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. *Verdell Linton, and Lynn R. and Sandra R. Linton vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 2, 2002). The issue in this case is whether Lynn R. Linton's payments to Verdell Linton from 1995 through 1998 were deductible by him and includable in her taxable income.

Lynn R. Linton ("Lynn") and Verdell Linton ("Verdell") were divorced in March 1985. There were three children of the marriage, born in December 1971, May 1975, and April 1981. The Judgment of Divorce awarded custody of the three children to Verdell.

The Judgment of Divorce provided that, with respect to family support, Lynn was to pay $500 per month "…for the support, welfare and maintenance of [Verdell] and the minor children of the parties…." The judgment contained no other material terms concerning family support, child support, or maintenance.

Pursuant to the divorce judgment, Lynn paid $500 per month to Verdell from July 1985 until June 1999. On their Wisconsin income tax returns for 1995 through 1998, Lynn and Sandra Linton deducted the amounts Lynn paid to Verdell as alimony or separate maintenance. Verdell did not report the payments as income on her 1995 through 1998 Wisconsin income tax returns.

In February 2000, the department issued assessments in the alternative against Verdell Linton and against Lynn and Sandra Linton, based on their inconsistent reporting of Lynn's payments from 1995 through 1998. The taxpayers filed timely petitions for redetermination, which the department denied. The taxpayers then filed timely petitions for review with the Commission.

The Commission concluded that the family support payments that Lynn R. Linton paid to Verdell Linton from 1995 through 1998 constituted alimony or other maintenance under section 71 of the Internal Revenue Code, as incorporated into sec. 71.06, Wis. Stats. As such, the payments in those years were deductible by Lynn and Sandra Linton and includable in Verdell Linton's income. Verdell's argument that the payments should be considered child support because they ceased two months after the 18th birthday of the youngest child fails, because that contingency was not contained in the divorce judgment.

Neither Verdell Linton, Lynn R. Linton, Sandra R. Linton, nor the department has appealed this decision.

Alimony; Dependent credit. *Robert L. Daher, and Robert J. and Dianna Buffham vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 18, 2002). The issues in this case are:

A. Whether, and if so the extent to which, Robert Daher's payments to Dianna Buffham in 1995 were deductible by him and includable in her income.

B. Whether Robert Daher or Dianna Buffham was entitled to claim a dependent credit for their son Michael Daher for 1995, 1996, and 1997.

Robert L. Daher ("Mr. Daher") and Dianna Buffham ("Mrs. Buffham" in this summary, even though she was known as Dianna Daher during certain events material to this matter) were divorced in October 1991. They entered into a Final Stipulation, which was made a part of the Divorce Judgment.

There are two children of the marriage, Robert L. Daher, Jr., born in September 1976, and Michael P. Daher, born in August 1980. The taxpayers were awarded joint custody of the two children. Primary physical placement of Robert Daher was with Mr. Daher, and primary physical placement of Michael Daher was with Mrs. Buffham.

The Final Stipulation provided that Mr. Daher was to pay family support to Mrs. Buffham until June 1997, deductible by him and taxable to her. At that time, he was to commence paying child support or "family support" to her, until Michael Daher reached age 18, or 19 under certain circumstances. The Final Stipulation also contained a hand-written statement, initialed "RLD," providing that family support was to terminate upon death or remarriage of Mrs. Buffham.

The Final Stipulation provided that Mrs. Buffham may claim no income tax exemptions for the children, and that Mr. Daher may claim them for tax purposes. Mrs. Buffham was to provide a written waiver of her right to claim the children and to permit Mr. Daher to claim them.

Robert Buffham and Dianna Buffham were married July 22, 1995. After the marriage, Mr. Daher ceased making family support payments to Mrs. Buffham and instead made child support payments.

Mr. Daher claimed a deduction of $6,510 for alimony or separate maintenance on his 1995 Wisconsin income tax return, of which $4,650 was paid prior to Mrs. Buffham's marriage to Robert Buffham. The Buffhams reported none of the $6,510 on their 1995 Wisconsin income tax return.

During the years 1995, 1996, and 1997, Michael Daher lived with Mrs. Buffham the majority of the time. Mrs. Buffham did not execute a Form 8332 waiving her right to claim Michael Daher as a dependent. For those three years he was claimed as a dependent by both Mr. Daher and the Buffhams.

