



## 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.

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## INDIVIDUAL INCOME TAXES



### Domicile; Assessments - presumed correct; Signature.

*Crazy Jim vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 21, 2000). The issues in this case are:

- Whether the taxpayer was a Wisconsin resident in 1984.
- Whether the department's assessment against the taxpayer for 1994 was correct.
- Whether the taxpayer signed his 1994 income tax return under duress.

In November 1996, the department issued an income tax assessment to the taxpayer for tax year 1984, based on information contained in an Internal Revenue Service ("IRS") adjustment. Also in that month, the department issued an income tax assessment to the taxpayer covering 1994. The taxpayer filed a petition for redetermination objecting to both assessments. The department denied the petition.

The taxpayer filed a timely 1984 Wisconsin resident income tax return that included a Form W-2 for a Wisconsin employer, listing a Wisconsin address for the taxpayer. The taxpayer also filed a timely 1984 federal income tax return listing a Wisconsin address. In April 1996 he filed an amended 1984 return again listing a Wisconsin address, on which he claimed he was a Nevada resident in 1984. The department rejected the claim of 1984 Nevada domicile for lack of substantiation.

On the taxpayer's 1994 Wisconsin income tax return, he reported a \$97,000 capital gain from the sale of Wisconsin real property, and he calculated his income tax due as \$6,601. No payment was included, and the department issued an assessment for the tax plus interest and a late filing penalty. The taxpayer appealed the assessment, on the grounds that he signed his income tax return under duress and that he did not actually receive the \$97,000.

The Commission concluded as follows:

- The taxpayer was a Wisconsin resident in 1984. He did not meet his burden of proof to show otherwise.

B. The taxpayer failed to meet his burden of proof to overcome the presumptive correctness of the department's assessment for tax year 1994.

C. The taxpayer did not sign his 1994 income tax return under duress.

The taxpayer has not appealed this decision. [↗](#)

### **Interest income, municipal bonds.**

*Michael and Betty C. Borge vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 22, 2000). The issue in this case is whether the department properly determined that distributions received by the taxpayers from mutual funds that invest solely in obligations whose interest is subject to Wisconsin income tax is taxable as “interest” within the meaning of sec. 71.05(6)(a)1, Wis. Stats.

The taxpayers filed joint resident Wisconsin income tax returns for 1993 to 1996 (“the years at issue”). On those returns they reported interest received from individual state and municipal bonds. On those same returns, they excluded from income certain dividend distributions (“the disputed distributions”) received from mutual funds investing solely in federally tax-exempt state and/or municipal bonds. The department adjusted the returns for the years at issue, on the basis that the taxpayers may not exclude the disputed distributions.

The taxpayers filed a letter of objection, which the department considered a petition for redetermination. The taxpayers argued that the disputed distributions were not “interest” within the meaning of sec. 71.05(6)(a)1, Wis.

Stats., and are, therefore, not subject to Wisconsin income tax. The department denied the taxpayers’ petition for redetermination on grounds that the disputed distributions retain their character as state and municipal interest when passed as dividends to the shareholders of a mutual fund and are thus taxable under sec. 71.05(6)(a)1.

The Commission concluded that the department properly determined that dividend distributions received by the taxpayers from mutual funds investing solely in obligations whose interest is subject to Wisconsin income tax are includable in Wisconsin adjusted gross income as “interest,” pursuant to sec. 71.05(6)(a)1, Wis. Stats. The disputed distributions are expressly required by Internal Revenue Code sec. (852)(b)(5)(B) to be treated as “interest,” excludable for federal income tax purposes. Section 71.05(6)(a)1, Wis. Stats., requires that they be added back in determining Wisconsin adjusted gross income because they are “interest ... which is not included in federal adjusted gross income ...”

The taxpayers have appealed this decision to the Circuit Court. [↗](#)

### **Records required – substantiation.**

*Billy E. and Terry Stephenson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 20, 2000). The issue in this case is whether the taxpayers substantiated business and rental deductions and losses they claimed.

In 1991, Billy E. Stephenson (“the taxpayer”) attempted to open a telemarketing business. The business, allegedly operated out of the basement of the taxpayers’ home, was never formally incorporated, never had any employees, and never produced any receipts or income.


The taxpayer claimed to have purchased various items for use in the business, including office equipment and supplies, two boats, a camper, an automobile, and a commercial furnace. The taxpayer claimed a net business loss in 1991, a loss on the sale of business property (with a sales price of “0”) in 1992, and a loss on the sale of business property in 1994.

