

The Commission concluded that taxpayer may only claim \$12,795.17 as Wisconsin itemized deductions.

The taxpayer has not appealed this decision.

Old Orchard Corporation vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 21, 1980). Taxpayer, Old Orchard Corporation, is a business corporation organized and existing under the laws of the State of Wisconsin with its principal offices located in Green Bay, Wisconsin. Taxpayer was formed in 1969 to build an apartment building in Green Bay, Wisconsin. It operated on a fiscal year ending on September 30 and reported net business losses from its operations of \$53,633.03 in 1970, \$51,503.98 in 1971, \$35,183.69 in 1972 and \$48,481.70 in 1973 for losses totaling \$188,802.40.

In 1974, the apartment building in question was sold to a partnership consisting of the ten original stockholders of taxpayer plus another individual for the sum of \$949,050.00 resulting in a gain of \$183,430.65. Taxpayer used the loss carryover from the years 1970 through 1973 on its Wisconsin franchise/income tax return for the fiscal year ended September 30, 1974 to offset the gain from the sale of the building. Taxpayer was not in the business of buying and selling real estate and has not shown any compelling business reasons for the sale of its apartment building.

The department disallowed the loss carry forward claimed by taxpayer to the extent the loss carry forward was offset against capital gains income from the sale of the apartment building, which amounted to \$183,430.65.

At the hearing before the Wisconsin Tax Appeals Commission, taxpayer modified its position reducing its claimed loss carryover of the business losses at issue from \$183,430.65 to \$73,017.69 which is the amount of depreciation claimed by taxpayer on the apartment building for the fiscal years 1970-1973.

The Commission ruled that the depreciation deducted by taxpayer during the fiscal years 1970-1973 as an annual expense was a write-off of the cost of an asset over the asset's life which could not be recovered as

business income upon the sale of the asset in 1974. The Commission also ruled that the gain from the sale of taxpayer's apartment building does not constitute "net business income" within the intent and meaning of section 71.06 of the Wisconsin Statutes and cannot be offset by net business losses from prior years.

The taxpayer has not appealed this decision.

Joseph J. Puta vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 21, 1980). The sole issue in this case is whether or not the taxpayer properly filed a Wisconsin individual income tax return for the year 1977 without reporting his income on said return and by writing in the words "Object - 5th Amendment" and signing said return as "Object - 5th Amendment".

The taxpayer did not introduce any testimony or evidence as to his income for the year 1977 and refused to answer the department's questions as to his income.

The Commission stated that the department's estimated assessment of taxes in the amount of \$1,665.00 is presumptively correct and that the burden of proof is on the taxpayer to offer credible testimony and evidence on his behalf. It ruled the taxpayer failed to prove his claim.

The taxpayer has not appealed this decision.

Steven R. Shumaker and Karen L. Shumaker vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 11, 1980). During the period January 1, 1977 through August 1, 1977, Steven R. Shumaker and Karen L. Shumaker were residents of La Crosse, Wisconsin. Taxpayers moved to Ohio where they became domiciled and which they claimed as their new residence after August 1, 1977.

In 1977 they sold their Wisconsin home, realizing a gain from the sale, and during 1977 purchased a replacement residence in a state other than Wisconsin (Ohio). Taxpayers also deducted their moving expenses incurred in moving from Wisconsin to Ohio.

The department assessed the 1977 gain on the sale of the Wisconsin residence, since the replacement

residence was not located in Wisconsin. Also, moving expenses incurred to move from Wisconsin were disallowed.

Taxpayers contended these adjustments were in violation of the Wisconsin statutes, in violation of the Constitution of the State of Wisconsin, in violation of a person's rights under the Fourteenth Amendment to the Constitution of the United States and in violation of Article I, Section 8, and Article IV, Section 2 of the Constitution of the United States.

The Commission concluded that (1) the gain on a sale of real estate located in Wisconsin in 1977 as assessed was proper, and (2) the moving expenses incurred by the taxpayers in moving from the State of Wisconsin to another state are not deductible. The Commission indicated it does not have the authority to rule on questions of constitutionality, said power being retained by courts of record in the State of Wisconsin.

The taxpayers have not appealed this decision.

