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:

SALES AND USE TAXES

Admissions. *Milwaukee Symphony Orchestra vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 15, 2006). The issues in this case are (1) whether revenues received by Milwaukee Symphony Orchestra (MSO) from admissions to its concerts are subject to Wisconsin sales tax under sec. 77.52(2)(a)2., Wis. Stats., which imposes Wisconsin sales and use tax on the sale of admissions to amusement, athletic, entertainment, or recreational events or places; and (2) whether the admission receipts are nontaxable under appellate precedent creating an exception from sales tax for sales that are not made by retailers engaged in mercantile transactions. (See pages 13-15 of *Wisconsin Tax Bulletin* 28 (April 1982) for a summary of the precedent case of *Sister Mary Joanne Kollasch, et. al. and Sisters of St. Benedict, of Madison, Wisconsin vs. David W. Adamany, Secretary of the Department of Revenue* (Wisconsin Supreme Court, December 1, 1981), 104 Wis. 2d 552, 313 N.W.2d 47.)

The Department of Revenue conducted a field audit of MSO for September 1, 1992 through August 31, 1996. During the audit, MSO filed amended sales tax returns for the audit period, claiming a refund of $719,456.69 in sales tax that it had previously paid on its sales, including all of its ticket sales. The Department granted a portion of MSO's refund claim and denied the remainder of the claim, which denial MSO contests.

MSO was a professional full-time orchestra. Its musicians had written contracts and were paid at the union wage for all rehearsals and performances. MSO brought in and contracted with as many as 95 guest artists per year, paying as much as a total of $566,823 per year plus expenses of as much as $62,002. MSO operated in a businesslike manner with a form and structure comparable to for-profit businesses. MSO developed ambitious ticket revenue goals, and MSO's overall operating revenues consisted almost entirely of revenues from the sale of tickets to its performances.

Both MSO and the Department of Revenue agreed that, pursuant to sec. 77.52(2)(a)2., Wis. Stats., the event must be *primarily* amusement, entertainment, and/or recreational in nature and that "primarily" means anything more than 50%. Both parties also agreed that reliance on dictionary definitions is appropriate here. It was the assertion of MSO that its purpose of performing was *primarily* educational in nature. The Department of Revenue contended that MSO's performances were *primarily* entertainment in nature.

The Commission held that (1) MSO's performances were properly characterized as entertainment events for purposes of imposing sales tax under sec. 77.52(2)(a)2., Wis. Stats.; and (2) sales of admissions to MSO's performances are not immune from sales tax under *Kollasch* and its progeny.

Entertainment Events: The Commission concluded that the concerts at issue are not primarily educational events. MSO's concerts are not a formal course of study, instruction, or training, nor offered by an institution, and attending them is not the act or a process or course of learning, instruction, or training. MSO had no structured instructional curriculum or specific instructional course and did not give its concerts in a classroom or learning center setting, and no skill or knowledge was obtained or developed by attending concerts such as there would be by taking music lessons or attending a college music history or theory course. There is no direct or concrete correlation between attending a concert and learning. Even if some educational value flowed from MSO's concerts, that would be insufficient to classify the concerts as primarily educational.

The Commission rejected MSO's argument that whether an event is primarily entertaining, amusing, or recreational in nature is dependant only upon the sponsor's motivation in presenting the event. The Commission stated that the better approach is to look not only at the motivation or purpose of the sponsor in presenting the event, but also at the nature of the event itself and the audience's motivation in attending, and its reaction to, the event. Therefore, the Commission clarified that the sponsor's motivation is only one factor in the analysis and that a sponsor's statements that its events have an educational purpose might be undermined by other evidence showing that its purpose was otherwise.

Mercantile Transactions: The Commission held that MSO's sales of concert tickets were mercantile transactions, consistent with other Commission cases. MSO's annual receipts from its concerts were in the millions of dollars in each of the audit years and constituted at least 90 percent of its revenues. Its ticket sales were voluminous and were a means of supporting MSO. MSO made enormous efforts to sell tickets and spent considerable funds on its marketing activities. MSO used many different forms of commercial advertising, which included printed materials prepared by its own marketing department; advertisements in newspapers, on TV, and over the radio; flyers, brochures, and multiple different types of mailings; as well as telephone calls directly to its patrons. To hold that the transactions involved in this case were nonmercantile would be to stretch *Kollasch* beyond recognition. The Commission stated that it declined to expand *Kollasch* that far.

The taxpayer has appealed this decision to the Circuit Court.

Bad debts. *DaimlerChrysler Services North America LLC vs. Wisconsin Department of Revenue* (Court of Appeals, November 22, 2006). See *Wisconsin Tax Bulletin* 141 (January 2005), page 25, and *Wisconsin Tax Bulletin* 148 (July 2006), page 30, for summaries of the Wisconsin Tax Appeals Commission and Dane County Circuit Court decisions, respectively.

