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

Alimony. *Donald R. and Kristen E. Jensen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 20, 2000). The issue in this case is whether alimony payments received by Kristen E. Jensen from her former husband in 1996 and 1997 are subject to Wisconsin income tax, even though her former husband, a nonresident of Wisconsin, did not claim a deduction for the payments on a Wisconsin income tax return.

The taxpayers jointly filed a Form 1A Wisconsin income tax return for 1996, and a copy of their federal tax return was not attached. On their Wisconsin return they did not include alimony payments received by Kristen E. Jensen ("the taxpayer") from her former husband, Perry R. Fritz.

In July 1999, the department sent a letter to the taxpayers regarding the alimony payments. In August 1999,

the taxpayers sent a reply, which stated that alimony payments were made by the taxpayer's former husband, and asserting that the payments are reportable to the federal government but not to Wisconsin.

The taxpayers also jointly filed a 1997 Wisconsin income tax return that did not include alimony payments the taxpayer received that year.

The taxpayers allege that the alimony payments the taxpayer received in 1996 and 1997 were not reported because the taxpayer's former spouse was a nonresident of Wisconsin in those years and could not claim the payments as a deduction for Wisconsin income tax purposes.

The Commission concluded that the alimony payments the taxpayer received from her former husband in 1996 and 1997 are includable in the taxpayers' Wisconsin taxable income. Because alimony is subject to the federal income tax, it is also subject to Wisconsin income tax, because Wisconsin statutes rely on the Internal Revenue Code's definition of "gross income" to identify what types of income are taxable. There is no provision in Wisconsin law to exclude alimony payments if there is no Wisconsin tax deduction available to the alimony payer.

The taxpayers have not appealed this decision.

Business expenses - employee business expense; Bad debts. *Philip and Patricia Sunich vs. Wisconsin Department of Revenue* (Circuit Court for Kenosha County, June 28, 2000). This is an appeal from a September 14, 1999, decision of the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 118 (January 2000), page 26, for a summary of the Commission's decision. The issues on appeal are:

A. Whether the taxpayers substantiated the unreimbursed employee vehicle expense deductions claimed on their 1991 to 1994 Wisconsin income tax returns.

B. Whether they substantiated a worthless debt, deductible as a short-term capital loss, on their 1993 and 1994 tax returns, as required by the Internal Revenue Code.

The department made a motion to dismiss the case, and the Circuit Court issued an oral decision dismissing the action, on May 24, 2000. On June 28, 2000, the Circuit Court ordered and adjudged that the action be dismissed, for the reasons stated in its earlier oral decision.

The taxpayers have not appealed this decision and order.

Business expenses - substantiation; Personal residence, sale of - cost basis substantiation. *Thomas E. Zablocki vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 18, 2000). The issue in this case is whether the taxpayer submitted sufficient substantiation to prove that the department's assessment against him was incorrect.

The taxpayer was a lawyer during 1992, 1993, and 1994 (the period under review), and he also operated a real estate business in 1994. The department audited his tax returns for the period under review and subsequently issued an assessment for those years.

The taxpayer's business expenses relating to his law practice and his real estate business were reduced, and a gain on the sale of his personal residence in 1993 was added. The taxpayer's self-employment tax deductions, homestead credit, and other credits were also reduced.

The taxpayer filed a petition for redetermination, and the department modified the assessment based on additional substantiation submitted. The taxpayer timely appealed the remaining assessment to the Commission.

In his appeal, the taxpayer presented only his own testimony and one exhibit to support his claim that the department improperly assessed him. He submitted no substantiation to overcome the presumptive correctness of the department's assessment. The department filed a motion to dismiss the case on the ground that the taxpayer had shown no right to relief.

The Commission concluded that since the taxpayer failed to substantiate any of the claimed business expenses or real estate cost basis items disallowed by the department, the department's motion to dismiss the case is granted.

The taxpayer has not appealed this decision.

Estimated assessments. *George F. Reif vs. Wisconsin Department of Revenue* (Circuit Court for Menominee/Shawano Counties, January 31, 2001). This is an appeal from a September 1, 2000, decision of the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 123 (January 2001), page 23, for a summary of the Commission's decision.

The issue in this case is whether the taxpayer's petition for review of the department's estimated assessments against him state a claim against which relief can be granted. In July 1999, the department issued two estimated assessments against the taxpayer because he failed to file income tax returns for 1993 to 1997. The taxpayer filed timely petitions for redetermination, and the department denied them. The taxpayer then filed petitions for review with the Commission.

In the petitions for review, the taxpayer indicated that he did not give his consent "to be governed by any tyranny nor any depotism," and that "I simply do not owe any tax to any government that refuses to recognize me as its free and equal citizen." In response the Commission requested a clear and concise statement of the facts in the case and the taxpayer's specific objections to the department's action. The taxpayer did not respond to the notice, and the Commission held that the taxpayer failed to state a claim against which relief can be granted.

In its memorandum decision, the Circuit Court stated that "…WHEREAS petitioner makes passionate, but groundless and frivolous arguments about his 'right' not to pay taxes, his arguments are not relevant to the facts…"

The Circuit Court concluded that the department's brief correctly states the law applicable to this fact situation, and it therefore affirmed the Commission's Ruling and Order in all regards.

The taxpayer has not appealed this decision.

Interest - assessments; Interest - underpayment. *Edward Staacke vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 10, 2001). The issue in this case is whether the taxpayer should be required to pay the interest and "penalties" imposed on an income tax assessment for the years 1995, 1996, and 1997.

The department issued an assessment to the taxpayer for the years 1995, 1996, and 1997. The assessment, which included additional tax, interest, and "penalties," disallowed the taxpayer's deductions for child support and maintenance paid to his former wife.