Howard U. Taylor, Margaret T. Taylor, Wayne Thomas Feyereisen, Frances C. Feyereisen, James W. McCarville, Karen Beth McCarville, Michael E. Fairfield, and Donna J. Fairfield vs. Dennis J. Conta, Individually and as Former Secretary of the Wisconsin Department of Revenue, and Mark E. Musolf, Individually and as Former Secretary of the Wisconsin Department of Revenue (Dane County Circuit Court, October 21, 1980). Taxpayers commenced this action on June 8, 1977 seeking declaratory judgment as to their Wisconsin income tax liability. On December 8, 1977, Judge Michael Torphy, to whom this case was then assigned, denied the department's motion to dismiss, ruling that this action was appropriate for declaratory judgment.

Subsequently, taxpayers filed a motion for summary judgment. In furtherance of that motion, both parties submitted a stipulation of facts. Those facts were repeated by taxpayers in their brief. The following summary of the facts is taken largely from that brief.

The eight taxpayers, (four couples), all resided in Wisconsin for varying periods of time prior to

calendar year 1976. Each couple owned the home in which they resided. In 1976, all male taxpayers were relocated by their respective employers to a location outside of Wisconsin. All taxpayers sold their homes in Wisconsin in 1976 and purchased new homes in the cities in which they resettled.

Each couple sold their Wisconsin residence at a gain. In all cases, all or substantially all of the realized gain was used to make the downpayment on the new residence or applied on the indebtedness owed on the new residence.

Under the federal income tax law, the gain on the sale of a taxpayer's principal residence is deferred from income taxation if certain conditions are met. In such case, the federal statutes require that the basis of the new residence be reduced by the amount of the nonrecognized gain so that, presumably, the gain will be carried forward and be reflected when and if the new residence is sold, (unless again deferred or forgiven under this or other code sections).

All taxpayers in this matter qualified for nonrecognition of their respective gain under section 1034 of the Internal Revenue Code of 1954. As a consequence, all taxpayers prepared and filed Form 2119 with their 1976 federal income tax returns, which form is required for the implementation of section 1034 (a).

Since all taxpayers were residents of Wisconsin for part of 1976, all were required to file and did file Wisconsin income tax returns for 1976. All disclosed on their respective Wisconsin income tax returns for 1976 the amount of the gain realized on the sale of their respective Wisconsin residences.

However, while the Wisconsin income taxation scheme is largely federalized, in the sense that it has adopted by reference most of the personal income and tax definitions, and permits most of the personal deductions and exemptions from income found in the Internal Revenue Code of 1954, including the nonrecognition of gain provision (sec. 1034 (a)) quoted above, the statutes make several significant departures from the federal law. Among these distinctions is one that has given rise to this action for declaratory relief. Specifically, Wisconsin

accords its continuing residents the nonrecognition treatment of gain on the sale of a principal residence as provided for in section 1034 (a). That is, if a homeowner resident sells his or her principal residence for a gain, relocates within the boundaries of the State of Wisconsin, buys a new principal residence and otherwise qualifies under section 1034, he or she is permitted to defer that realized gain. However, if the home-owning resident happens to relocate beyond the boundaries of the State of Wisconsin, and would otherwise qualify for nonrecognition treatment under section 1034 (a), Wis. Stats. Sec. 71.05 (1) (a) 5 (1975) requires that taxpayer to include in his or her Wisconsin income for that year, the:

"Gain on the sale or exchange of a principal residence, excluded under section 1034 (a) of the internal revenue code if the 'new residence' referred to therein is located outside this state."

Based on the above-quoted Wisconsin statute section, all taxpayers in this matter were assessed additional taxes for 1976, because none included their respective realized gains in their Wisconsin income for 1976.

In addition to the gain on the sale of their principal residences, at least some of the taxpayers also chose to deduct from their federal gross income, moving expenses incurred in their moves to their new homes in 1976. Such deductions are permitted by the federal law.

As in the case of the treatment of the gain on the sale of a principal residence, Wisconsin permits such moving expense deductions for relocating Wisconsin residents, but only if they remain in the state. Thus, Wis. Stats. Sec. 71.05 (1) (a) 7 (1975) provides that the following must be added back to federal adjusted gross income in order to arrive at a taxpayer's Wisconsin taxable income: "Moving expenses incurred to move from the state."