In addition, The taxpayers rented out the second floor of their residence in 1993 and received \$1,500 in rent. They claimed a rental loss for 1993. They also claimed an itemized deduction credit for unreimbursed employee business expenses in 1993 and 1994.

The department disallowed all of the losses and deductions, on the basis that none of the items were substantiated. The department did allow rental expenses to offset the gross rent of \$1,500 for 1993.

The Commission concluded that the department properly determined the taxpayers’ tax liability for 1991 to 1994, because the taxpayers did not substantiate the deductions and losses for those years.

The taxpayers have appealed this decision to the Circuit Court. [↗](#)

 **Retirement funds exempt.** *Phillip A. and Ruth E. Kuss vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 26, 2000). The issue in this case is whether the taxpayers are entitled to a refund of Wisconsin income taxes paid on Ruth E. Kuss' pension income in 1994 and 1995, based on the exemption provided by sec. 71.05(1)(a), Wis. Stats.

Ruth E. Kuss ("the taxpayer") was a member of the State of Minnesota Teachers Retirement System ("MTRS"), or a predecessor system, on December 31, 1963. The taxpayer retired from the MTRS and began receiving a pension based on her 31 years of service.

The taxpayers reported the pension income on their 1994 and 1995 Wisconsin income tax returns. They later filed amended 1994 and 1995 returns, seeking a refund of the taxes paid on the pension income.

The department issued the refund for 1994 in October 1996 but later issued an assessment for recovery of the refund. The taxpayers returned the check "under protest," along with a petition for redetermination. The department denied the petition. In January 1997, the de-


partment denied the taxpayers' claim for refund for 1995. The taxpayers filed a petition for redetermination of that denial, and the department denied the petition.

The department's basis for its actions is that the taxpayer's pension income did not come from any of the retirement systems identified in sec. 71.05(1)(a), Wis. Stats. That section exempts payments from certain retirement systems based on membership in any of those systems as of December 31, 1963. The taxpayers' sole argument is that the statute unfairly discriminates against them because it grants an income tax exemption to members of certain retirement systems as of December 31, 1963, but not to other similarly situated pensioners.

The Commission concluded that the taxpayers are not entitled to a refund of Wisconsin income taxes paid on the taxpayer's pension income from the MTRS, because they have not shown that the disparate treatment under sec. 71.05(1)(a), Wis. Stats., is impermissibly irrational or arbitrary.

The taxpayers have not appealed this decision. [↗](#)

## CORPORATION FRANCHISE AND INCOME TAXES

 **Dividends received deduction.** *Firststar Bank Wausau, N.A. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 24, 2000). The Wisconsin Tax Appeals Commission issued a decision on August 18, 1999, which the taxpayer appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 115 (October 1999), page 24, for a summary of the Commission's decision. The issue in this case is whether the department properly disallowed, pursuant to sec. 71.26(3)(j), Wis. Stats., the taxpayer's deduction of dividends it received from the Federal Reserve Bank ("FRB").


The taxpayer is a national bank. As such, it is required to be a member of the Federal Reserve System and to hold FRB stock. FRBs, incorporated under the laws of the United States and not of any state, are exempt from all taxes except real estate taxes. The taxpayer received a dividend on its FRB stock and claimed a deduction for the dividend on its 1991 Wisconsin franchise tax return. The department disallowed the deduction, and the Commission affirmed the department's action.

The taxpayer argued that the Commission erroneously applied sec. 71.26(3)(j), Wis. Stats. (1991-92), by concluding that the FRB dividend could not be deducted. It further argued that, because the statute that allows the deduction discriminates against dividends received from non-Wisconsin corporations, it violates the Interstate Commerce, the Equal Protection, and the Supremacy clauses of the United States Constitution.

The Circuit Court concluded that the Commission's interpretation of sec. 71.26(3)(j), Wis. Stats. (1991-92), was reasonable, and that its application of the statute was consistent with that interpretation. The Circuit Court further concluded that although sec. 71.26(3)(j), Wis. Stats. (1991-92), is unconstitutional in certain respects, it is not unconstitutional with respect to the taxpayer's dividend. It only discriminates against dividends received from non-Wisconsin corporations that pay franchise and income taxes in other jurisdictions, a class that does not include the taxpayer's FRB dividend.