The department issued assessments in the alternative to both Mr. Daher and the Buffhams, based on the inconsistent reporting of Mr. Daher's payments in 1995 and the fact that both Mr. Daher and the Buffhams claimed Michael Daher as a dependent. Both Mr. Daher and the Buffhams filed petitions for redetermination, which the department denied. They then filed petitions for review with the Commission.

The Commission concluded as follows:

A. Mr. Daher is entitled to a deduction for payment of alimony or other maintenance of $4,650 in 1995, and the Buffhams must include that amount as income for 1995. Under the provisions of the Final Stipulation, payments of family support made prior to the marriage of the Buffhams were clearly alimony or other maintenance under section 71 of the Internal Revenue Code. No deduction is permitted for the remaining payments Mr. Daher made to Mrs. Buffham after the marriage (and those payments are not includable in her income), because Mr. Daher conceded that those amounts were child support and not family support.

B. The Buffhams are entitled to claim Michael Daher as a dependent for 1995, 1996, and 1997, and Mr. Daher is not, because Mrs. Buffham did not execute a waiver Form 8332 for those years. For divorces granted after 1984, the execution of such a form by the custodial parent is the only exception under which the parent without physical custody is entitled to claim the child as a dependent.

Neither Robert L. Daher, Robert J. Buffham, Dianna Buffham, nor the department has 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.

Appeals – jurisdiction. *Robert J. Quinnell vs. Wisconsin Department of Revenue and Wisconsin Tax Appeals Commission.* (Court of Appeals, District IV, January 29, 2002, and Wisconsin Supreme Court, April 10, 2002). This is an appeal from an order of the Circuit Court dated June 12, 2001, dismissing the taxpayer's appeal of a decision of the Wisconsin Tax Appeals Commission, and a petition for review of the Court of Appeals' decision. See *Wisconsin Tax Bulletin* 127 (October 2001), page 19, for a summary of the Circuit Court's decision.

Without the authority or jurisdiction to act, the Circuit Court dismissed the taxpayer's petition for review of the Commission's February 20, 2001, decision, because it was not timely filed. The 30-day period for filing a petition for review of the Commission's decision lapsed on March 22, 2001. The taxpayer's petition for review was filed with the Circuit Court on March 23, 2001. Even though the petition for review was only one day late, the Circuit Court held, it has no authority to hear it, regardless of any merit it may have. The deadline may not be extended or ignored by the court.

The taxpayer argues that Article I, Section 4 of the Wisconsin Constitution does not contain any time limit for filings. He further asserts that section 227.42(1)(a) and (d), Wis. Stats., gives him a right to a hearing at the Circuit Court.

The Court of Appeals concluded that neither Article I, Section 4 of the Wisconsin Constitution nor section 227.42(1)(a) and (d), Wis. Stats., permit the taxpayer to file an appeal after 30 days from the decision of the Tax Appeals Commission. The Court of Appeals accordingly affirmed the decision of the Circuit Court.

The taxpayer filed a motion to extend the time to file a petition for review with the Wisconsin Supreme Court. The Supreme Court construed the motion as a timely petition for review and informed the taxpayer that unless a statement in support of the petition conforming with statutory requirements was filed by April 1, 2002, the petition for review would be summarily dismissed. No statement in support of the petition was filed.

The Wisconsin Supreme Court thus dismissed the petition for review.

Assessments – estimated; Appeals – frivolous. *Roy M. and Lori A. Guralski vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 14, 2002). The issues in this case are:

A. Whether the department's estimated assessment against the taxpayers was reasonable and within its statutory authority.

B. Whether the taxpayers' arguments as to why the Wisconsin income tax statutes do not apply to them are frivolous and groundless, thereby subjecting them to an additional assessment under sec. 73.01(4)(am), Wis. Stats.

The taxpayers resided in Wisconsin during all of 1999, and in that year Roy M. Guralski ("the taxpayer") was employed. The employer issued a Form W-2 for 1999, reporting $31,090.47 of "Wages, tips, other compensation" and $1,260.03 of Wisconsin tax withheld.

In February 2000, the taxpayers filed a 1999 Wisconsin income tax form, with an attached federal income tax form. The taxpayers wrote "-0-" on every line of the Wisconsin form, with four exceptions: on lines 32 (Wisconsin tax withheld), 39, 40, and 41, they wrote $1,260.03, thus claiming a refund of all income taxes withheld. Above the signatures, the taxpayers wrote "This return is Not being filed VOLUNTARILY. I'm filing it in fear of unlawful Prosecution if I do Not file."