Taxpayers Howard Taylor and Michael Fairfield deducted their 1976 moving expenses. As a result, both were assessed additional taxes for 1976. The reason for the assessment was the fact that the taxpayers moved from the State of Wisconsin.

The issues before the Court were (1) whether s. 71.05 (1) (a) 5, Wis.

Stats., which allows Wisconsin residents who sell their principal residence, relocate within Wisconsin, and otherwise qualify under I.R.C. section 1034 to defer recognition of the gain realized on the sale, while denying this deferral right to taxpayers who relocate outside the state, violates the privileges and immunities clauses (s. 2, Article IV and s. 1, 14th Amendment) of the U.S. Constitution, and (2) whether s. 71.05 (1) (a) 7, Wis. Stats., which allows a deduction for moving expenses for Wisconsin residents who relocate for employment purposes within the state but denies a similar deduction when the taxpayer relocates outside the state, violates the same privileges and immunities clauses.

The Court concluded that neither s. 71.05 (1) (a) 5 nor s. 71.05 (1) (a) 7, Wis. Stats., violates the privileges and immunities clauses of the U.S. Constitution and the motion for summary judgment was denied.

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

Peter Y. Taylor, Jr., and the Peter Y. Taylor, Jr. Family Estate (A Trust), Et. Al. vs. Wisconsin Department of Revenue (Supreme Court of the United States, June 2, 1980). This is an appeal of a Wisconsin Supreme Court order that denied taxpayers' petition to appeal the decision of the Wisconsin Court of Appeals which affirmed a judgment of the Milwaukee County Circuit Court denying a transfer of tax burden on compensation earned by taxpayers individually to a Family Trust.

Each of the taxpayers had created a "Family Trust", also known as an equity or constitutional trust, and conveyed to same various items of real estate and/or personal property and the right to all income they received. In return each taxpayer received all the beneficial ownership of his or her family trust, including the right to designate all owners of beneficial interest.

Income earned by the taxpayers and transferred to their respective trusts was used by the trusts to pay the personal deductible and non-deductible living expenses of the taxpayers and their families. Each taxpayer also served as manager of his or her trust, and any monies left over after payment of the living expenses

were paid to the taxpayer for services allegedly rendered in said capacity or to his or her designate. The taxpayers retained complete control over their income and/or assets after creation of the family trust involved.

The Court of Appeals concluded that the taxpayers could not transfer the tax burden on compensation which they earned to a family trust by transfer and assignment of their earned income for lifetime services to the family trust.

The Wisconsin Supreme Court subsequently denied the taxpayer's petition for review of the Court of Appeals decision and the taxpayers appealed to the Supreme Court of the United States.

The U.S. Supreme Court dismissed this appeal for want of jurisdiction.

Erwin J. Thoenes vs. Wisconsin Department of Revenue (Wisconsin Court of Appeals, September 25, 1980). This is an appeal of a Circuit Court of Milwaukee County judgment which affirmed a Wisconsin Tax Appeals Commission decision that denied a shifting of tax burden from the taxpayer to a family trust. (A summary of the Circuit Court's decision is in WTB #19.)

The issue on appeal was whether taxpayer can transfer his tax burden on income earned by real estate transferred to a "Family", constitutional or equity trust, effective control over which was retained by him. The Court of Appeals concluded he cannot. Although income was not expressly assigned to the trusts by the taxpayer, the facts support the findings that income attributed to the trusts during the taxable years in question, 1972 and 1973, was in fact income earned by the taxpayer which should have been reported as such.

The Wisconsin Court of Appeals affirmed the Circuit Court judgment.

The taxpayer has not appealed this decision.

Union Prescription Centers, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 8, 1980). Union Prescription Centers, Inc. was a Delaware corporation doing business in Wisconsin, subject to the franchise tax provisions of Chapter 71, Wis. Stats. For the taxable years

ending May 31, 1971 to May 31, 1975 the department issued an assessment of franchise tax and interest for income from the sale of franchises and from payments based on 4% of the franchisees' gross receipts. The taxpayer contended that this income was allocable to the taxpayer's state of residence (Delaware) and not subject to the Wisconsin franchise tax.