The taxpayer has not appealed this decision. [↗](#)

## SALES AND USE TAXES


 **Manufacturing.** *Parkview Sand & Gravel, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, July 25, 2000). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated June 22, 1999. See *Wisconsin Tax Bulletin* 115 (October 1999), page 25, for a summary of the Commission's decision. The issues in this case are:

- A. Whether the taxpayer's purchase and use of a backhoe and related parts and repairs was exempt from use tax under sec. 77.54(6)(a), Wis. Stats.
- B. Whether the taxpayer was negligent in failing to report use tax and filing incorrect use tax returns for taxable years 1992 to 1995.

The taxpayer is a Wisconsin corporation engaged in manufacturing operations at a sand and gravel pit. The taxpayer purchased the backhoe for use in its operations without paying any sales or use tax.

The department assessed the taxpayer use tax on its purchase of the backhoe because the backhoe was used partly outside the scope of manufacturing for:

- Stripping and restoration of land before and after extraction of stone (33% use),
- Excavation of earth and materials in creating new settling ponds (30.8%),
- And loading materials onto customers' trucks (1%).

 **Motor vehicles and trailers – nonresident purchases.** *Wisconsin Department of Revenue vs. Johnson Welding & Manufacturing Company, Inc., a/k/a Johnson Truck Bodies* (Court of Appeals, District IV, July 13, 2000). On August 11, 1999, the Circuit Court for Dane County reversed the Wisconsin Tax Appeals Commission's December 30, 1998 decision. See *Wisconsin Tax Bulletin* 118 (January 2000), page 31, and *Wisconsin Tax Bulletin* 113 (April 1999), page 22, for summaries of the decisions of the Circuit Court and the Commission. The issue in this case is whether the taxpayer's sales of 25 truck bodies to a Minnesota corporation doing business in Wisconsin qualify as exempt sales under sec. 77.54(5)(a), Wis. Stats.

The Department also imposed the 25% negligence penalty under sec. 77.60(3), Wis. Stats.

The Circuit Court affirmed the Commission's decision and concluded:

- A. The taxpayer's purchase of the backhoe and related parts and repairs is not exempt from use tax under sec. 77.54(6), Wis. Stats.
- B. The taxpayer was negligent in filing incorrect returns for the period under review.

The Circuit Court found the Commission's interpretation of sec. 77.54(6), Wis. Stats., reasonable when the Commission determined the backhoe was not used *exclusively* and *directly* in the manufacturing process, two of the elements required for the exemption.

The Circuit Court further found that the Commission's interpretation of sec. 77.60(3), Wis. Stats., was reasonable for the imposition of the negligence penalty because (1) the taxpayer had previously been audited for similar violations, (2) the taxpayer had no system of recording or reporting use tax on its purchases, and (3) when asked on its franchise tax returns if it made any purchases without payment of Wisconsin tax, it answered "no." The Court did not accept the taxpayer's explanation that (1) it relied on its suppliers to collect the tax, (2) its accountant found the items to be exempt, and (3) the department did not impose the negligence penalty during a prior audit when the taxpayer used the same record-keeping system.

The taxpayer has not appealed this decision. [↗](#)

The truck bodies were delivered to Schwan's Sales Enterprises, Inc. ("Schwan's") in Rice Lake, Wisconsin, and installed on trucks assigned to Schwan's depots located in other states. Schwan's is a corporation organized and incorporated under the laws of Minnesota. Its corporate headquarters are, and at all times during its existence have been, in Minnesota. Schwan's does business in all 50 states, including permanent places of business at 19 locations throughout Wisconsin.

The Commission held that the taxpayer's sales to Schwan's qualified for the exemption under sec. 77.54(5)(a), Wis. Stats. because there is no provision in Chapter 77 that would find a corporation's residence different than its state of incorporation.


The Circuit Court reversed the Commission's decision, concluding that residency for sales tax exemptions was more reasonably determined on the basis of the nature and extent of a corporation's business activities in Wisconsin.

The Court of Appeals concluded that the Commission's interpretation of there being no provision in Chapter 77 to find a corporation's residence different from its state of incorporation was acceptable unless a more reasonable interpretation was available. Giving due weight to

the Commission's conclusions, and finding that it was not more reasonable to determine a corporation's residency based on the nature and extent of its Wisconsin business activities, the Court of Appeals was satisfied that the Commission's interpretation was correct and the taxpayer's sales qualified for the exemption.

