

## REPORT ON LITIGATION

*This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.*

*The last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: 1) "the department appealed", 2) "the department has not appealed but has filed a notice of nonacquiescence" or 3) "the department has not appealed" (in this case the department has acquiesced to Commission's decision).*

The following decisions are included:

### Income and Franchise Taxes

- Daniel T. Betow vs. Wisconsin Department of Revenue
- Falls Communication, Inc. vs. Wisconsin Department of Revenue
- John W. Nelson vs. Wisconsin Department of Revenue
- Lake Wisconsin Country Club vs. Wisconsin Department of Revenue
- Midland Financial Corp. vs. Wisconsin Department of Revenue
- NCR Corporation vs. Wisconsin Department of Revenue
- Pabst Brewing Co. vs. Wisconsin Department of Revenue
- Southgate Mall, Inc. vs. Wisconsin Department of Revenue
- Theodore A. Gernaey vs. Wisconsin Department of Revenue
- Transam Warehouses of Illinois, Inc. vs. Wisconsin Department of Revenue
- Uniroyal, Inc. vs. Wisconsin Department of Revenue
- Warren's Turf Nursery, Inc. vs. Wisconsin Department of Revenue

### Sales/Use Taxes

- Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Manhole Co., Inc. vs. Wisconsin Department of Revenue
- City of Racine vs. Wisconsin Department of Revenue
- Johnson and Johnson, A partnership (D/B/A Asphalt Products Co.), and Asphalt Products Co., Inc. vs. Wisconsin Department of Revenue

Wisconsin Telephone Company, ET AL. vs. Wisconsin Department of Revenue

### Cigarette Tax

George R. Elliott vs. Wisconsin Department of Revenue

## INCOME AND FRANCHISE TAXES

**Daniel T. Betow vs. Wisconsin Department Of Revenue** (Court of Appeals, District IV, November 22, 1983). The taxpayer, a Wisconsin resident, asserts that income he received from wages is not subject to the Wisconsin income tax. There is no question that the taxpayer received wages during the year 1980 since he reported the same on his Wisconsin tax return under "Non Taxable Receipts" and requested a full refund of all Wisconsin income taxes withheld by his employer. The department, as a result of the taxpayer's actions, issued an assessment on May 18, 1981, covering the amount received by taxpayer from wages plus an additional \$2,000 estimated income. The taxpayer filed a petition for redetermination which included among his objections the claim that his wages were not subject to tax because: (a) the wages and salaries which his corporate employer gave him in exchange for his labor amounted to an equal exchange, and not to any profit or gain upon which he is taxable; (b) Article I, Section 10 of the U.S. Constitution provides that no state "make anything but gold and silver coin as tender in payment of debts", even if the taxpayer's wages were subject to Wisconsin's individual income tax, the Constitution prohibits him from paying Wisconsin in greenbacks or by check to extinguish the debt, as the department wishes; and (c) "wages" are not subject to federal or Wisconsin income tax because that word is not included in the alleged imprecise definition of "income" in section 61 of the Internal Revenue Code.

The department contended that the taxpayer failed in his petition for review to state any error in the assessment; that the taxpayer did not raise any dispute on the facts, but merely contended that he should prevail as a matter of law; and that the taxpayer's legal arguments are incorrect and have been decided often enough by state and federal tribu-

nals against persons advancing them to render them meritless and of no substance.

The Commission granted the department's motion to dismiss on the grounds that the taxpayer's legal arguments had been decided previously by other legal tribunals and determined to be without merit. The Court of Appeals upheld the decision of the Circuit Court to support the dismissal by the Commission.

The taxpayer has not appealed this decision.

### Falls Communications, Inc. vs. Wisconsin Department Of Revenue

(Wisconsin Tax Appeals Commission, November 1, 1983). The issue in this case is whether there was a disposition of an installment obligation owned by Falls Communications, Inc., within the meaning of Chapter 71 and Wis. Adm. Code s. Tax 2.19, when the installment agreement becomes the asset of a surviving corporation in a statutory merger authorized and completed pursuant to Chapter 180, Wis. Stats., the incidents of taxation of which merger are statutorily governed by ss. 71.354, 71.361 and 71.368, Wis. Stats.

Falls Communications, Inc., a Wisconsin corporation, was formed on May 17, 1961, by its two shareholders, Mary Ann McDonald and John R. McDonald. Upon incorporation, the taxpayer acquired a radio station in Black River Falls. Subsequently, the radio station was sold and a Country Kitchen Restaurant in Sparta was acquired. In August 31, 1977, Falls Communications, Inc. agreed to sell the restaurant; however, the sale was consummated on October 31, 1978. The taxpayer received an installment obligation pursuant to the contract for the unpaid balance of the purchase price.