The taxpayer filed a petition for redetermination with the department. The department denied the petition, and the taxpayer then filed a petition for review with the Commission. The department filed a motion to dismiss the taxpayer's petition for review, because it fails to state a claim on which relief can be granted.

The taxpayer did not dispute the additional tax but objected only to the interest and "penalties," because he stated he was only following what the Waukesha County Circuit Court instructed him to do. A 1995 divorce judgment entered in that Court stated that the taxpayer may deduct his payments from his income.

The Commission concluded that the taxpayer's petition for review fails to state a claim on which it can grant relief. Even if the taxpayer had objected to the department's disallowance of the deductions for child support and maintenance, the language in the divorce decree relating to the deductibility of the payments may not override income tax law. The Commission therefore granted the department's motion to dismiss the petition for review.

The Commission further held that the assessment imposes interest (not "penalties") under two statutes, and the characterization by both the department and the taxpayer as "penalty" is incorrect. These statutory impositions of interest are mandatory, and neither the department nor the Commission has the authority to waive their imposition.

The taxpayer has not appealed this decision.

Interest income, municipal bonds. *Michael and Betty C. Borge vs. Wisconsin Tax Appeals Commission and Wisconsin Department of Revenue* (Circuit Court for Dane County, November 29, 2000). This is an appeal from a May 22, 2000, decision of the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 122 (October 2000), page 23, for a summary of the Commission's decision.

The issue on appeal 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.

Without an explanation in its written decision and order of November 29, 2000 ("for the reasons expressed on the record"), the Circuit Court affirmed the May 22, 2000, Commission decision.

The taxpayers have appealed this decision to the Court of Appeals.

Native Americans - income earned off the reservation. *Eugene and Patricia Danforth vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 24, 2000). The issue in this case is whether income earned by Eugene Danforth from an employer located off the reservation where he resided is taxable for Wisconsin income tax purposes.

Eugene Danforth ("the taxpayer") is an enrolled member of the Oneida Indian Nation. At all times relevant to this case, both he and Patricia Danforth ("the taxpayers") resided on the Oneida reservation. During 1995, the taxpayer was employed by a company whose facility was not located on the Oneida reservation.

When the taxpayers filed their 1995 Wisconsin income tax return, they asserted that the taxpayer's income from the company where he was employed was not subject to the Wisconsin income tax. Their position is based on the assertion that the company's facility is located on land that was once part of the Oneida reservation.

In June 1999, the department issued an assessment rejecting the claim that the taxpayer's income from the company is not taxable for Wisconsin tax purposes. The taxpayers filed a petition for redetermination, the department denied it, and the taxpayers then filed a timely petition for review with the Commission.

The Commission concluded that the taxpayer's income from the company where he was employed is subject to taxation by the State of Wisconsin, because it was not earned on the Oneida reservation. Even if the facility is located on land that was once part of the Oneida reservation (no documentation was submitted to prove this), it would not matter because it was not on the reservation when the taxpayer earned the income.

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. The decision is provided for informational purposes only.

Nonresidents - nonresident alien; Appeals - frivolous. *Ross L. Bosetti and Brenda Bosetti vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 16, 2000). The issues in this case are:

A. Whether the taxpayers were nonresident alien individuals during the years at issue.

B. Whether the taxpayers' arguments that the Wisconsin income tax did not apply to them for the years at issue were frivolous and groundless, thereby subjecting them to an additional assessment under sec. 73.01(4)(am), Wis. Stats.

Mr. Bosetti timely filed his 1996 Wisconsin income tax return as an unmarried "head of household." The taxpayers filed timely joint Wisconsin income tax returns for 1997 and 1998. All of the returns listed a Wisconsin address and contained documents listing their address as a Wisconsin address.

In September 1999, both Mr. and Mrs. Bosetti filed with the department claims for refund for all income taxes he paid with his 1996 Wisconsin income tax return, and all income taxes they paid with their 1997 and 1998 Wisconsin income tax returns. The claims for refund made the following assertions:

(1) The taxpayers are nonresident aliens and are thus not obligated to pay Wisconsin income tax;

(2) They revoke their prior election to pay income taxes under an election nonresident aliens have pursuant to the Internal Revenue Code (IRC) and request refunds of the Wisconsin income taxes paid with their 1996 to 1998 income tax returns;

(3) There is a "nexus" between the IRC and Wisconsin tax laws that excuses them from paying Wisconsin income taxes because they are nonresident alien individuals and the tax laws do not apply to them; and

(4) The Wisconsin Statutes do not define "income."

In separate notices, the department denied the claims for refund. Each taxpayer filed a petition for redetermination with the department, which the department denied. They then each filed a timely petition for review with the Commission. The department subsequently filed a motion for summary judgment, on the basis that there is no genuine issue as to any material fact in this case.

The Commission concluded as follows:

A. Mr. Bosetti was not a nonresident alien individual for 1996 Wisconsin income tax purposes, nor were both taxpayers nonresident alien individuals for 1997 and 1998 Wisconsin income tax purposes. Their claims for refund of taxes paid in those years were properly denied by the department.

B. The taxpayers' arguments that the Wisconsin income tax did not apply to them from 1996 to 1998 are frivolous and groundless, thereby subjecting them to an additional assessment under sec. 73.01(4)(am), Wis. Stats.

Finding that there is no genuine issue as to any material fact in this case, the Commission granted the department's motion for summary judgment. In addition, the Commission assessed an additional $500, pursuant to the cited statute.

The taxpayers have not appealed this decision.

Penalties - retirement plan early withdrawals; Appeals - jurisdiction. *Laura Darne vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, December 7, 2000). The taxpayer seeks review of a September 1, 2000, decision of the Wisconsin Tax Appeals Commission, as well as various other decisions of the Commission and the department. The Commission decision was not previously summarized in the *Wisconsin Tax Bulletin* but is briefly summarized below.

