpayers agreed to the \$1,000 adjustments for each year for warranty work.

The department assessed use tax on the taxpayers' non-asset purchases, dealer plates, and purchase of a boat.

The Commission concluded the following:

- A and B. Upon review of each adjustment on the sales and purchases of vehicles on an individual basis, and, with slight modifications, the Commission affirmed the department's adjustments for sales and use taxes and income taxes.
- C. The Commission affirmed the department's disallowance of the taxpayers' expenses. The tax-

payers were not able to demonstrate that the expenses claimed had not already been claimed on their income tax returns. For some expenses, the taxpayers were unable to show that the expenses were business related rather than personal.

- D. The Commission reversed the department's adjustment to income for warranty repair work. The taxpayers' concession to this adjustment for 1991-1992 in the context of a settlement cannot be considered an admission that this adjustment is correct for 1989-1990.
- E. The taxpayers failed to substantiate any objection to the department's imposition of use tax on non-asset purchases; therefore, the Commission affirmed the department's action.
- F. The Commission affirmed the department's adjustments for use tax on dealer plates. The taxpayers failed to provide any records concerning the retention, demonstration, or display of cars with dealer plates.
- G. The Commission affirmed the department's imposition of use tax on the boat. The taxpayers presented no evidence or theory why they should not be liable for use tax on the boat, nor did they present evidence that they paid sales tax when they purchased the boat.

Neither the taxpayer nor the department has appealed this decision.  $\Box$ 

### SALES AND USE TAXES

Boats, vessels and barges - nonresident purchases. Charles K. Harder vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 19, 1998). The issue in this case is whether the taxpayer's purchase of a sailboat qualifies for exemption from use tax under sec. 77.53(17m), Wis. Stats.

On March 17, 1994, the taxpayer, a Minnesota resident, purchased a sailboat. The taxpayer and the sellers met in Minnesota to close on the sale. At closing, the taxpayer and the sellers executed a Bill of Sale that transferred the sellers' "right, title, and interest" in the sailboat to the taxpayer.

From before the date of closing until the taxpayer took physical possession of the sailboat several weeks later, the sailboat was berthed in Lake Superior, at Port Superior in Wisconsin. The sailboat continued to be berthed at Port Superior and used in the boundary waters of Wisconsin in the years following the taxpayer's purchase of the sailboat. The taxpayer's purchase of the sailboat was an exempt occasional sale under the laws of Minnesota.

The department assessed the taxpayer use tax and interest based upon the sales price of the sailboat.

Section 77.51(14r), Wis. Stats., provides that "A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place when and where possession is transferred by the seller . . . to the purchaser . ." The department contends that the taxpayer took possession of the sailboat in Wisconsin, for purposes of sec. 77.51(14r), Wis. Stats., when he physically visited the sailboat several weeks after closing.

The taxpayer argues that the purchase of the sailboat qualifies for exemption under sec. 77.53(17m), Wis. Stats., which provides a use tax exemption for "... a boat purchased

in a state contiguous to this state by a person domiciled in that state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state in which the purchase was made."

The Commission concluded that the taxpayer qualifies for exemption under sec. 77.53(17m), Wis. Stats., because *constructive possession* of the sailboat transferred at the closing in Minnesota. The taxpayer met the other elements of this exemption: the taxpayer is a resident of Minnesota, the sailboat was berthed in Wisconsin's boundary waters adjacent to Minnesota, and the purchase of the sailboat was an exempt occasional sale under the laws of Minnesota.

The department has appealed this decision to the Circuit Court.

Containers, packaging and shipping materials - delivery of newspapers. Madison Newspapers, Wisconsin Inc. ν. Department of Revenue (Circuit Court for Dane County, September 1, 1998). The Wisconsin Tax Appeals Commission issued a decision on January 28, 1998, which was appealed to the Circuit Court. See Wisconsin Tax Bulletin 107, page 16, for a summary of the January 28, 1998 decision. The issue is whether the Commission was correct in determining that the taxpayer's carriers are *not* its "customers" for purposes of the exemption from sales tax for materials packaging in sec. 77.54(6)(b), Wis. Stats.