On March 27, 1973, Mary Ann McDonald and John R. McDonald had formed a Tennessee corporation, C.K. of Tennessee, Inc., for the purpose of owning, operating and franchising Country Kitchen Restaurants in Tennessee. After selling its restaurant in Sparta, Falls Communications, Inc. was unable to acquire additional Country Kitchen Restaurants or a suitable general restaurant business in Wisconsin. It was the consensus that a business combination of Falls Communications, Inc. and C.K. of Tennessee, Inc. would better be able to continue the restau-

rant business. All of the assets and liabilities of Falls Communications, Inc., including the installment obligation, were distributed to C.K. of Tennessee in exchange for stock in C.K. of Tennessee on April 1, 1979.

The Commission ruled that the unreported balance on gain of the installment sale must be recognized in the year the assets were distributed. The department's assessment was proper in accordance with s. 71.11(8), Wis. Stats., and s. Tax 2.19, Wis. Adm. Code.

The taxpayer has appealed this decision to the Circuit Court.

**John W. Nelson vs. Wisconsin Department Of Revenue** (Circuit Court of Racine County, August 23, 1983). The taxpayer filed a 1979 Wisconsin income tax Form 1A with the word "object" written on almost every answer line. The Wisconsin form was accompanied by a 1979 federal Form 1040 which was completed in the same manner. Attached to the forms were a memorandum to the Commissioner of Internal Revenue and copies of several newspaper articles. The department sent letters to Mr. Nelson requesting that he file a completed 1979 Wisconsin income tax return. He failed to obey the department's directive and was assessed a tax of \$2,000.04. He sought a redetermination of this assessment, but refused to disclose the amount of his 1979 income. His petition was denied by the department. The taxpayer appealed this denial to the Wisconsin Tax Appeals Commission but again refused to disclose his income. The department moved for and received a dismissal of the petition. The taxpayer's petition for rehearing filed with the Tax Appeals Commission was denied.

The Court found the assessment levied by the department to be neither arbitrary nor capricious, but to be an assessment made within the department's best judgment. The taxpayer is not entitled to a rehearing with the Wisconsin Tax Appeals Commission as none of the three conditions imposed by s. 227.12(3), Wis. Stats., has been met. Lastly, the Court found that the taxpayer's constitutional rights have not been violated, but have been maintained throughout all proceedings related to this dispute. The taxpayer's request for a rehearing with the Wisconsin Tax Appeals Commission regarding a redetermination of a tax assessment

levied against him is denied. The Commission's decision to dismiss his petition for review dated 16 December 1982 is affirmed.

The taxpayer has not appealed this decision.

**Wisconsin Department Of Revenue vs. Lake Wisconsin Country Club** (Circuit Court of Dane County, November 11, 1983). The issue in this case is whether fees and annual special assessments charged to members of the Lake Wisconsin Country Club are ordinary income to the club, as the department determined, or contributions to the club's capital and, as such, not taxable under Wisconsin's franchise tax on corporations, s. 71.01(2), Wis. Stats. The club contended that the fees and assessments are not includable in the club's gross income because contributions to capital are excludable from gross income under section 118 of the Internal Revenue Code.

Section 71.03, Wis. Stats., which defines gross income, predates its federal counterpart, IRC section 61, by five years and was not copied from the federal statute. Section 71.03, Wis. Stats., does not contain an exclusion from gross income for contributions to capital similar to that found in IRC section 118. "Gross income" is defined in s. 71.03(1), Wis. Stats., to include all fees derived from services, all profits derived from the transaction of business and all other gains, profits, or income or any kind derived from any source whatever.

The Circuit Court reversed the Tax Appeals Commission's decision because it was erroneously based on an application of federal tax law to a question solely answerable by Wisconsin tax law. Under ss. 71.01(2) and 71.03, Wis. Stats., the fees and assessments collected by the Club were correctly determined by the department to be includable in the club's gross income.

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

**Midland Financial Corporation vs. Wisconsin Department Of Revenue** (Wisconsin Supreme Court, December 29, 1983). This is a review by the Supreme Court of a Court of Appeals decision affirming the judgement of the Circuit Court of Milwaukee County. The Circuit Court reversed a decision of the Wisconsin Tax Appeals Commission, which upheld the department's assessment of addi-

tional franchise taxes for 1972 (see WTB #22 and #28 for summaries of the prior decisions).