The issue on appeal is whether the department may impose a penalty on the taxpayer's early withdrawal of funds from her retirement plans in 1998, equal to 33% of the income tax penalty on her 1998 federal return.

In August 1999, the department issued an assessment to the taxpayer, consisting of the Wisconsin early withdrawal penalty, plus interest. The taxpayer filed a petition for redetermination, which the department denied. She then filed a timely petition for review with the Commission, and the department filed a timely answer to the petition. The taxpayer filed with the Commission a motion to dismiss the department's answer, as well as several additional motions and counter-motions.

The Commission held that the department's action was proper. In addition, the Commission held that the taxpayer's position before the Commission was frivolous and groundless, and it thus assessed the taxpayer an additional $500 penalty.

On appeal, the taxpayer seeks a declaration that the Wisconsin statute providing for the early withdrawal penalty is invalidated by federal ERISA provisions and therefore seeks a permanent injunction barring its enforcement. The department seeks dismissal of the appeal on the grounds that the taxpayer did not comply with statutory appeal procedures. The taxpayer served the Attorney General rather than the department as required.

The Circuit Court concluded that it lacks subject matter jurisdiction over the matter because the taxpayer failed to serve a copy of her petition for review upon the department as required by statute. The Court therefore granted the department's motion and dismissed the taxpayer's petition for review.

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

Retirement benefits - situs of income; Appeals - frivolous. *Robert J. and Ruth I. Quinnell vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 20, 2001). The issues in this case are:

A. Whether the department correctly added pension income received by Robert J. Quinnell ("the taxpayer") to the income of the taxpayers for tax years 1993 through 1997 ("the period under review").

B. Whether the taxpayers' assertions that the pension income is not taxable are frivolous and groundless, thereby subjecting them to an additional assessment.

The taxpayers were Wisconsin residents and filed Wisconsin resident income tax returns for each of the years in the period under review. On each return they did not list pension income that the taxpayer received from a Wisconsin corporation.

The department issued two assessments to the taxpayers, one in May 1999 covering tax years 1995, 1996, and 1997, and another in January 2000 covering tax years 1993 and 1994. Both assessments added the taxpayer's pension income to the taxpayers' income for each tax year. The taxpayers filed timely petitions for redetermination with the department, the department denied them, and the taxpayers then filed timely petitions for review with the Commission.

The taxpayers argued that there is no statutory authority to impose the Wisconsin income tax on the taxpayer's pension income, and that it is not taxable because it is not attributable to property located in Wisconsin and is not from business transacted in Wisconsin. The taxpayers further argued that the pension income is not taxable by Wisconsin because it is available to them as federal reserve notes, which are included in the definition of "obligation or other security of the United States."

The Commission concluded as follows:

A. The department correctly added pension income received by the taxpayer to the income of the taxpayers for tax years 1993 through 1997, as the taxpayers were Wisconsin residents when the income was received. Since the pension income is taxable under the federal Internal Revenue Code, it is includable as Wisconsin adjusted gross income under sec. 71.01(13), Wis. Stats. Since the taxpayers were Wisconsin residents the pension income is taxable under sec. 71.02(1), Wis. Stats., which imposes Wisconsin tax on all income, regardless of its source.

B. The taxpayers' assertions that the pension income is not taxable are frivolous and groundless, thereby subjecting them to an additional assessment. The taxpayers' written submissions do nothing to disprove the accuracy of the department's assessments; instead, they amount to frivolous arguments that have no chance of prevailing.

   Because the Commission concluded that the taxpayers' position in the proceedings is frivolous and groundless, the Commission assessed an additional $500 under sec. 73.01(4)(am), Wis. Stats.

The taxpayers have appealed this decision to the Circuit Court.

HOMESTEAD CREDIT

Homestead credit - household income-retirement plan distribution. *Efrim V. Fudim vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 1, 2001). The issue in this case is whether a retirement plan distribution received by the claimant in 1998 and included as part of his federal and Wisconsin adjusted gross income could be subtracted in determining household income for homestead tax credit purposes.

The claimant's 1998 federal income tax return included a taxable distribution from a Roth IRA, which was then included on his Wisconsin income tax return as a component of federal adjusted gross income. He also filed a homestead credit claim (Schedule H) for 1998. He subtracted the IRA distribution from his household income because it had been included in (added back to) household income in 1993 and 1994. It was a required addition in those years because it was household income that had been deducted in determining federal adjusted gross income. The subtraction on the claimant's 1998 Schedule H was made pursuant to sec. 71.52(6), Wis. Stats., which states, in part:

> …Amounts not included in adjusted gross income but added to "income" in a previous year and repaid may be subtracted from income for the year during which they are repaid. …

The Commission concluded that the retirement plan distribution could be subtracted from the claimant's household income for 1998, because a) in 1993 and 1994 it was not included in adjusted gross income but was added for homestead credit purposes, and b) it was "repaid" to the claimant and included in adjusted gross income in 1998.

The department has not appealed this decision and order but has adopted a position of nonacquiescence in regard to the decision or order. The effect of this action is that, although it is binding on the parties in this case, the Commission's conclusions of law, the rationale, and the construction of statutes in this case are not binding upon or required to be followed by the department in other cases.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. The decision is provided for informational purposes only.

CORPORATION FRANCHISE AND INCOME TAXES

Accounting - change in method. *Babcock & Wilcox Company (The) vs. Wisconsin Department of Revenue (*Court of Appeals, District IV, November 9, 2000). This is an appeal from an order of the Circuit Court for Dane County dated December 16, 1999. See *Wisconsin Tax Bulletin* 119 (April 2000), page 17, for a summary of that decision.

The issue in this case is whether the taxpayer properly changed its method of accounting when it filed amended state income tax returns for taxable years ending in 1981, 1982, and 1983, thereby assigning to the taxpayer's predecessor a portion of $600 million in deferred income of the predecessor.