The taxpayer produces and distributes two newspapers. It seeks a use tax exemption on its purchases of string, strap, and other wrapping and packaging materials that it used to bind bundles of newspapers which were then delivered to route carriers under contract directly with the taxpayer for subsequent delivery to home subscribers.

Section 77.54(6)(b), Wis. Stats., provides an exemption for the gross receipts from the sale of and the storage, use or consumption of "Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property, *if such items are used by the purchaser to transfer merchandise to customers...*" (Emphasis added.)

The Court affirmed the decision of the Commission that the carriers were not the taxpayer's customers. The Court concluded that the Commission's decision was free from material legal errors and supported by substantial evidence. The taxpayer's purchases of string, strap, and other wrapping and packaging materials that it used to bind bundles of newspapers which were then delivered to route carriers, do not qualify for exemption under sec. 77.54(6)(b), Wis. Stats.

The taxpayer has appealed this decision to the Court of Appeals.  $\Box$ 

Penalties - negligence. Wimmer Construction, Inc., vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 22, 1998). The issue in this case is whether the department properly imposed the negligence penalty pursuant to sec. 77.60(4), Wis. Stats.

Ronald C. and Joan Wimmer ("the owners") are the owners and officers of Wimmer Construction, Inc. ("the corporation"), which is a construction business incorporated in 1971. The owners also own, together or individually, three other corporations. These corporations all held

Wisconsin seller's permits and filed monthly sales tax returns.

The corporation was previously audited by the department for the years 1982 - 1984, at which time the corporation was assessed unpaid taxes, interest, and late filing fees, primarily for failure to pay use tax on purchases of tangible personal property.

Sales and use tax was assessed against the taxpayer as a result of a department field audit covering years 1989 - 1992. During the course of this audit, the corporation, at the request of the department, obtained a Wisconsin seller's permit for the first time. The department imposed the negligence penalty in sec. 77.60(4), Wis. Stats., for the following reasons: 1) the failure of the corporation to obtain a seller's permit; 2) procedures to collect the sales and use tax were established during the audit period; 3) the owners were aware of sales and use tax law because they owned other entities which held sellers' permits; 4) no effort was made prior to the audit to find out applicable law; 5) the additional measure of sales and use tax uncovered by the audit was "considerable;" and 6) no reasonable reason for the failure to report the tax was presented by the corporation.

The corporation contended that the department had not asked the corporation to obtain a seller's permit and file sales tax returns after the earlier audit. The corporation also argued that the owners have no educational background in tax, finance, accounting, or auditing, and that its financial statements were fully audited by certified public accountants.

The Commission concluded that the department properly assessed the negligence penalty. It was not reasonable for the owners and officers

to rely on the determination of the prior audit as a clean bill of health for all future transactions. Nor was it reasonable to ignore the law concerning obtaining a seller's permit and filing returns where the corporation engaged in taxable transactions.

The Commission also concluded that it was neglect for the corporation's owners and officers to fail to inform themselves concerning the sales and use tax law pertaining to the taxable purchases and sales transactions involved in the assessment; and it was neglect for them to fail to pay sales and use tax on those transactions. The corporation argued that it relied on its accountant for advice; however, such reliance does not constitute "reasonable cause" under sec. 77.60(4), Wis. Stats.

The taxpayer has not appealed this decision.

# Printing - advertising materials sent out-of-state.

Sax Arts & Crafts, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 12, 1998). The issues in this case are:

- A. Whether the department properly imposed a tax upon the purchase in Wisconsin of unprinted paper to be used in catalogs printed in Wisconsin by third parties and mailed free of charge to addresses outside the state.
- B. Whether a tax was properly imposed upon unprinted paper purchased outside Wisconsin to be used in advertising catalogs printed in Wisconsin and subsequently mailed by the printers to addresses in Wisconsin.
- C. Whether a tax was properly imposed upon 2% of printing