The department appealed this decision to the Wisconsin Supreme Court but subsequently filed a notice of voluntary withdrawal, which was granted by the Supreme Court on August 23, 2000. [☞](#)

### Services subject to the tax – towing.

 *Wisconsin Department of Revenue vs. City of Milwaukee* (Circuit Court for Dane County, July 20, 2000). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated February 28, 2000. See *Wisconsin Tax Bulletin* 119 (April 2000), page 22, for a summary of the Commission's decision. The issue in this case is whether the \$135 fee charged by the City of Milwaukee for removal of an illegally parked or abandoned vehicle is subject to the sales tax on towing services under sec. 7.52(2)(a)10, Wis. Stats.


As a deterrent to illegal parking, the City of Milwaukee passed ordinance 101.25 that provided for the confiscation of illegally parked vehicles. The vehicles were released to the owners upon payment of a \$135 assessment. The City contracted with a private towing

company for these towing services for a flat \$35 towing fee.

The Circuit Court affirmed the Commission's decision and concluded that this case was the same as Example 4 of Tax Release 5 in *Wisconsin Tax Bulletin* 81 (April 1993), page 18. The City was the consumer of the towing services, it was not reselling the towing services, and it was not providing retail towing services under sec. 77.52(2)(a)10, Wis. Stats. The Court found the \$100 additional cost to the violator over the \$35 towing fee to be an additional charge, assessment, penalty, forfeiture, painful consequence, punishment established by law, or fine, and similar to a sentence under the criminal law.

The department has not appealed this decision. [☞](#)

## WITHHOLDING OF TAXES

 **Officer liability.** *Alexander Alex vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 17, 2000). The issues in this case are:

- A. Whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of Alexis Investment Co., Inc. ("Alexis") under sec. 71.83(1)(b)2, Wis. Stats., for portions of 1992 and 1993.
- B. Whether the taxpayer is liable under sec. 73.01(4)(am), Wis. Stats., for an additional amount to be assessed by the Commission, on the grounds the taxpayer maintained this proceeding primarily for delay.

In a May 1997 stipulation, the taxpayer agreed to the following facts:

1. That he was the owner, president, and sole signatory on the business checking account of Alexis;
2. That he was a person with the authority and duty to withhold, account for, and pay over the withholding taxes of employees of Alexis;
3. That he failed to cause Alexis to pay withholding taxes to the department, even though sufficient funds existed in Alexis' business checking account;
4. That he paid other creditors of Alexis, knowing that the withholding taxes at issue were not paid; and
5. That he intentionally failed to pay the withholding tax liability of Alexis.

The only issue that remained after the May 1997 stipulation was the amount of the taxpayer's tax liability.

The matter was held in abeyance for more than two years, to allow Alexis to collect its accounts receivable and apply the proceeds to Alexis' withholding tax liability. In June 1999, the taxpayer's representative stated that Alexis had exhausted all collection efforts and conceded that there was no issue as to the amount of the taxpayer's liability. The taxpayer failed to respond to two subsequent settlement stipulations.


The Commission concluded as follows:

A. The taxpayer is liable for the withholding tax liability of Alexis, because he had the **authority** and **duty**

to direct payment of Alexis' taxes, and he **intentionally breached this duty**.

B. The taxpayer is liable under sec. 73.01(4)(am), Wis. Stats., for an additional amount to be assessed by the Commission, because he maintained this proceeding primarily for delay. The Commission ordered that \$750 be added to the assessment at issue in this case.

The taxpayer has not appealed this decision. [☞](#)


 **Officer liability.** *Robert H. Sabaska vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 26, 2000). The issue in this case is whether the taxpayer is a responsible person who is liable for withholding taxes.

The Commission set an initial telephone scheduling conference date of July 12, 2000, and in a Notice dated June 8, 2000, requested the taxpayer to provide a telephone number. The taxpayer did not supply a telephone number, was not at the telephone number listed in the telephone book, and did not appear at the July 12, 2000 scheduling conference. On July 13, 2000, the Commis-

sion issued a Scheduling Order Memorandum setting another telephone scheduling conference on July 25, 2000, and again requested the taxpayer to supply a telephone number. The taxpayer again failed to provide a telephone number.

The Commission, on its own motion, dismissed the taxpayer's petition for review because he ignored two telephone scheduling conferences and failed to provide any explanation for his actions.