The taxpayer's predecessor ("Old B&W") had ongoing, multi-year contracts at the time of a corporate reorganization in 1978. The taxpayer ("New B&W") reported all of the income earned on those contracts in the years it completed them. New B&W later filed amended state income tax returns to exclude income it asserted to be allocable to Old B&W. The department denied the refunds, and the Tax Appeals Commission and Circuit Court affirmed the department's actions.

As a result of the reorganization, New B&W acquired all of the assets and liabilities of Old B&W and began carrying on the same business as Old B&W, with the same management. The nature of the manufacturing business of Old B&W and New B&W required them to enter into long-term contracts covering several years. This required both corporations to use special rules and procedures to account for the income generated by these contracts. The methods used by both were "percentage of completion" accounting for financial reporting purposes, and "completed contract" accounting for tax reporting purposes.

The use of completed contract accounting for tax purposes by Old B&W meant that, at any given time, there was a substantial amount of income generated that was not contemporaneously recognized for income tax purposes. The reporting of the income was deferred until the completion of the entire contract. At the time of the merger in 1978 there was approximately $600 million of deferred income earned but not reported. All of the deferred income was reported by New B&W in the years following the merger, consistent with the completed contract method of accounting used by Old B&W. New B&W later filed amended state income tax returns to exclude income it asserted to be allocable to Old B&W.

New B&W argued that it did not change its method of accounting when it filed its amended tax returns. The amended returns merely excluded the percentage of profit it claimed was allocable to Old B&W.

The Court of Appeals affirmed the order of the Circuit Court and concluded that the Commission's ruling in affirming the department's actions was reasonable. The Court further concluded that the taxpayer's actions on its amended returns did constitute a change in accounting method, and that at the time of the reorganization New B&W assumed the responsibility for the contracts of Old B&W, both to complete the contracts and to report the income on those contracts.

The taxpayer has not appealed this decision.

Business loss carryforward - reorganization. *Wisconsin Department of Revenue* vs. *Caterpillar, Inc.* (Court of Appeals, District IV, January 11, 2001). This is an appeal from a December 15, 1999, decision of the Circuit Court, which affirmed a March 25, 1999, decision of the Wisconsin Tax Appeals Commission. The Circuit Court decision was not summarized in the *Wisconsin Tax Bulletin*. See *Wisconsin Tax Bulletin* 114 (July 1999), page 14, for a summary of the Commission's decision.

The issue on appeal is whether Wisconsin net business losses for tax years 1982 through 1984, sustained by Caterpillar Tractor Co. prior to its merger into the taxpayer in 1986, may be carried forward to tax years 1987 through 1990, pursuant to sec. 71.26(4), Wis. Stats. (1987-88).

Caterpillar Tractor Co. was incorporated in California in the 1920s. In 1986 the company changed its name and incorporated a new entity, Caterpillar, Inc., in Delaware as a wholly owned subsidiary of the existing entity, which immediately merged into the taxpayer, effective May 8, 1986. There was no change in ownership, and all shares of common stock were converted to shares of the taxpayer's common stock.

The officers and directors remained the same for both corporations. No distribution of any property was made by reason of the reorganization. The taxpayer succeeded to all assets, liabilities, rights, privileges, and duties, without limitation, of those formerly held by Caterpillar Tractor Co., and the taxpayer maintained the same federal taxpayer identification number.

For federal income tax purposes, the reorganization constituted a nontaxable reorganization under Internal Revenue Code (IRC) sec. 368(a)(1)(F), and the taxpayer succeeded to all the tax attributes of Caterpillar Tractor Co., pursuant to IRC sec. 381.

Caterpillar Tractor Co. sustained Wisconsin net business losses in 1982, 1983, and 1984. It carried forward and used part of the loss in 1985 and carried forward the balance to 1986. The taxpayer used part of the carryover losses on each of its 1986 through 1990 Wisconsin corporate franchise tax returns. The department disallowed the carryover losses for the portion of 1986 after the reorganization, and for all of 1987 through 1990.

The Commission held that the taxpayer was not entitled to deduct carryover losses for the portion of 1986 after the reorganization, because the taxpayer is not the corporation that incurred the losses, as required under Wisconsin law for 1986; the federalization of Wisconsin's corporate and franchise tax took effect the following year. The Commission further held that the taxpayer may deduct the carryover losses for 1987 through 1990, because the federalization of IRC sec. 381 is not limited to corporate reorganizations occurring after January 1, 1987, as contended by the department. The portion of the decision relating to 1986 was not appealed, but the department appealed the portion of the decision relating to 1987 through 1990.

The Court of Appeals concluded that sec. 71.26(4), Wis. Stats. (1987-88), the renumbered successor to sec. 71.06(1), Wis. Stats. (1985-86), permitted the taxpayer to make the net operating loss carry-forwards in 1987 through 1990. The Court thus affirmed the decision of the Circuit Court.

The department has appealed the decision to the Wisconsin Supreme Court.

Underpayment interest; Interest on underpayment interest. *General Casualty Company of Wisconsin and Regent Insurance Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 25, 2001). The issue in this case is whether the department properly imposed underpayment interest, plus additional interest on the underpayment interest, on assessments it issued to the taxpayers.

Both taxpayers are corporations organized and existing under laws of Wisconsin, as they were from May 1, 1990 through December 31, 1995 (the "audit period"). Regent Insurance Company ("Regent") is a wholly owned subsidiary of General Casualty Company of Wisconsin ("General Casualty"). In 1990, Winterhur U.S. Holdings, Inc. ("Winterhur") acquired the stock of both companies, and Regent remained a subsidiary of General Casualty.

In February 1997, Winterhur entered into a settlement agreement with the Internal Revenue Service. The agreement required both taxpayers to amortize the intangible assets that were included in the asset acquisition by Winterhur, over 15 years. The use of the 15-year amortization period increased both taxpayers' Wisconsin franchise tax liability for the tax years included in the audit period.