During the years involved, the taxpayer engaged in 2 types of business operations in Wisconsin: (1) selling franchises for retail drug stores, and (2) managing or assisting in managing franchised retail drug stores. Taxpayer's business activities included locating potential franchisees and helping the franchisee begin operations. Such help has included loaning money to franchisees to assist their starting business. In taxable year 1974, taxpayer acquired and ran a store in Wisconsin Rapids for a portion of the taxable year and had income from that operation. Taxpayer also purchased prescription drugs in large quantities from manufacturers, stocked the drugs in its Milwaukee warehouse, and sold the drugs to franchisees at cost plus 4% (to cover the operations of the warehouse); this allowed the relatively small franchisees the benefit of mass purchasing. Beginning January 1972, taxpayer continued this service but discontinued maintaining its warehouse; at that time, it arranged mass purchasing from major wholesalers and manufacturers which agreed to ship directly to franchisees.

During the years involved, the taxpayer assisted franchisees as follows: obtaining prescription drugs at volume discount rates; choosing the location for the pharmacy; ordering, stocking and displaying products; developing proper labor organization and community contacts; providing financial and accounting services; and assisting in promotion and advertising.

A franchisee had 2 obligations to the taxpayer. First, a franchisee was required to pay a one-time franchise fee. This fee entitled a franchisee to use the name "Union Prescription Center", to benefit from the goodwill attached to the name, to benefit from taxpayer's close relationship with labor union organizations, and to purchase from taxpayer prescription drugs at beneficial rates. Sec-

ondly, after a franchisee began operating, it was required to pay the taxpayer 4% of its gross receipts.

During the taxable years ending May 31, 1971 to 1973, taxpayer received one-time franchise fees and the continuing 4% payments of \$1,910,207.70. Taxpayer contended that under the statutes, the amounts are allocable to the taxpayer's state of residence (Delaware) and are not subject to the Wisconsin franchise tax.

On its Wisconsin franchise tax returns for the taxable years ending May 31, 1971 to 1973, taxpayer listed the income identified above in its total gross receipts from all sources and subtracted it, claiming it was not subject to Wisconsin's franchise tax. The taxpayer also claimed that the department's assessment for taxable years ending May 31, 1971 and 1972 was foreclosed by the 4-year statute of limitations and is not permitted under the 6-year statute of limitations. The department contended that the assessment is allowable under the 6-year statute of limitations.

On the 1971 and 1972 Wisconsin tax returns filed, the taxpayer did not include franchise payments received during 1971 and 1972 taxable years. Nor did the Wisconsin total income reported contain at least 75% of taxpayer's "net income properly assessable".

The statutes involved were s. 71.07(1), 1969 Wis. Stats. and 71.11(21)(bm) and (g), 1975 Wis. Stats., which read in part:

"71.07(1) For the purposes of taxation income or loss from business, not requiring apportionment under sub. (2), (3) or (5), shall follow the situs of the business from which derived . . . All other income or loss, including royalties from patents, income or loss derived from land contracts, mortgages, stocks, bonds and securities or from the sale of similar intangible personal property, shall follow the residence of the recipient, except as provided in s. 71.07(7) . . ."

"71.11(21) Additional Assessments, When Permitted.

(bm) With respect to assessments of income received in the calendar year 1954 or corresponding fiscal year, and in sub-

sequent years, such notice shall be given within 4 years of the date the income tax or franchise tax return was filed.

(g) Notwithstanding any other limitations expressed in this chapter, an assessment or refund may be made: 1. If notice of assessment is given within 6 years after a return was filed, if the taxpayer reported for taxation on his or her return less than 75% of the net income properly assessable, except that no assessment of additional income may be made under this paragraph for any year beyond the period specified in par. (bm) unless the aggregate of the taxes on the additional income of such year is in excess of \$100." (emphasis added)

The issues involved are as follows: Is the income received by the taxpayer from the sale of franchises and from payments based on 4% of a franchisee's gross receipts "income . . . from business" and subject to Wisconsin's franchise tax or "other income" and not subject to Wisconsin's franchise tax?

Are the assessments of franchise tax for taxable years ending May 31, 1971 and 1972 barred by the 4-year statute of limitations under s. 71.11(21) (bm) or are the assessments allowable under s. 71.11(21) (g), Wis. Stats.?