- services purchased by the taxpayer in Wisconsin from printers for catalogs mailed to Wisconsin addresses.
- D. Whether a tax was properly imposed upon 100% of certain purchases of tangible personal property, such as consumer commercial labels, spill-x neutralizers, flammable labels, ink rollers, bogan adapter, and lamps that were used or consumed in printing the taxpayer's catalogs.
- E. Whether a tax was properly imposed upon 2% of the envelopes used to contain finished catalogs mailed out by the taxpayer's printers to Wisconsin addresses.
- F. Whether a tax was properly imposed upon 100% of the purchases of envelopes used for ordering merchandise by recipients of the taxpayer's catalogs.
- G. Whether a tax was properly imposed upon 100% of the purchases of finished art that were consumed or used in the production, manufacturing, and printing of the taxpayer's catalogs.

The facts of this case are as follows:

- The taxpayer is a Delaware corporation that maintains its principal place of business in Wisconsin.
- The taxpayer is a direct seller of school supplies, arts and crafts supplies, and other related items.
- The taxpayer distributed catalogs that advertised its merchandise to customers and potential customers on a nationwide basis.
- The taxpayer did not charge the overwhelming majority of its customers for the catalogs.

- The taxpayer purchased the unprinted paper used to print its catalogs from Wisconsin and out-of-state merchants who, at the direction of the taxpayer, had the unprinted paper shipped directly from the paper manufacturers to the Wisconsin printers.
- The paper manufacturers did not collect sales or use tax from the taxpayer on the paper at issue.
- The taxpayer paid for all the paper at issue after the paper was delivered to the Wisconsin printers
- The taxpayer chose the printers to whom it directed shipment of unprinted paper from the paper manufacturers.
- The paper manufacturers shipped the unprinted paper at issue to the Wisconsin printers via common carrier or via delivery vehicles operated by the paper manufacturers.
- The taxpayer had arrangements with each printer that the printer would accept delivery of the unprinted paper that the taxpayer purchased.
- The Wisconsin printers to whom the taxpayer had the unprinted paper delivered notified the taxpayer that the paper was delivered.
- The Wisconsin printers did not take title to and did not give the taxpayer valuable consideration for the paper. The printers took possession of the paper, but the paper remained the property of the taxpayer while in the hands of the printer.
- After printing the catalogs, the printers distributed the catalogs. Approximately 98% of the taxpayer's catalogs were distributed outside Wisconsin.

- In 1969 and 1976, the taxpayer issued blanket resale certificates to its Wisconsin paper merchant. The taxpayer did not revoke or alter these certificates prior the purchase of the paper at issue.
- The taxpayer:
  - a) purchased finished photography and photographic processing services from a Wisconsin retailer,
  - b) purchased Linotronic typesetting services from a Wisconsin retailer, and
  - c) provided finished artwork to Wisconsin printers.

The services or finished art detailed in a), b), and c) were used or consumed by the Wisconsin printers to produce the tax-payer's catalogs.

The Commission concluded that the department properly imposed Wisconsin sales and use taxes, with the exception of a portion of the use tax imposed on finished art purchased outside Wisconsin and used for the production of catalogs that do not remain in Wisconsin for free distribution (Issue G).

- A. The department correctly assessed the taxpayer on the unprinted paper purchased for use in its advertising catalogs printed by others in Wisconsin and distributed outside the state without charge. Although the paper became an ingredient or component part of the manufactured catalogs, the catalogs were not resold.
- B. Wisconsin use tax applies to the storage, use, or other consumption of tangible personal property that remains in this state and is not resold. The department correctly assessed use

- tax on the taxpayer's purchase of unprinted paper to be used in catalogs mailed to addresses in Wisconsin.
- C. The 98% of the printing done for the taxpayer to be transported outside the state for use outside the state is tax exempt. The department's assessment of 2% of the printing of tangible personal property which will be mailed to Wisconsin addresses is correct.
- D. The taxpayer and the department stipulated that the taxability of certain purchases for use or consumption in printing the catalogs was to be consistent with Issue A, unprinted paper to be used in catalogs, which was determined by the Commission to be taxable.
- E. The use tax was properly imposed on the 2% of the envelopes that remained in Wisconsin without resale.
- F. The envelopes were purchased for use in Wisconsin and are subject to Wisconsin use tax. The envelopes were purchased from a Wisconsin vendor and were inserted by the printers into the catalogs for use by catalog recipients.
- G. The catalogs were not resold. Hence, 100% of the finished art purchased in Wisconsin is subject to tax. The 2% of finished art purchased outside Wisconsin that is shipped to Wisconsin addresses is also subject to tax.