The department issued field audit assessments to Regent on July 23, 1997, and to General Casualty on August 1, 1997. Both assessments consisted of franchise tax, interest, interest for the underpayment of estimated taxes, and interest on the underpayment interest. Both taxpayers paid the tax and regular interest portions of the assessments. Both taxpayers filed timely petitions for redetermination on August 8, 1997, objecting to the underpayment interest and the interest on the underpayment interest.

Both taxpayers and the department agreed to extensions of the period for the department to act on the petitions for redetermination. The department denied both petitions on August 6, 1999, and issued a Notice of Amount Due to each taxpayer. Both taxpayers timely deposited the amounts due with the department and filed timely appeals with the Commission.

During the audit period, the tax returns of both taxpayers were filed on a calendar-year basis and had an unextended due date of March 15, 1991 through March 15, 1996, respectively. On each due date the taxpayers had paid at least 90% of the tax stated on each return filed (as required under sec. 71.84(2)(a), Wis. Stats.). However, after the returns were adjusted, the taxpayers had not paid at least 90% of the adjusted tax due. The taxpayers argued that "90% of the tax shown on the return" as stated in the statute refers to the tax shown on the originally filed tax return.

The Commission concluded that the department "correctly imposed delinquent interest on the regular interest assessed on the additional estimated taxes due in its assessment" to each taxpayer. The taxpayers' interpretation of the meaning of "90% of the tax shown on the return" would lead to the absurd result that if, after an audit, the taxes were increased, no interest could be imposed on the additional taxes.

Both taxpayers have appealed this decision to the Circuit Court.

SALES AND USE TAXES

Admissions - theater performances. *Milwaukee Repertory Theater, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 15, 2000). The issue in this case is whether admissions to performances in theaters operated by Milwaukee Repertory Theater, Inc. are subject to the Wisconsin sales and use tax.

During the years 1991 through 1994, the taxpayer, a Wisconsin nonprofit corporation organized and operated exclusively for educational purposes, operated and produced performances at theaters in Milwaukee. Over 500 performances were presented by the taxpayer each year. The taxpayer holds a Wisconsin seller's permit for sales of food and other items, as well as its activities at several of the theaters that are not at issue.

The taxpayer produces and presents public theatrical performances primarily for adult audiences. The mission of the taxpayer is to create theatrical experiences that explore and illuminate the human condition. The sole consideration in selection of performances by the taxpayer is whether a performance will fulfill the taxpayer's mission rather than whether the performance will be entertaining or profitable. Revenue from ticket sales never exceeds expenses.

The taxpayer engages in the following activities to educate and familiarize audiences with its productions:

- Printed materials: *Prologue* newsletter; *Footlights* program magazine; *Study Guides* and *Play Guides;* and Lobby exhibitions;

- Presentations: "First-Nighter" opening night presentation series; "Talkback" discussion sessions following performances; "Backstage Briefing" and "Sunday Brunch" pre-show discussions;

- Intern Acting Program: A training program for unpaid interns;

- The taxpayer's Community Education Department: Responsible for developing programs and instructional materials that assist members of the community in having greater access to the activities and programs of the taxpayer.

The taxpayer advertises its shows in newspapers and magazines, and on radio, creating its own graphics and other advertising materials. Newspaper and magazine advertisements produced by the taxpayer refer to its performances as entertaining, using such phrases as: "magic," "fun," "enjoyment," "exciting," "entertaining," "fascinating," "powerful and alluring," "will thrill our audiences," and "wonderfully funny."

Tickets for the taxpayer's performances are sold only at the taxpayer's main box office. A subscriber discount is provided to purchasers of multiple ticket packages. The taxpayer strives to set ticket prices at a level that maximizes attendance. The taxpayer also conducts special promotional shows, benefits, and parties to attract potential ticket purchasers and benefactors.

The Commission concluded that the sale of admissions to the taxpayer's performances were taxable sales of admissions to "amusement" or "entertainment" events or places, within the meaning of sec. 77.52(2)(a)2, Wis. Stats., and that the taxpayer was a "retailer" under sec. 77.51(13), Wis. Stats., with respect to ticket sales to its performances.

The taxpayer has not appealed this decision.

Services subject to the tax - landscaping. *John Taylor Golf, Inc. d/b/a/ The Bog vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, interim decision dated November 16, 2000, and final decision dated February 28, 2001). The issues in this case are:

A. Whether the services purchased by the taxpayer for the design, development, and construction of The Bog golf course were landscaping services within the meaning of sec. 77.52(2)(a)20, Wis. Stats.

B. Whether the department properly assessed sales and use tax on all or certain portions of the disputed services as landscaping services under sec. 77.52(2)(a)20, Wis. Stats.

The taxpayer is a Wisconsin corporation engaged in the development, design, construction, and operation of The Bog golf course.

The taxpayer contracted with Palmer Course Design Company (Palmer) for architectural and design services for the golf course, which included:

- Preparation of land use plans such as course routing, site location for the clubhouse, maintenance area, practice facilities, and related amenities, including cost estimates.
- Participation in zoning meetings.
- Preparation of construction plans and specifications for all features of the golf course, including tees, fairways, roughs, greens, mounds, swales, bunkers, grading cut and fill calculations, grassing and/or seeding plans, and plans for irrigation systems.
- Preparation of bid documents, including preparation of bid packages, evaluation of bids, selection of contractors, construction scheduling and programming for the 18 holes, and assistance in the administration of the course construction.
- Inspection and monitoring of the construction work.
- Coordination with the landscape architect in the location of trees for strategic and aesthetic purposes, rain and comfort stations, water fountains, and other amenities.
- Coordination with the construction manager to ensure timely construction.
- Approval of construction bills.