The issue in this case is whether the taxpayer may claim a refund for bad debts resulting from installment contracts assigned to the taxpayer by motor vehicle dealers and later found to be worthless.

The transactions underlying the taxpayer's claim are motor vehicle sales during the years of 1997, 1998, and 1999. At the time of each sale, the vehicle purchaser financed the vehicle by entering into an installment contract with a vehicle dealership. The amount financed included the sales tax.

At or shortly after the time of sales, the dealers sold or assigned the installment contracts to the taxpayer by executing assignment provisions. In exchange for the assignments, the taxpayer paid the dealers the full amounts financed, including amounts attributable to sales tax financed as a part of the installment contracts. The dealers paid the appropriate sales tax to the Department of Revenue.

The purchasers in these particular transactions defaulted on their installment contracts. To the extent the taxpayer was unable to recoup the balances due on the contracts, it claimed the debts uncollectible for purposes of federal and state income taxes. The unpaid balances included a proportional share of the sales tax on the vehicles. The taxpayer filed a claim with the department seeking a deduction for those proportional shares of the sales tax.

The department denied the taxpayer's claimed deduction, and the taxpayer sought review before the Commission. The Commission ruled in favor of the department, concluding that the taxpayer was not entitled to a deduction because it was not the retailer who previously paid the sales tax to the department. The Commission further concluded that the taxpayer was not entitled to a tax deduction as an assignee under the contracts at issue. The taxpayer petitioned the Circuit Court for review of the Commission's decision, and the Circuit Court affirmed the Commission.

The Court of Appeals concluded that the Commission reasonably determined that the taxpayer was not entitled to a deduction under the bad debt deduction statutes because the taxpayer was not the retailer that previously paid the sales tax to the Department of Revenue. The Court further concluded that the Commission reasonably determined that the taxpayer was not entitled to the deduction as an assignee. The taxpayer's interpretations of the bad debt statutes were not more reasonable than the Commission's interpretations; therefore, the Court of Appeals affirmed the Circuit Court's order upholding the Commission.

The taxpayer has appealed this decision to the Wisconsin Supreme Court.

Telecommunications services – refund requested by a class of purchasers. *Steven G. Butcher, Randy Meicher and Anthony F. Coffaro, on behalf of themselves and the class they represent vs. Ameritech, a foreign corporation, Michael Morgan as Secretary of the Wisconsin Department of Revenue and Wisconsin Bell, Inc., a Wisconsin corporation* (Court of Appeals, District IV, December 21, 2006). The Circuit Court's prior decision was not summarized in the *Wisconsin Tax Bulletin*. The issue in this case is whether the Circuit Court properly exercised its discretion in dismissing the claims for monetary relief, denying the motion to amend, and dismissing the amended complaint.

Ameritech, a retailer of telecommunications products in Wisconsin, has been collecting sales tax from its Wisconsin customers on services that it provides. The complaint alleges that certain services that were taxed are not subject to taxation, because the services do not come within the definition of "telecommunications services" as defined in sec. 77.51(21m), Wis. Stats. On behalf of the class of Ameritech customers who have paid the allegedly unauthorized taxes, the complaint seeks monetary and injunctive relief for claims of breach of contract, money had and received, unjust enrichment, and violation of the tax statute and the Wisconsin Constitution. The amended complaint also names the secretary of the Wisconsin Department of Revenue (DOR) as a defendant because, the complaint asserts, DOR may have an interest in the litigation.

At the Circuit Court, both Ameritech and DOR moved to dismiss the complaint, arguing failure to state a claim and failure to exhaust administrative remedies; Ameritech also argued that the case should be dismissed based on the doctrine of primary jurisdiction. The Circuit Court denied these motions. Ameritech filed another motion to dismiss, providing additional arguments for its position that the complaint did not state any claim on which relief could be granted. Ameritech also argued in this motion that all claims were barred by the voluntary payment doctrine. The Circuit Court denied the motion as to all claims except the quantum meruit claim, which it ordered dismissed. The Circuit Court concluded that the voluntary payment doctrine was inapplicable because it did not apply if there was a mistake of fact and the plaintiffs here may have paid the disputed tax because of a mistake of fact. After the Circuit Court made this decision, the Wisconsin Supreme Court decided *Putnam*, (255 Wis. 2d 447), which addressed the voluntary payment doctrine. On Ameritech's motion for reconsideration in light of *Putnam*, the Circuit Court concluded that the voluntary payment doctrine did apply and dismissed all the claims for monetary relief.

The plaintiffs contend that the Circuit Court erred when it dismissed their claims for monetary relief.

The Court of Appeals affirmed the Circuit Court's order to dismiss the amended complaint. The Circuit Court correctly determined that the voluntary payment doctrine barred the monetary claims; did not erroneously deny the plaintiffs' permission to file a second amended complaint; and properly exercised its discretion in dismissing the claims for injunctive and declaratory relief on the basis of the primary jurisdiction doctrine.

It was not known at the time of publication whether the taxpayer would appeal this decision.