The taxpayer has not appealed this decision. [☞](#)

 **Officer liability.** *Martha Washington vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 26, 2000). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of Inner City Council on Alcoholism, Inc. ("the corporation"), under sec. 71.83(1)(b)2, Wis. Stats., for the period January through September 1996.

The taxpayer was a member of the corporation's board of directors and was the corporation's president and board chairperson, beginning in February 1996. The taxpayer was at the corporation's offices nearly every day and observed what obligations of the corporation were being paid. The taxpayer signed most of the corporation's semi-monthly withholding deposit reports and did not sign the reports for January through April and June 1996 until June 25, 1996. None of the tax due on any of the reports for the period January through September 1996 was remitted, or the reports were filed late, or both. The taxpayer also signed the corporation's 1996 annual withholding reconciliation report as Board Chairperson.

The corporation's checking account showed a positive balance, and other creditors were paid during the month of February 1996. However, no payments were made to the department for the withholding taxes due on the reports the taxpayer signed. The taxpayer directed the corporation's executive director to pay the withholding taxes during March 1996, but they also were not paid.

In mid-June 1996, the taxpayer became a signatory on the corporation's checking account and co-signed checks totaling \$1,811.70 to pay wages to four employees of the corporation. At the time, the corporation's checking account had a balance of nearly \$5,600. Deposits totaling \$4,100 were made in July 1996. The taxpayer also co-signed a check to the department for \$403.12 in July 1996, while checks totaling more than \$10,000 were paid to other creditors.

The Commission concluded that the taxpayer is a responsible person who is liable for the corporation's unpaid withholding taxes under sec. 71.83(1)(b)2, Wis. Stats., for the period January through September 1996.

The taxpayer was the corporation president and board chairperson and had **authority** to direct payment of the taxes. She exercised her authority by directing the executive director to pay the taxes, which were left unpaid, and by signing the corporation's withholding deposit reports, even though she did not see to it that the withholding taxes for those periods were paid. The taxpayer

was aware of the corporation's unpaid taxes and had a **duty** to make sure they were paid. She was directly involved with the corporation's payment of creditors and corporation payroll, and she **intentionally breached her duty** to pay the corporation's withholding taxes.

The taxpayer has not appealed this decision. [↗](#)



**Officer liability.** *Essie L. Zollicoffer vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 27, 2000). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of Inner City Council on Alcoholism, Inc. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats., for the period January through September 1996.

The taxpayer was employed by the corporation as "interim executive director" from August 1995 until February 1996, when the corporation hired an executive director. At that point the taxpayer returned to her former position of "director of business and personnel."

With the assistance of others, including a bookkeeping firm, the taxpayer maintained the corporation's books and records between January 1 and July 30, 1996. The taxpayer's other duties included personnel administration and payroll.

Between January 1 and July 30, 1996, the taxpayer was an authorized co-signatory on the corporation's checking account. Each check required two signatures. Four other individuals were also authorized to sign checks. During that period the taxpayer co-signed payroll checks to pay net wages to employees of the corporation. During that period she knew that taxes withheld from wages were not being paid to the department.

The taxpayer was laid off as a paid employee of the corporation on June 30, 1996, but she continued to provide her services without pay until December 1996.

The taxpayer did not have the authority to order, direct, or prioritize the payment of taxes due to the department, or of other obligations of the corporation.

The Commission concluded that the taxpayer was not a person responsible for the payment of withholding taxes of the corporation within the meaning of sec. 71.83(1)(b)2, Wis. Stats., because she did not have the authority to pay or direct payment of the taxes to the department. Even though the taxpayer was one of five authorized check signatories, she needed prior approval to exercise that authority. Because she did not have the authority to see to the payment of withholding taxes, the taxpayer cannot be held liable as a responsible person.

The department has not appealed this decision but has adopted a position of nonacquiescence to the extent that the decision is based upon a factual finding that the taxpayer lacked the ability or authority to order, direct, or prioritize the payment of corporate taxes or other obligations due the department. The effect of this action is that, although the decision or order is binding on the parties for the instant case, the Commission's conclusions of law, its construction of statutes, its use of case law and other authority, and the legal rationale of its decision in the instant case are not binding upon or required to be followed by the department in other cases. [↗](#)

## SALES AND USE TAXES, AND WITHHOLDING OF TAXES



**Officer liability.** *James R. Werner vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 16, 2000). The issues in this case are:

- A. Whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of Ceille Industries, Inc. ("Ceille Industries") under sec. 77.60(9), Wis. Stats, for the periods of August, 1990 and November 1990 through September 1992.
- B. Whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of Ceille Industries under sec. 71.83(1)(b)2, Wis. Stats., for the period of June 16 through September 30, 1992.

C. Whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of Five Ceals, Inc. (“Five Ceals”) under sec. 77.60(9), Wis. Stats., for the period of May through June, 1992.

During the period from July 15, 1990 to July 15, 1992, the taxpayer was the manager of a restaurant operated by Ceille Industries known as Country Gardens. Five Ceals held the liquor license for the bar on the premises. The taxpayer had little or no role in operating the bar, which was operated by another employe of Ceille Industries. The taxpayer had check writing authority on the business checking account of Ceille Industries which was also used to pay obligations of Five Ceals.


The taxpayer had no other position or office associated with Ceille Industries and was not a shareholder of Ceille Industries. The taxpayer had authority to run the day-to-day affairs of Country Gardens, but the Board of

Directors limited his authority in directing payments to vendors and creditors of Ceille Industries. The Board of Directors authorized the taxpayer to pay those vendors who required payment in exchange for supplies. Decisions concerning payments to other vendors and creditors, including the Department of Revenue, rested with the Board of Directors. The Board of Directors ordered the taxpayer to pay other expenses, while tax obligations went unpaid, and to pay taxes only when the restaurant’s finances permitted.

The Commission concluded the taxpayer was not liable for the unpaid withholding tax or sales and use tax liabilities of Ceille Industries, or the unpaid sales and use tax liability of Five Ceals, because he lacked the authority to direct payment of the unpaid taxes.

The department has appealed this decision to the Circuit Court. [↗](#)

## DRUG TAXES

 **Drug tax, appeals – timeliness.** *David L. Gilbert vs. Wisconsin Department of Revenue* (Circuit Court for Waukesha County, June 21, 2000). The is a petition for judicial review of the Tax Appeals Commission’s Ruling and Order dated August 27, 1999, and the Commission’s October 8, 1999, denial of the taxpayer’s petition for rehearing. See *Wisconsin Tax Bulletin* 118 (January 2000), page 33, for a summary of the Commission’s August 27, 2000, decision.

In June 1993, the department issued a controlled substances tax assessment, plus interest and penalties, against the taxpayer, pursuant to sec. 139.93(1), Wis. Stats. The taxpayer paid the assessment.

In 1997, the Wisconsin Supreme Court, in *State v. Hall*, 207 Wis. 2d 54 (1997), held that secs. 139.87 to 139.96, Wis. Stats., the controlled substances tax, were unconstitutional because they violated the constitutionally guaranteed privilege against self-incrimination.

In November 1997, the taxpayer filed a claim for refund with the department, asserting that the department illegally collected amounts pursuant to the assessment since the controlled substances tax was declared unconstitutional in *Hall*. The department denied the claim for refund on the basis that it was not filed within two years of the assessment, as required under secs. 71.75(5) and 139.93(1), Wis. Stats. The taxpayer filed a petition for

redetermination, and the department denied it, again stating that the request was untimely.

The taxpayer filed a petition for review with the Commission, alleging that the assessment was invalid and that the department erred on a number of grounds, including timeliness, void assessment, and retroactivity. The department sought an order dismissing the petition, and the Commission granted the motion to dismiss without addressing whether the assessment itself was constitutionally valid under *Hall*. The Commission then denied the taxpayer’s timely filed petition for rehearing.

The Circuit Court concluded that the taxpayer’s petitions were in fact timely, and that the Commission improperly denied them. Because the drug tax was held to be unconstitutional, any assessment resulting from it is void and has no legal existence. The statute of limitations therefore cannot be triggered. Since the Commission denied the taxpayer’s petition based on timeliness and did not address the other issues in the case, the Circuit Court may review only the timeliness issue.

Accordingly, the Circuit Court reversed the Commission’s Ruling and Order dated August 27, 1999, as well as the October 8, 1999 Order denying the taxpayer’s petition for rehearing. The Court also remanded the matter to the Commission for consideration of the taxpayer’s refund and reassessment claims on the merits.

The department has appealed this decision to the Court of Appeals. [↗](#)