The Tax Appeals Commission ruled that the taxpayer's income received in taxable years ending May 31, 1971 to 1973 from the sale of franchises and from payments based on 4% of a franchisee's gross receipts constitutes "income . . . from business" under s. 71.07(1), Wis. Stats., and is subject to Wisconsin's franchise tax. Also, the taxpayer's assessments of franchise tax for taxable years ending May 31, 1971 and 1972 are barred by the 4-year statute of limitations under s. 71.11(21) (bm), Wis. Stats., but are not barred under the 6-year statute of limitations under s. 71.11(21) (g), Wis. Stats.

The taxpayer has not appealed this decision.

WTMJ, Inc. and Newspapers, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 23, 1980). The sole issue relates to whether or not it was correct for the department to impose on taxpayers the addition

to the tax and delinquent interest for taxable year 1973. The taxpayers, WTMJ, Inc. and Newspapers, Inc., were Wisconsin corporations, wholly owned by The Journal Company.

Neither taxpayer filed a declaration of estimated tax nor paid any estimated tax during 1973. Instead, The Milwaukee Journal, the parent corporation of each taxpayer, filed its own declarations and paid its own estimated taxes in a large enough amount to cover the taxes estimated to be due of The Journal Company and of the taxpayers. Taxpayers contend that the declarations filed and estimated taxes paid by their parent corporation satisfy the requirements and liabilities of the taxpayers. They contend that the intent of s. 71.22, Wis. Stats., is to assure timely payment of taxes owing and that this intent was satisfied and met by the parent corporation.

The Commission ruled that each taxpayer was required to file its own timely declarations of estimated tax and pay each installment on the due date. It concluded that the assessments for additions to the tax were correct and the department was correct in assessing each taxpayer delinquent interest for failure to timely pay estimated franchise taxes in 1973. The Commission also stated that the increased amount of the parent corporation's estimated tax payments did not excuse taxpayers from the declaration and payment requirements of the Wisconsin statutes.

The taxpayers have not appealed this decision.

SALES/USE TAX

Donna Brewer vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission Oral Decision of October 28, 1980). The taxpayer operated two separate businesses in Eagle River, a motel and a tavern. The department issued the taxpayer a seller's permit for each location under the same number, but with a suffix "A" on the permit for the motel and a "B" for the tavern.

On June 17, 1979 the taxpayer ceased business operations at both the motel and the tavern and the next day, June 18, surrendered both seller's permits to the department's local office. The taxpayer then sold the business assets of the tavern on

June 20 and on the next day reopened the motel. Therefore, the taxpayer ceased operating her motel for 3 days during which she sold her tavern and claimed the sale of the tavern assets was an exempt occasional sale under ss. 77.51(10) (a) and 77.54(7), Wis. Stats.

The department's contention was that this was not an exempt occasional sale because the sale was *not* an "isolated and sporadic" sale. The taxpayer operated a motel business continuously except for the 3 day period. Since she intended to continue to operate the motel at the time she sold the tavern business assets, the department's position was that she needed a seller's permit at the time the tavern assets were sold.

The Wisconsin Tax Appeals Commission found that at the time of the sale of the tavern business assets the taxpayer did not hold and was not required to hold a seller's permit. Therefore, the sale was an exempt occasional sale.

The department has appealed this decision to Circuit Court.

Chicago Bridge & Iron Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission Oral Decision of September 12, 1980). The issue in this case is the measure of the tax in computing the Wisconsin use tax on items fabricated out-of-state that are installed in Wisconsin. The use tax is imposed under s. 77.53(1), Wis. Stats.

The taxpayer fabricates tanks and vessels in Illinois which it used in construction work in Wisconsin. The taxpayer contended that it should be taxed on the actual materials brought into Wisconsin (average cost of material times the weight of the materials actually shipped into Wisconsin). The department computed the tax based on the purchase price of all the materials purchased for use in fabricating tanks and vessels which are to be installed in Wisconsin, including the materials which end up as scrap in the fabricating process, reduced by the sales price of scrap subsequently sold.

Section 77.53(1) specifically provides that "an excise tax is hereby levied and imposed on the storage, use or other consumption in this state of tangible personal property