On May 15, 2000, the department issued an assessment to the taxpayers for 1999, comprising income tax and interest. The assessment was based on the taxpayer's wages plus its estimate of $4,000 of additional income, pursuant to its authority under sec. 71.74(3), Wis. Stats. The additional income was added in light of the taxpayers' 1995 to 1998 returns on which income other than wages of approximately $1,600 to $3,000 was reported.

The taxpayers sent a letter to the department on May 19, 2000, which the department deemed a petition for redetermination. In July 2000, the department denied the petition for redetermination, and the taxpayers filed a timely petition for review with the Commission.

In March 2002, the Commission received the taxpayers' reply brief, along with an amended 1999 Wisconsin Form 1X income tax return and their check of $123.75 for additional taxes ($101.00) and interest ($22.75). Attached to the return was an amended 1999 federal Form 1040X income tax return, which included $4,253 of capital gain distributions and $720 of rental income.

The Commission transmitted the amended return and check to the department.

The taxpayers made several assertions to explain why the Wisconsin income tax laws do not apply to them or their income. These assertions include the following:

- The wages are not taxable because the Form W-2 in the record is a federal form, not a state form.
- The wages are not taxable because section 61 of the Internal Revenue Code ("IRC"), adopted by Wisconsin for tax year 1999, does not include the word "wages."
- Because of the omission of the word "wages" in IRC section 61, the taxpayers would be committing perjury if they reported the income.
- The taxpayers also referred to several federal cases, which demonstrated their belief that they owe no income taxes.

The Commission concluded as follows:

A. Notwithstanding the taxpayers' assertions, the taxpayer's wages are subject to income tax, and the department's estimated assessment against the taxpayers was reasonable and within its statutory authority.

B. The taxpayers' arguments as to why the Wisconsin income tax statutes do not apply to them constitute frivolous, irrelevant, and useless ramblings about the department's authority and practice relating to Wisconsin and federal income tax statutes. Because the taxpayers offered only frivolous and groundless arguments, they are subject to an additional assessment under sec. 73.01(4)(am), Wis. Stats. The Commission assessed an additional penalty of $500 against the taxpayers.

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.

Assessments – presumption of correctness; Partnerships – basis. *Gayle R. Dvorak, and Gayle R. and Norene M. Dvorak vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 30, 2002). The issues in this case are:

A. Whether the taxpayers overcame the presumptive correctness of the department's actions on their 1982 through 1986 income tax returns regarding the bases of and deductions attributable to four corporations and a partnership, interest deductions taken on their 1983 tax return, and a gain on the sale of their personal residence in 1986.

B. Whether Gayle R. Dvorak properly added $62,500 to his basis in a partnership after executing an indemnification agreement to pay any losses out of the partnership up to $62,500, and then not being required to pay anything under the agreement.

C. Whether the taxpayer properly deducted his portion of unpaid interest on the refinancing of the partnership, after the principal and unpaid interest was rolled into a refinanced loan.

D. Whether the taxpayers proved that the department incorrectly added $83,500 to their 1985 income after Gayle R. Dvorak's loan to another party in that amount was cancelled in 1985, in exchange for Mr. Dvorak's stock in the corporations at issue.

In February 1989, the department issued an assessment to both taxpayers for tax year 1986, and it issued another assessment to Gayle R. Dvorak ("the taxpayer") for tax years 1982 through 1985. The taxpayers filed petitions for redetermination with the department in April 1989, relating to both assessments. The taxpayers signed 20 extension agreements between 1989 and 1999, granting the department additional time to act on their appeals. In November 1999, the department granted in part and denied in part both petitions for redetermination, and the taxpayers then filed timely petitions for review with the Commission.

Prior to and during the period under review (1982 through 1986), the taxpayer had business interests in four corporations: DRI, Inc. ("DRI"), DRI Two, Inc. ("DRI 2"), DRI Three, Inc. ("DRI 3"), and DRI Four, Inc. ("DRI 4"), and a partnership, Parkview Heights Partnership ("Parkview Heights"). These corporations and the partnership are the subject of several of the issues in this case.

Most of the disputed issues regarding the corporations relate to whether the taxpayer has substantiated adjustments to his bases in the corporations, specifically additions to his initial investments. The department also adjusted the taxpayers' gain on the sale of their personal residence reported on their 1986 income tax return, adjusted the total itemized deductions claimed on their 1983 income tax return, and added $83,500 to their 1985 income tax return for the asserted cancellation of a debt.

