



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:

Corporation Franchise and Income Taxes

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CORPORATION FRANCHISE AND INCOME TAXES

Apportionment – apportionable income.
Louis Dreyfus Petroleum Products Corp. vs. Wisconsin Department of Revenue (Dane County Circuit Court, October 7, 2008). This is a judicial review of the Wisconsin Tax Appeals Commission decision dated January 2, 2008. See *Wisconsin Tax Bulletin* 156 (April 2008), page 15, for a summary of the Wisconsin Tax Appeals Commission’s decision.

The issue in this case is whether Louis Dreyfus Petroleum Products Corp.’s (LDPPC’s) capital gain income from the sale of a partnership interest is apportionable to Wisconsin.

LDPPC, a Delaware corporation, was a 50% general partner in Pilot Travel Ventures (PTV), a Delaware general partnership, together with Pilot Corporation (Pilot), a Tennessee corporation that was the other 50% general partner. LDPPC sold its interest in PTV to Pilot, resulting in a capital gain. PTV’s assets included ownership or leasehold interests in travel centers, one of which was located in Wisconsin.

The Wisconsin Tax Appeals Commission, applying sec. 71.25(5)(a)5., Wis. Stats., previously determined the sale of LDPPC’s partnership interest was a sale of specific partnership assets, thus the gain from the sale is apportionable to Wisconsin. They also determined that such apportionment is constitutionally permissible under

the unitary business and operational function tests established in the Supreme Court decision *Allied Signal v. Director, Div. of Tax.*, 504 U.S. 768 (1992).

LDPPC, citing an IRS Revenue Ruling, contends that the sale was of its partnership interest and not of the underlying assets of the corporation. Thus, instead of sec. 71.25(5)(a)5., Wis. Stats., the department must rely on sec. 71.25(5)(a)10., Wis. Stats., which requires the application of the unitary business rule to the sale outside Wisconsin of an intangible asset.

The department agrees that it cannot rely on sec. 71.25(5)(a)5., Wis. Stats. It contends, however, that it may apply sec. 71.25(5)(a)14., Wis. Stats., which authorizes apportionment of a partner’s share of income or loss from a partnership. The Circuit Court rejected this argument on the basis that the income from the sale of a partnership interest cannot be characterized as a partner’s share of income or loss from the partnership.

The Circuit Court determined that the Commission erred when it characterized the sale of LDPPC’s partnership interest as the sale of tangible personal property within the meaning of sec. 71.25(5)(a)5., Wis. Stats. The Commission correctly applied the unitary business rule, however, to conclude that the capital gain from the sale of the partnership asset was apportionable to Wisconsin. Accordingly, the Circuit Court modified the Commission’s decision to eliminate its reliance on sec. 71.25(5)(a)5., Wis. Stats., and affirmed the decision as modified.

It was not known at the time of publication whether this decision would be appealed.

SALES AND USE TAXES

Rebate. *Douglas Suiter vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 31, 2008).

The issues in this case are whether (1) a direct-to-dealer rebate on a motor vehicle is subject to Wisconsin sales and use tax; and (2) the taxpayer owes interest on the tax.

In September of 2005 the taxpayer purchased a 2005 Ford Truck in Omaha, Nebraska and subsequently regis-

tered the vehicle in Wisconsin. No Wisconsin sales or use tax was paid upon registration. The Wisconsin Department of Revenue assessed the taxpayer use tax on his purchase price, including the amount of a direct-to-dealer rebate received, and interest.

The taxpayer acknowledged that the tax on the truck was not paid after being told by his banks that no check on his account had been written to Registration Fee Trust; however, the taxpayer continued to dispute the tax on the direct-to-dealer rebate. The taxpayer contended that the failure to pay the tax was unintentional and that the taxpayer thought that someone else involved in the transaction had taken care of the tax when he registered the vehicle in Wisconsin and obtained Wisconsin license plates. The taxpayer also challenged the assessment of interest, stating that he would pay the sales tax if it was due, but would not pay interest on an honest mistake made two and a half years ago by someone else.

The Commission ruled that the Department of Revenue was entitled to summary judgment on both issues. Rebates paid to an auto dealer related to a taxpayer's purchase of a motor vehicle are subject to Wisconsin sales and use taxes, as provided in sec. Tax 11.28(6), Wis. Adm. Code, which states that "[a] manufacturer's rebate to a person who purchases tangible personal property ... from a retailer is not a reduction of the retailer's gross receipts or sales price for the item ..." The assessment of interest is mandatory and not reviewable by the Commission.

The taxpayer has not appealed this decision.