Palmer prepared drawings depicting the master plan for the golf course, the features of each golf hole, including the greens complex, and the practice facility. The detail drawings included information regarding tee boxes, grade elevations, locations of fairways, bunkers, hazards, native areas, greens, cart paths, bridges, retaining walls, and natural elements adjacent to the specific golf hole.

The taxpayer contracted with Golf Course Consultants (GCC) and others for the construction of the golf course. The contract with GCC stated that it would supply all the necessary equipment, skilled equipment operators, and laborers required to construct the golf course. GCC also provided project superintendents, assisted in supervising and sequencing all other contractors, and various on-site management services. GCC's contract provided a schedule of specific services, including:

- Silt fencing.
- Greens, tee, bunker construction.
- Finish grading.
- Rock wall construction.

- Seedbed preparation.
- Seeding and sodding.

Construction of The Bog changed and modified the natural features of the land and ornamented the natural landscape by altering the plant cover to incorporate the various golf course features, including tee boxes, fairways, roughs, greens, mounds, swales, bunkers, and cart paths. Features of the golf course were designed into the course by Palmer, based on strategies of the game of golf and the playability of the golf course.

In its interim decision of November 16, 2000, the Commission concluded as follows:

A. With the exception of silt fencing and rock wall construction, the services purchased by the taxpayer and assessed by the department for the design, development, and construction of The Bog golf course were subject to sales tax as landscaping services within the meaning of sec. 77.52(2)(a)20, Wis. Stats. Silt fencing and rock wall construction are not landscaping services within the meaning of that statute.

   The Commission reached this conclusion on the basis that construction of The Bog involved changing the natural landscape to fairways, roughs, greens, bunkers, and other golf course features with different vegetation.

   In determining what activities were considered landscaping, the Commission referred to various dictionary definitions, including one found in *Webster's Ninth New Collegiate Dictionary* (1991), which defines landscaping as: "to modify or ornament (a natural landscape) by altering the plant cover…" Using these definitions, the Commission determined that landscaping involves *changing the natural landscape by altering the plant cover, whether for beautification or otherwise.*

B. Determination of whether the amounts assessed by the department for each landscaping item were proper will be made at a subsequent hearing, pursuant to a prior stipulation of the parties.

With regard to Issue B, the parties reached a settlement as to the amounts to be assessed in this matter, and pursuant to that settlement the Commission, on February 28, 2001, ordered that the interim Decision and Order of November 16, 2000, is a final Decision and Order.

Neither the department nor the taxpayer has appealed this decision, since it was based on the settlement reached by both parties.

Services subject to the tax - transient lodging. *Ronald J. Hergert d/b/a Aero Expo Corporate Service vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 8, 2001). The issue in this case is whether the taxpayer is liable for sales tax on receipts for furnishing accommodations to the public under sec. 77.52(2)(a)1, Wis. Stats.

During the years 1993 through 1997, the taxpayer advertised in aviation trade magazines to solicit persons who were interested in renting homes in the Oshkosh area during the annual Oshkosh Experimental Aircraft Association Fly In (the "Fly In"). The taxpayer solicited homeowners in the Oshkosh area who were interested in renting their homes out during the week of the Fly In, and he advertised his service as the "Oshkosh Fly In Housing Specialists."

The taxpayer developed forms using his own stationery, for use as rental contracts between homeowners and renters, in which the taxpayer was listed as a signatory and often as a party to the contract. Homeowners and renters each signed individual forms with the taxpayer prior to signing rental contracts through the taxpayer that contained the signatures of the taxpayer, homeowner, and renter.

No direct negotiations occurred between homeowners and renters concerning the terms of rental contracts. The taxpayer negotiated the rental amounts with homeowners and renters. For additional fees the taxpayer would provide services such as: catered food, commercial shipping services, facsimile and copy machines, rental cars, rollaway beds, and maid services. The taxpayer unilaterally determined the fee he would charge and retain as part of each rental contract.

The taxpayer obtained signatures of homeowners and renters through individual contact with each party. In almost every case homeowners and renters did not know each other and never met face-to-face. The taxpayer met with renters to provide them with rental home keys, which in most cases were returned to the taxpayer, although on occasion the renter would leave the keys at the rental home.

Each renter paid the taxpayer the total amount of the rental price, and the taxpayer paid each homeowner an agreed upon amount for the rental. During the years 1993 through 1997, the taxpayer paid the cost of one refund, and he was not reimbursed by the homeowner.

In 1996, the taxpayer added a "no compete" clause to his rental contracts, which required a $500 penalty if the homeowner and renter made independent rental arrangements with each other within 3 years of the taxpayer's contract with the homeowner and renter. If homes required repair during the rental period, the renter was instructed to contact the taxpayer.

The Commission concluded that the taxpayer's contracts with renters were subject to the sales tax under sec. 77.52(2)(a)1, Wis. Stats., because the taxpayer furnished accommodations to the public and made lodging available to transients.

The taxpayer has appealed this decision to the Circuit Court.

WITHHOLDING OF TAXES

Officer liability. *Steven T. Rich vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 26, 2001). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of Mark VII of Wisconsin ("Mark VII") under sec. 71.83(1)(b)2, Wis. Stats., for the calendar year 1995.

The taxpayer was employed by Mark VII to manage its operations from July 1993 until November 1995.

The taxpayer had authority to sign checks drawn on Mark VII's checking account and had physical possession of the checkbook. Although three other individuals also had authority to sign checks drawn on Mark VII's checking account, the taxpayer was the only person to sign checks drawn on this account prior to his termination on November 14, 1995.

Prior to sometime in 1994, an independent payroll service prepared withholding tax forms and checks for Mark VII's payroll. In 1994, the taxpayer insisted on taking over the preparation of the withholding tax returns and checks to eliminate the expense paid to the independent payroll service. The taxpayer also prepared and signed sales and use tax returns on behalf of Mark VII.