The Commission concluded as follows:

A. The taxpayers did not overcome the presumptive correctness of the department's actions on their 1982 through 1986 income tax returns regarding the bases of and deductions attributable to the four DRI corporations and Parkview Heights, interest deductions taken on their 1983 tax return, and a gain on the sale of their personal residence in 1986.

   Income tax assessments of the department are presumed to be correct, and the burden of proving them incorrect rests with the taxpayers assessed. Mr. Dvorak failed to provide the substantiation needed to overcome this presumption.

B. Gayle R. Dvorak improperly added $62,500 to his basis in Parkview Heights after executing an indemnification agreement to pay any losses arising out of that partnership up to $62,500, and then not being required to pay anything under the indemnification agreement.

C. Gayle R. Dvorak improperly deducted his portion of unpaid interest on the refinancing of Parkview Heights, after the principal and unpaid interest was rolled over into a refinanced loan.

D. The taxpayers failed to prove that the department incorrectly added $83,500 to their 1985 income after Gayle R. Dvorak's loan to another party in that amount was cancelled in exchange for Mr. Dvorak's stock in the DRI corporations and in another corporation.

The taxpayers have appealed this decision to the Circuit Court.

Business expenses. *Margaret J. Dye vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 26, 2002). The issue in this case is whether the taxpayer has substantiated the expenses that were disallowed by the department.

The taxpayer owns a horseracing business as a sole proprietor, which is operated by her husband, John Cianciolo. All actions of Mr. Cianciolo described below were taken on behalf of the taxpayer in the furtherance of her horseracing business.

In 1996, the taxpayer and Mr. Cianciolo had three vehicles at their disposal, including a 1995 Cadillac Eldorado that was leased pursuant to a 24-month lease beginning in June 1995 ("the car"). The car was used exclusively for the taxpayer's business in 1996. The taxpayer and Mr. Cianciolo used a calendar on which they kept a record of personal and business events. The calendar included the business trips they made with the car.

On her 1996 Wisconsin income tax return, the taxpayer deducted $6,930 in lease payments on the car. However, she did not add back any inclusion income as required by Treasury Regulations.

Also on her 1996 Wisconsin income tax return, the taxpayer deducted various business expenses on Schedule C, which included trainer fees of $27,566. In that year she incurred $26,950.05 in expenses properly deducted as trainer fees.

In June 1996, the taxpayer paid $9,000 to purchase a 2-year-old thoroughbred gelding. The gelding subsequently developed a condition that doomed its chances of ever racing, and therefore the taxpayer sold the gelding for slaughter in August 1996, for $200. She claimed an ordinary loss of $8,800 on her 1996 tax return, associated with the gelding at issue.

In April 1997, the taxpayer purchased a 2-year-old thoroughbred gelding for $26,500. Later that year, the gelding incurred a catastrophic injury that required that it be destroyed. The taxpayer sold the gelding for slaughter in December 1997, for $250. The taxpayer clamed an ordinary loss of $26,250 on her 1997 tax return, associated with this gelding.

In July 1999, the department issued an assessment against the taxpayer for 1996 and 1997, consisting of three adjustments:

- The $6,930 transportation expense for 1996 was denied.
- The expense for trainer fees was reduced by $4,050.
- The ordinary losses of $8,800 in 1996 and $26,250 in 1997 were disallowed.

The taxpayer filed a petition for redetermination, which the department denied, and the taxpayer then filed a timely petition for review with the Commission.

The Commission concluded that the taxpayer has substantiated:

- The $6,930 in rental expense in 1996 for lease payments on the car.
- All but $615.95 of the trainer fees claimed in 1996.
- Both of the losses of $8,800 in 1996 and $26,250 in 1997.

In addition, the Commission concluded that the taxpayer's gross income for 1996 is increased by $378, the amount calculated under Treasury Regulation section 1.280F-7, as an inclusion amount relating to the lease of the car.

Neither the taxpayer nor the department has appealed this decision.

Refunds, claims for – timeliness. *Daniel and Kathleen Berg vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 13, 2002). The issue in this case is whether the taxpayers are entitled to a refund based on a 1993 Wisconsin income tax return they filed on November 27, 2000.

On or about April 15, 1998, the department received the taxpayers' 1993 Wisconsin income tax return, consisting of a partially completed Form 1 and a partially completed farmland preservation credit claim, Schedule FC. The Form 1 contained the notation "Tentative Return, Amended Return to be Filed Later."