The taxpayer has appealed this decision to the Circuit Court.  $\Box$ 

Retailer - defined. American Baptist Assembly, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 27, 1998). The

issue in this case is whether the gross receipts from the taxpayer's sales of meals are subject to Wisconsin sales tax.

The facts in the case are as follows:

- 1. The taxpayer is a non-stock, non-profit corporation which qualifies for tax exempt status under Internal Revenue Code sec. 501(c)(3).
- 2. The taxpayer's purpose, as stated in its Articles of Incorporation, is:
  - "... to provide, for American Baptists and others, a comprehensive program of Christian education, training, and inspiration by means of conferences, institutes, research projects, classes, schools, college extension courses, camps, assemblies, and all other appropriate means for the nurture and training of leadership for the cause of evangelical Christianity and of the world mission of the churches."
- 3. The taxpayer held and was required to hold a Wisconsin seller's permit in conjunction with its facilities at Green Lake Conference Center (the "center") and Lawsonia Golf Course (the "golf course"). Note: Subsequent to the period under review, the golf course was conveyed to a for-profit subsidiary of the taxpayer and has since operated as a separate business entity.

The taxpayer filed a claim for refund with the department for sales taxes previously collected and paid on guest meals. These meals were catered by an outside catering service and provided by the taxpayer to conference participants and others at the conference center.

In Kollasch v. Adamany, 104 Wis. 2d 552, 562 (1981), the Wisconsin Supreme Court ruled that a nonprofit organization can be a "retailer" when engaging in "profit seeking" transactions but not necessarily so when engaging in "fundamentally nonmercantile" transactions. The Sisters in Kollasch were determined to be outside the definition of "retailer" because serving meals was "an integral part of their ministry."

The Commission concluded that the taxpayer was a "retailer" within the meaning of sec. 77.51(13), Wis. Stats., with respect to meals served to conference participants and others for purposes of the imposition of sales tax. The Commission determined that the taxpayer's sales of meals was a fundamentally mercantile activity. The provision of meals was not an integral part of the taxpayer's charitable mission, but a means of supporting it. The meals were commercially catered and were an on-site amenity for the convenience of conference participants and to the calculated financial advantage of the taxpayer.

The taxpayer has not appealed this decision.

Services subject to the tax producing, fabricating, and and processing. Hammersley Stone Company, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 17, 1998). The issue in this case is whether the department properly assessed use tax for stone crushing services that the taxpayer purchased from independent contractors who performed the services on stone furnished by the taxpayer, when the stone was later used or consumed by the taxpayer in real property construction.

The taxpayer was in the business of construction contracting involving excavation work. The taxpayer also operated two quarries from which it extracted stone, some of which it sold and the majority of which it used in real property construction activities.

After extracting stone from the quarries, the taxpayer hired and paid independent contractors to crush the stone into smaller particles of many types, including gravel, sand, pea gravel, and limestone. The crushed stone was used and consumed by the taxpayer in real property construction activities.

The Commission concluded that the taxpayer was properly assessed use tax on its purchase from independent contractors of stone crushing services on stone furnished by the taxpayer which was later used and consumed by the taxpayer in real property construction activities.

Section 77.52(2)(a)10, Wis. Stats., provides that the alteration of tangible personal property by a third party is a taxable service when it is separate and distinct from the services of installing or applying the same tangible personal property as an addition or capital improvement of real property.

The taxpayer has appealed this decision to the Circuit Court.  $\Box$ 

Use tax - storage. Glenn Rieder, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 4, 1998). The issue in this case is whether materials purchased by the taxpayer on or after October 1, 1991 and stored in Wisconsin for contracts entered into prior to October 1, 1991 are subject to Wisconsin use tax.