For 1971 and 1972 Midland Financial Corporation, a Wisconsin corporation, operated as a bank holding company. Midland owned a controlling interest in several banks as well as two corporations which performed leasing and consulting services and two office buildings. In 1971 Midland received \$112,633 of dividend income from its subsidiary corporations which it deducted from gross income on its Wisconsin income tax return pursuant to s. 71.04(4), Wis. Stats. As a result, Midland reported a net loss of \$156,534 in 1971. This amount was carried forward as a loss and used as a deduction on its 1972 corporate tax return. The department offset the \$112,633 of dividend income against the taxpayer's 1971 loss of \$156,534 thus reducing the carry forward to 1972 to \$43,901. In January of 1978 Midland was liquidated and dissolved.

There were three questions on this review. The first question is whether the dividends received by Midland in 1971 must be subtracted from its net business loss in calculating the business loss carry forward to 1972 under s. 71.06, Wis. Stats. (1971). The pertinent portion of s. 71.06 of the 1971 Wis. Statutes, provides that "if a corporation in any year sustains a net business loss, such loss, to the extent not offset by other items of income of the same year, may be offset against the net business income of the subsequent year." Neither "net business loss" nor "other items of income" is defined in the statute. Midland argues that "other items of income" used to offset a loss must be understood to mean income that is not business income, and that since dividend income received by a bank holding company is business income, the dividend income need not be used to offset the net business loss. The department reads "other items of income" to mean all income which was not included in the calculation of net business loss, including the dividend income in question. Alternatively, the department seeks to have the business loss carry forward reduced by disallowing the deduction for dividends in the calculation of the corporation's "net business loss".

The Supreme Court concluded that s. 71.06 of the 1971 Wis. Statutes is

ambiguous and must be construed in accordance with legislative intent. The Court further decided that in order to give effect to the purpose of the loss carry forward provisions under s. 71.06, Wis. Stats., and to allow the taxpayer the full benefit of the dividend deduction permitted under s. 71.04(4) Wis. Stats., dividends should not be subtracted from the net business loss to reduce the amount of the loss carry forward.

The second and third questions have to do with whether Midland lacked capacity to sue under Wisconsin Statutes. The second question was whether Midland, a dissolved corporation, had commenced action or other proceeding within two years after the date of its dissolution. The Court found that the two year requirement was satisfied by Midland's filing its petition with the Tax Appeals Commission. The third question, whether Midland was an "aggrieved person" entitled to seek judicial review was also resolved by the Court in favor of Midland.

**NCR Corporation vs. Wisconsin Department Of Revenue** (Wisconsin Tax Appeals Commission, February 15, 1984). The issue for the Commission to determine is the deductibility by the taxpayer of federal income taxes under s. 71.04(3), Wis. Stats., in the years 1975, 1976, 1977, 1978 and 1980.

Effective for calendar years prior to 1975 or corresponding fiscal years, corporations required to file Wisconsin franchise tax returns were permitted a deduction for federal income taxes paid within the year covered by the income tax return, limited to a total amount not in excess of 10 per cent of the taxpayer's net income of the calendar or fiscal year. The statutes relating to this deduction were:

71.02 Definitions. "(1) Definitions applicable to Corporations. As used in this chapter: (c) 'Paid' or 'actually paid' are to be construed in each instance in the light of the method used in computing taxable income whether on the accrual or receipt basis; but the deduction for federal income and excess profits taxes shall be confined to cash payments made within the year covered by the income tax return."

71.04 Income and Franchise Taxes. "(3) Taxes other than special improvement taxes paid during the year upon the business or property

from which the income taxes is derived, including therein taxes imposed by the state of Wisconsin and the government of the United States as income, excess or war profits and capital stock taxes, including taxes on all real property which is owned and held for business purposes whether income producing or not, provided that such portion of the deduction for federal income and excess profits taxes as may be allowable shall be confined to cash payments made within the year covered by the income tax return, and provided further that deductions for income taxes paid to the United States government shall be limited to taxes paid on net income which is taxable under this chapter; provided further that income taxes imposed by the state of Wisconsin shall accrue for the purpose of this subsection only in the year in which such taxes are assessed. (3a) The deduction for all United States income, excess or war profits and defense taxes shall be limited to a total amount not in excess of 10 per cent of the taxpayer's net income of the calendar or fiscal year as computed without the benefit of the deduction for said United States income, excess or war profits and defense taxes, and before the deductions of amounts permitted by subsection (5) of this section. In no event shall any taxpayer be permitted hereunder a total deduction in excess of the actual amount of United States income, excess or war profits and defense taxes paid, and otherwise deductible."

By section 471d of Chapter 39, Laws of 1975, the Wisconsin Legislature amended s. 71.04(3), Wis. Stats., effective for calendar year 1975 or corresponding fiscal year and thereafter, as follows:

71.04 "(3) Taxes other than special improvement taxes paid during the year upon the business or property from which the income taxed is derived, including therein taxes imposed by the state of Wisconsin as income taxes, and taxes on all real property which is owned and held for business purposes whether income producing or not. Income taxes imposed by the state of Wisconsin shall accrue for the purpose of this subsection only in the year in which such taxes are assessed."