In 1995, the taxpayer prepared and filed at least one withholding tax return and paid at least one withholding tax payment to the department. He also prepared and signed at least 19 payroll checks on behalf of Mark VII, including seven to himself. The taxpayer signed checks for amounts between $10,077.44 and $101,184.47 during June through September 1995, during which time Mark VII's checking account had monthly ending balances of more than $5,000.00. Mark VII's withholding taxes for 1995 were underpaid by $3,236.37, most of which was attributable to the first nine months of 1995.

The Commission concluded that the taxpayer was a person responsible for the 1995 withholding tax liability of Mark VII under sec. 71.83(1)(b)2, Wis. Stats. The taxpayer actively sought the ability to make withholding tax payments and possessed the **authority** to write checks on the Mark VII checking account. As manager, he was responsible for directing payment of more than $145,000.00 to creditors of Mark VII from June to September of 1995. The taxpayer had a **duty** to pay the withholding taxes of Mark VII because he knew of the obligation to make the payments when he took over the payroll reporting responsibilities. The taxpayer **intentionally breached his duty** to pay the withholding taxes when he made payments to other creditors while the withholding taxes went unpaid.

The taxpayer has not appealed this decision.

Officer liability. *Roland F. Sarko vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 8, 2001). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid withholding taxes of R. F. Sarko and Associates, Inc. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats., for the period beginning with the year-end reconciliation for 1988 and various periods through the month of April 1995.

Until May 1991, the taxpayer was president and treasurer of the corporation and owned 70% of the corporation's stock. Beginning May 1991, the taxpayer held the offices of president, vice president, secretary,

and treasurer of the corporation and was the corporation's sole director and shareholder.

The taxpayer signed all of the corporation's monthly and annual withholding tax returns, most of which were filed late and without payment of the tax due.

The taxpayer was one of two authorized signatories of the corporation's business checking accounts. He signed checks drawn on those accounts to pay other creditors, including himself and other employees of the corporation, while knowing the withholding taxes were unpaid.

The taxpayer represented the corporation in entering into agreements with department representatives to pay the withholding taxes due.

On behalf of the corporation, the taxpayer signed a Second Amended Plan of Reorganization in bankruptcy in 1994, which provided that he "will retain ownership and management of the company."

The Commission concluded the taxpayer was a person responsible for the withholding tax liability of the corporation under sec. 71.83(1)(b)2, Wis. Stats.

The taxpayer was the corporation's president and treasurer, had the ability to make withholding tax payments, and possessed the **authority** to write checks on the corporation's checking account. As the corporation's president and treasurer, the taxpayer had a **duty** to pay the withholding taxes of the corporation and knew they were not being paid. The taxpayer **intentionally breached his duty** to pay the withholding taxes when he made payments to other creditors while the withholding taxes went unpaid.

The taxpayer has not appealed this decision.

SALES AND USE TAXES, AND WITHHOLDING OF TAXES

Officer liability. *Wisconsin Department of Revenue vs. James R. Werner* (Circuit Court for Dane County, December 8, 2000). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated June 16, 2000. See *Wisconsin Tax Bulletin* 122 (October 2000), page 28, for a summary of the Commission's decision. 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, 1992 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.

Starting July 15, 1990, the Board of Directors of Ceille Industries hired the taxpayer to manage a restaurant known as Country Gardens. Five Ceals held the liquor license for the bar on the premises of Country Gardens.

The taxpayer was in charge of the restaurant's day-to-day operation. He had check writing authority on the business checking account of Ceille Industries, which was also used to pay obligations of Five Ceals, but the Board of Directors limited his authority in directing payments to vendors and creditors of Ceille Industries. The taxpayer had no other position or office associated with Ceille Industries and was not a shareholder of Ceille Industries.

The Board of Directors authorized the taxpayer to pay some back taxes due from a time prior to his hiring. The taxpayer did not pay all sales and use taxes while he was the manager, nor did he pay all withholding taxes due to the department, although taxes were withheld from employees' wages and the restaurant did collect sales taxes on substantial monthly receipts. The taxpayer was aware that creditors other than the department were being paid, but decisions concerning payments to other vendors and creditors were made by the Board of Directors, which required the taxpayer to report to them on a monthly basis.

The Circuit Court concluded as follows:

A. The taxpayer is not a responsible person who is liable for the unpaid sales taxes of Ceille Industries under sec. 77.60(9), Wis. Stats.

B. The taxpayer is not a responsible person who is liable for the unpaid withholding taxes of Ceille Industries under sec. 71.83(1)(b)2, Wis. Stats.

C. The taxpayer is not a responsible person who is liable for the unpaid sales taxes of Five Ceals under sec. 77.60(9), Wis. Stats.

In affirming the Commission, the Circuit Court gave great deference to the Commission's decision. For each issue, the Circuit Court held that the taxpayer lacked the authority to direct payment of the unpaid taxes.

The department has not appealed this decision.

DRUG TAXES

Drug tax - constitutionality; Appeals - jurisdiction. *Jon P. Craven vs. Wisconsin Department of Revenue* (Circuit Court for Outagamie County, January 11, 2001). This is an action for review of a March 10, 2000, decision of the Wisconsin Tax Appeals Commission, which dismissed the taxpayer's controlled substances tax refund claim. The Commission held that it did not have jurisdiction because the refund claim was not made within two years following the assessment, as required by sec. 71.75(5), Wis. Stats. The Commission decision was not summarized in the *Wisconsin Tax Bulletin.*

The department issued a controlled substances tax assessment against the taxpayer in March 1991, pursuant to sec. 139.93(1), Wis. Stats. The taxpayer did not contest the assessment, and the department subsequently collected some funds from the taxpayer.