The Form 1 had entries of $600 on line 25 (farmland preservation credit), $600 on line 28 (farmland tax relief credit), and $1,200 on lines 29 (total of the two credits) and 30 (amount to be refunded). The Schedule FC household income area was blank except for the notation "Actual Amounts to be Filed Later (May Qualify for Higher Amount than 10% Minimum)." A 10% Special Minimum Credit of $600 was claimed on lines 11, 15, and 16, based on $6,000 in property taxes. The taxpayers failed to include required supporting documents relating to their tax return and farmland preservation credit claim.

The department requested the required documentation and subsequently denied the taxpayers' claim for refund after they failed to provide it. In October 1998, the taxpayers filed a petition for redetermination with the department, which included a statement that "[p]lans are to file a complete income tax return within 30 days." In June 1999, the department denied the petition for redetermination, since it had not received the complete 1993 income tax return. The taxpayers then filed a timely petition for review with the Commission.

In November 2000, the taxpayers filed a complete 1993 Wisconsin income tax return, claiming a farmland preservation credit of $4,200 and a total refund of $4,989. In December 2000, the department granted a refund of $1,200, based on the amount claimed on the April 15, 1998, claim for refund.

The Commission concluded that the taxpayers are not entitled to a refund of more than the $1,200 they claimed within the time specified in section 71.75 of the Wisconsin Statutes. The taxpayers filed a skeleton of a claim for refund on the last day permissible, and based on the inadequate information on it, the taxpayers are fortunate to have received **any** refund. The November 2000 claim for refund (not denominated as an amended return) is a new claim for refund and, as such, is untimely.

The taxpayers have not appealed this decision.

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CORPORATION FRANCHISE AND INCOME TAXES

Underpayment of estimated taxes. *Online Packaging, Incorporated vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 19, 2002). The issue in this case is whether the department correctly assessed the taxpayer for underpayment interest, or whether the taxpayer's underpayment could be offset against the substantial overpayment of income tax by two shareholders who mistakenly assumed that they, not the taxpayer, would be liable for the tax on the taxpayer's income.

The taxpayer is a corporation, whose president is Roger D. Teske ("Mr. Teske"). Mr. Teske had the mistaken belief that the taxpayer was a Subchapter S corporation, and that its income would flow through and be taxed to his two daughters (who had a majority interest in the corporation), rather than the income being taxed to the taxpayer. The taxpayer paid only $25 of estimated tax for tax year 1999.

Mr. Teske's two daughters, believing they would have to pay income tax on the taxpayer's income they believed they would receive in 1999, overpaid their combined estimated individual income taxes for that year by about $24,000. Upon learning that it was **not** a Subchapter S corporation, the taxpayer paid almost $24,000 of tax to the department on September 15, 2000.

In October 2000, the department sent the taxpayer an assessment for $2,227.79 for 1999, which included interest for the underpayment of estimated taxes, plus other interest. The taxpayer sent a letter to the department, which was deemed to be a petition for redetermination. The department denied, it, and the taxpayer then filed a timely petition for review with the Commission.

The Commission concluded that because the taxpayer was required to pay about $24,000 of income tax for 1999 but paid estimated taxes of only $25, the department correctly assessed the taxpayer for underpayment interest for 1999. The taxpayer cannot avoid or reduce the assessment by offsetting its underpayment against the substantial overpayment by two shareholders who mistakenly believed that they, rather than the taxpayer, would be liable for the tax on the taxpayer's income. The statutes do not authorize such an offset, and there is no statute to excuse underpayment of estimated taxes based on an incorrect assumption, even though it was not intentional or malicious.

The taxpayer has not appealed this decision.

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

SALES AND USE TAXES

Boats, vessels and barges – nonresident purchases. *Gregory Thornton vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 22, 2002). The issue in this case is whether sec. 77.53(17m), Wis. Stats., is constitutional under the equal protection clause of the Wisconsin or federal constitutions or the commerce clause of the federal constitution.

The taxpayer is domiciled in Minnesota. On or about June 8, 1998, the taxpayer purchased a boat through a boat brokerage located in Florida. The boat, located in Michigan, was offered for sale through a Michigan boat broker on behalf of the sellers. The taxpayer received title to the boat on or about August 26, 1998. The taxpayer took physical possession of the boat from the sellers in Michigan on or about June 28, 1998, and began berthing the boat in Superior, Wisconsin on or about July 4, 1998. The taxpayer did not pay sales tax on the purchase of the boat to Florida, Michigan, or Wisconsin.