The taxpayer is a corporation based in Milwaukee that manufactures custom-order millwork such as door jams and frames, paneling, soffits, and other fixtures. The taxpayer also sells the millwork it produces, and it sometimes serves as a contractor incorporating its millwork into real property construction, both inside and outside Wisconsin. The period under review in this matter is the four-year period between July 1, 1991, and June 30, 1995.

The dispute in this case involves the effect of a change in the Wisconsin use tax law on October 1, 1991, upon three contracts for the manufacture of millwork as well as its subsequent delivery and installation out-of-state. The contracts were signed before the change in the law.

At the time each of the taxpayer's three contracts was signed, Wisconsin use tax law provided in sec. 77.51(19), Wis. Stats., that "storage" and "use" did not include keeping or retaining of tangible personal propertv "for the purpose subsequently transporting it outside the state for use thereafter solely outside the state, or for the purpose of being processed, fabricated, or manufactured into, attached to or incorporated into other property to be transported outside the state and thereafter used solely outside the state."

Effective October 1, 1991, sec. 77.51(19), Wis. Stats. (1989-90), was repealed and "storage" was defined as "any keeping or retention in this state for any purpose except sales in the regular course of business of tangible personal property purchased from a retailer." The department issued a tax release in April 1992, which provided that the Wisconsin use tax would not apply to the storage of tangible personal property purchased before October 1, 1991, unless the property was

purchased and storage occurred in another state prior to October 1, 1991, and then was transported to Wisconsin for additional storage and subsequent shipment outside Wisconsin after October 1, 1991.

The taxpayer based its bids and prices in the three contracts on the tax laws as they existed at the time it entered into the contracts.

The Commission concluded that the department properly assessed use tax for materials purchased and stored in Wisconsin after October 1, 1991, and later manufactured into property to be transported and used solely outside the state, because the repeal of the "storage" exception in sec. 77.51(19), Wis. Stats., by the 1991 legislature, which was effective beginning October 1, 1991, did not impair the obligations in three preexisting contracts in violation of the contract clauses of the United States and Wisconsin constitutions.

The taxpayer has not appealed this decision.  $\Box$ 

# SALES AND USE TAXES, AND WITHHOLDING OF TAXES

**Officer liability.** *Michael A.* Pharo vs. Wisconsin Department of Revenue (Circuit Court for Dane County, September 2, 1998). The Wisconsin Tax Appeals Commission issued a decision on December 11, 1997, which was appealed to the Circuit Court. See Wisconsin Tax Bulletin 107 (April 1998), page 20, for a summary of the Commission decision. The issue in this case is whether the Commission properly found that the taxpayer is a responsible person that could be personally assessed under 71.83(1)(b)2, Wis. Stats., and sec. 77.60(9), Wis. Stats., for the unpaid corporate taxes of Town and Country Communications, Inc. ("the corporation").

The taxpayer was the general manager of the corporation. Previously, the taxpayer was the sole proprietor of the business Town and Country Communications. Both the sole proprietorship and the corporation were engaged in the business of telephone sales, installation, and repair.

The taxpayer disputes the Commission's finding that the taxpayer converted his sole proprietorship into the corporation. The taxpayer also claims that he was not a responsible party for the filing and payment of withholding and sales and use taxes of the corporation because he was neither an officer nor a major stockholder. He alleges that he had no authority and duty to account for and pay for the taxes, and that the Commission was erroneous in its finding that he intentionally breached that duty.

The Circuit Court affirmed the decision of the Commission that the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., and sec. 77.60(9), Wis. Stats., with the **authority** and the **duty** to pay the corporation's withholding and sales and use taxes, and the **intention to breach that duty**.

The taxpayer has not appealed this decision.  $\Box$ 

### WITHHOLDING OF TAXES

Officer liability. Garry L. Matz vs. Wisconsin Department of Revenue (Circuit Court for Shawano County, July 13, 1998). The Wisconsin Tax Appeals Commission issued a decision on June 6, 1996, which was appealed to the Circuit Court. 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 primary shareholder of Camtool ("the corporation") between 1987 and September 15, 1992, when the company went out of business. The taxpayer was an absent overseer of the corporation. The day-to-day operations were handled by a manager and office bookkeeper. The corporation was in poor financial shape in 1991 and 1992, finally terminating business in September, 1992.