In January 1997, the Wisconsin Supreme Court held in *State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997), that the controlled substances tax affix and display provisions are unconstitutional. The taxpayer filed a claim for refund with the department in September 1997, based on the *Hall* decision. The department denied the claim for refund, as well as the taxpayer's petition for redetermination. The taxpayer appealed to the Commission, which determined that it lacked jurisdiction as explained above.

On appeal, the taxpayer contends that because the drug tax stamp law was declared unconstitutional, the assessment against him is void and the assessment should be vacated. The department maintains that the refund claim is barred because timely exhaustion of administrative remedies is mandated by the legislature in proceedings for the recovery of state taxes.

The Circuit Court concluded that the taxpayer failed to exhaust all administrative remedies mandated by the legislature for recovery of state taxes. The remedies prescribed under secs. 71.75 and 71.88, Wis. Stats., are exclusive and apply to refund claims based upon the constitutionality of a taxing statute. The doctrine of sovereign immunity bars the refund claim.

The taxpayer has not appealed this decision.

Drug tax - retroactive rehabilitation of assessment. *Cooper D. Collins vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 16, 2000). The issue in this case is whether an assessment of a controlled substances tax that was declared unconstitutional can be rehabilitated after the Wisconsin Legislature retroactively reimposed the tax in an amended form, in accord with the Wisconsin Supreme Court "unconstitutional" decision.

In July 1994, the department issued a controlled substances tax against the taxpayer, pursuant to sec. 139.87 *et. seq.*, Wis. Stats. The taxpayer filed a timely petition for redetermination with the department in September 1994. In January 1997, the Wisconsin Supreme Court declared the controlled substances tax unconstitutional. *State v. Hall*, 207 Wis. 2d 54 (1997).

On October 13, 1997, the Wisconsin Legislature "retroactively reimposed" the controlled substances tax after

amending the tax in accord with the Supreme Court decision in *Hall*. The department denied the taxpayer's petition for redetermination on October 24, 1997. The taxpayer appealed to the Commission, and subsequently both the taxpayer and the department moved for summary judgment.

The Commission concluded that the department's assessment was void *ab initio* and could not be rehabilitated by the Legislature's re-enactment of the controlled substances tax. Because the controlled substances tax was unconstitutional, it had no legal effect, and any assessments made pursuant to it are void and have no existence or legal effect.

The department has appealed this decision to the Circuit Court. On January 23, 2001, the Circuit Court issued an order staying further proceedings, pending the final outcome, including any subsequent appeals, of the decision in *David L. Gilbert v. Wisconsin Department of Revenue,* Ct. App., Dist. II, No. 00-2154.

Drug tax - retroactive rehabilitation of assessment. *Elaine K. Schmitz vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 16, 2000). The issue in this case is whether an assessment of a controlled substances tax that was declared unconstitutional can be rehabilitated after the Wisconsin Legislature retroactively reimposed the tax in an amended form, in accord with the Wisconsin Supreme Court "unconstitutional" decision.

In November 1995, the department issued a controlled substances tax against the taxpayer, pursuant to sec. 139.87 *et. seq.*, Wis. Stats. The taxpayer filed a timely petition for redetermination with the department in December 1995. In January 1997, the Wisconsin Supreme Court declared the controlled substances tax unconstitutional. *State v. Hall*, 207 Wis. 2d 54 (1997).

On October 13, 1997, the Wisconsin Legislature "retroactively reimposed" the controlled substances tax after amending the tax in accord with the Supreme Court decision in *Hall*. The department denied the taxpayer's petition for redetermination on October 24, 1997. The taxpayer appealed to the Commission, and subsequently both the taxpayer and the department moved for summary judgment.

The Commission concluded that the department's assessment was void *ab initio* and could not be rehabilitated by the Legislature's re-enactment of the controlled substances tax. Because the controlled substances tax was unconstitutional, it had no legal effect, and any assessments made pursuant to it are void and have no existence or legal effect.

The department has appealed this decision to the Circuit Court. On January 23, 2001, the Circuit Court issued an order staying further proceedings, pending the final outcome, including any subsequent appeals, of the decision in *David L. Gilbert v. Wisconsin Department of Revenue,* Ct. App., Dist. II, No. 00-2154.

Drug tax - retroactive rehabilitation of assessment. *Eugene D. Schmitz vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 16, 2000). The issue in this case is whether an assessment of a controlled substances tax that was declared unconstitutional can be rehabilitated after the Wisconsin Legislature retroactively reimposed the tax in an amended form, in accord with the Wisconsin Supreme Court "unconstitutional" decision.

In September 1993, the department issued a controlled substances tax against the taxpayer, pursuant to sec. 139.87 *et. seq.*, Wis. Stats. The taxpayer filed a timely petition for redetermination with the department in October 1993. The department denied the petition for redetermination in October 1994, and the taxpayer filed a petition for review with the Commission. Action on the petition for review was held in abeyance pending the outcome of litigation challenging the constitutionality of the controlled substances tax statute.

In January 1997, the Wisconsin Supreme Court declared the controlled substances tax unconstitutional. *State v. Hall*, 207 Wis. 2d 54 (1997).

In October 1997, the Wisconsin Legislature "retroactively reimposed" the controlled substances tax after amending the tax in accord with the Supreme Court decision in *Hall*.

The Commission concluded that the department's assessment was void *ab initio* and could not be rehabilitated by the Legislature's re-enactment of the controlled substances tax. Because the controlled substances tax was unconstitutional, it had no legal effect, and any assessments made pursuant to it are void and have no existence or legal effect.

The department has appealed this decision to the Circuit Court. On January 23, 2001, the Circuit Court issued an order staying further proceedings, pending the final outcome, including any subsequent appeals, of the decision in *David L. Gilbert v. Wisconsin Department of Revenue,* Ct. App., Dist. II, No. 00-2154.