On October 5, 1998, the taxpayer registered the boat with the Wisconsin Department of Natural Resources ("DNR"), and paid Wisconsin use tax. The DNR subsequently billed the taxpayer for Douglas County use tax on January 5, 1999, which the taxpayer paid January 15, 1999.

On September 21, 1999, the taxpayer filed a claim for refund of the Wisconsin and Douglas County use tax paid, claiming sec. 77.53(17m), Wis. Stats., violates the equal protection clauses of the Wisconsin and federal constitutions and the commerce clause of the federal constitution. The taxpayer argues that the law discriminates against Minnesota residents who buy boats outside of Minnesota, and that it discriminates against interstate commerce.

Section 77.53(17m), Wis. Stats., exempts from the use tax:

1. A boat purchased in a state contiguous to Wisconsin.

2. By a person domiciled in that state.

3. If the boat is berthed in Wisconsin's boundary waters adjacent to the state of the purchaser's domicile.

4. And if the purchase of the boat was an exempt occasional sale under the laws of the state in which the purchase was made.

The Commission concluded as follows:

A. The exemption does not violate the equal protection clause of the Wisconsin or federal constitution, because:

    1. It applies equally to all members of the class of Minnesota residents who qualify under the provisions of the exemption.

    2. It provides a class distinction between those persons domiciled in Minnesota whose boat purchases were exempt occasional sales and those whose purchases were not previously subject to a sales or use tax.

    3. It does not preclude other Minnesota residents from qualifying for the exemption.

    4. Its purpose is to allow an exemption limited to where there was already an exemption in the purchaser's state of domicile.

    5. It provides a class distinction, promoting a legitimate government interest, by not allowing the exemption to purchasers who have avoided the tax in their state of domicile by keeping their boats outside of their states' borders.

B. The exemption does not violate the interstate commerce clause of the federal constitution because:

    1. It does not provide an advantage to local business.

    2. It does not discriminate against foreign enterprises competing with local businesses.

    3. It does not discriminate against interstate commerce in favor of intrastate commerce.

    4. Further, the taxpayer has not shown where the provision is out of line with requirements of other states.

The taxpayer has not appealed this decision.

Leases and rentals – real vs. personal property. *All City Communication Company, Inc. and Waukesha Tower Associates vs. State of Wisconsin Department of Revenue* (Circuit Court for Dane County, March 18, 2002). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated August 6, 2001. See *Wisconsin Tax Bulletin* 127 (October 2001), page 24, for a summary of the Commission's decision. The issue in this case is whether Waukesha Tower's broadcast tower and equipment building are tangible personal property, making the lease or rental of the tower and equipment building subject to Wisconsin sales or use tax.

The determination of whether property, otherwise considered personal property, becomes real property is dependent upon the following three factors:

1. Actual physical annexation to the real estate;

2. Application or adaptation to the use or purpose to which the realty is devoted; and,

3. An intention on the part of the person making the annexation to make a permanent accession to the realty.

Annexation to the real estate means the article either becomes a necessary integral part of the property to which it is connected, or is so physically connected to the property that if removed, the property would be left unfit for use. The lease agreement between the land owner and Waukesha Tower provided that "Improvements and personal property" on the land were the property of Waukesha Tower, which could remove them at the end of the ten-year lease. The lease agreement also prohibited Waukesha Tower from doing anything to the land that might impair the usefulness of the land. The tower could be taken down either by toppling it in place or by dismantling it piece by piece. The tower could either be reassembled at another site, sold as scrap

metal, or sold as a used tower. These factors support the Commission's conclusion that the tower and equipment building were not annexed to the real property.

The tower and equipment building were adapted to the use of the realty because the tower was specifically designed for the property and the lease agreement provided the property to Waukesha Tower for the sole purpose of erecting the tower.

It was not Waukesha Tower's intention to make a permanent accession to the realty because the lease agreement was only for ten years, and Waukesha Tower retained the right to remove the tower and equipment building at the expiration of the lease.

The Circuit Court found the Commission's determination that the tower and equipment building were tangible personal property was reasonable when the Commission determined the tower and building were not annexed to the realty and Waukesha Tower did not intend them as permanent accessions, two of the elements required for the determination.

The Circuit Court concluded that the tower and equipment building were tangible personal property subject to Wisconsin sales or use tax.

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