The Circuit Court reviewed the decision by the Commission which held that the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., with the **authority** and the **duty** to pay the corporation's withholding taxes, and the **intention to breach that duty**. The taxpayer contends that the Commission failed to produce evidence to establish that he intentionally failed to pay withholding taxes of the corporation.

The Circuit Court concluded that the decision of the Commission was correct.

The taxpayer has not appealed this decision.

Officer liability. Michael A. Pharo vs. Wisconsin Department of Revenue (Circuit Court for Dane County, June 8, 1998). The Wisconsin Tax Appeals Commission issued a decision on October 9, 1997, which was appealed to the Circuit Court. See Wisconsin Tax Bulletin 106 (January 1998), page 23, for a summary of the October 9, 1997 decision. 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 department during the period under review.

The Circuit Court reviewed the decision by the Commission, which held

that the taxpayer was a responsible person under sec. 71.83(1)(b)2, Wis. Stats., with the **authority** and the **duty** to pay the corporation's withholding taxes, and the **intention to breach that duty**. The taxpayer contends that the Commission failed to produce the required evidence to

establish that he was a responsible person.

The Circuit Court affirmed the decision of the Commission.

The taxpayer has not appealed this decision.  $\Box$ 



### **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:

### **Individual Income Taxes**

- 1. Rollovers to Roth IRAs (p. 29)
- 2. Tuition Expense Subtraction: Eligible Institutions (p. 30)

### Sales and Use Taxes

3. Meat Processors May Qualify as Manufacturers (p. 36)

### INDIVIDUAL INCOME TAXES

### **1** Rollovers to Roth IRAs

**Statutes:** Sec. 71.04(1)(a), Wis. Stats. (1995-96)

**Note:** This tax release applies only with respect to taxable years beginning on or after January 1, 1998.

**Background:** Federal law (sec. 408A(d)(3)(A)(iii), Internal Revenue Code) provides that a taxpayer who rolls over a distribution from a regular IRA to a Roth IRA before January 1, 1999, is to include the taxable amount of the distribution from the regular IRA in income ratably over the four-taxable year period beginning with the taxable year in which the distribution is made, unless an election is

made to include the entire taxable amount in taxable income for 1998.

This federal provision also applies for Wisconsin tax purposes (sec. 71.01(6)(m), Wis. Stats., as amended by 1997 Wisconsin Act 237).

71.04(1)(a), Stats. Section Wis. (1995-96), provides that all income or loss of resident individuals and resident estates and trusts shall follow the residence of the individual, estate, or trust. In the case of nonresident individuals and nonresident estates and trusts, income or loss from business, rents and royalties, sales of real property, and personal services shall follow the situs of the business, property, or services. Other income (except certain gambling winnings), including income or loss derived from

land contracts, mortgages, stocks, bonds, and securities, or from the sale of similar intangible personal property, shall follow the residence of the individual, estate, or trust.

Facts and Question 1: The taxpayer was a legal resident of Wisconsin for 1998 (i.e., the taxpayer was domiciled in Wisconsin). During 1998 the taxpayer rolled over a \$40,000 distribution from a regular IRA to a Roth IRA. The taxpayer will report the taxable distribution over a four-taxable year period (\$10,000 per year). The taxpayer filed a 1998 Wisconsin income tax return and included the \$10,000 on his return. In 1999, the taxpayer abandons his Wisconsin residency and establishes a new legal residence in Florida.

Is the remaining \$30,000 (that is, the \$10,000 portion of the distribution that is includable in the taxpayer's federal adjusted gross income in tax years 1999, 2000, and 2001) taxable by Wisconsin?

Answer 1: Yes. The remaining \$30,000 of the IRA distribution is taxable by Wisconsin even though the taxpayer is a nonresident of Wisconsin. The taxpayer must file a Wisconsin income tax return (Form 1NPR) for each year (1999, 2000, and 2001) and report \$10,000 as Wisconsin income each year.