By section 471f of Chapter 39, Laws of 1975, the Wisconsin Legislature repealed s. 71.04(3a), Wis. Stats. The 1975 Legislature made no changes to s. 71.02(1)(c), Wis. Stats.

On January 8, 1974, the Department of Revenue submitted to the Budget Director for the State of Wisconsin proposed tax law changes that would produce additional revenue for the state. Such proposals were to be included in the 1975-77 budget bill. One of the proposed items was the elimination of the deduction for federal income taxes by corporations. It was estimated that the repeal of the deduction then allowed corporations for federal income taxes paid would raise approximately \$36,000,000 in additional revenue during the 1975-77 biennium. A department draft of legislation to repeal the corporation deduction for federal income taxes was attached to legislation proposed by the Department of Revenue for inclusion in the budget bill. By memorandum dated May 2, 1975, the Wisconsin Legislative Fiscal Bureau submitted to members of the Joint Committee on Finance a number of potential revenue sources to balance the 1975-77 biennial budget, including the repeal of the deduction allowed corporations for federal income tax paid. The draft of legislation to repeal the deduction for federal income tax was included in Assembly Substitute Amendment 1 to Assembly Bill 222, the Governor's budget bill. The Senate and Assembly disagreed on certain provisions of the budget, so a Committee of Conference was appointed. The Committee of Conference offered Conference Substitute Amendment 1 to 1975 Assembly Bill 222. The document entitled "1975-77 Biennial State Budget, Comparative Summary of Governor's, Joint Finance, Assembly, Senate and Conference Committee Budgetary Provisions, Assembly Bill 222," is a document prepared by the Legislative Fiscal Bureau after the budget has gone all the way through the legislative process, from the Governor's recommendations through the Joint Committee on Finance, the Assembly, the Senate and the Committee of Conference. That document includes provisions relating to the Department of Revenue and the identification of the \$38,000,000 as the amount that would be generated as additional revenue to the state treasury with the repeal of the law which allowed corporations to de-

duct federal income taxes. The document indicates that this provision was added by the Joint Committee on Finance and stayed in the budget bill all the way through the process. The language of the department's original draft remained unchanged throughout the legislative process and is the same language as was finally enacted into law as section 471d of Chapter 39, Laws of 1975.

Following the amendments to s. 71.04(3), Wis. Stats., and the repeal of s. 71.04(3a), Wis. Stats., by the 1975 legislature, the department disseminated information concerning these changes and other changes in the Budget Bill in the form of news releases such as articles in the Wisconsin CPA, the Milwaukee Journal, The Milwaukee Sentinel, and Wisconsin State Journal to the effect that the legislature had repealed the federal income tax deduction formerly allowed to corporations and that such change would generate additional revenue for the state. Commerce Clearing House, State Tax Review, December 23, 1975, Vol. 36, No. 51, listed Wisconsin as a state not allowing deductions for federal income tax for corporate income taxes as did the CCH, State Tax Handbook, as of October 1, 1976. The taxpayer does not contest the fact that there was an objective on the part of the 1975 legislature to remove the entire federal income tax deduction and not merely to remove the 10% limitation. On the 1974 Wisconsin Corporate Franchise or Income Tax Return, Form 4, printed by the department, line 24 provided for a deduction for "U.S. income taxes (not in excess of 10% of line 23) (Schedule X)." On the 1975 Form 4, the line for deduction of U.S. income taxes was eliminated.

As of February 13, 1981, 4,692 corporations had either filed claims for refunds, executed extensions of time in which to file refunds or were otherwise involved in the federal tax deduction issue. At the time of the hearing in this matter there were approximately 6,000 corporations which had filed claims, or extension agreements or returns with the department asserting their claim of deduction for federal income taxes.

In 1981 the department sponsored legislation to amend s. 71.04(3), Wis. Stats. A number of events occurred between 1979 and 1981 which convinced the department to propose

such legislation. Corporations began filing returns claiming the deduction for federal taxes paid and computing estimated taxes using said deduction in the computation. In 1979 there had been no estimate of the fiscal impact of the claimed deduction but by 1981, Michael Vlaisavljevich, Administrator, Division of Research and Analysis, Department of Revenue, had estimated the revenue loss for the period beginning with the 1975-76 fiscal year through the 1980-81 fiscal year if the taxpayer is successful with the litigation herein to be \$566 million. The department in proposing such legislation intended to make it clear that federal taxes are not deductible. Senator Gerald D. Kleczka, sponsor of said amendment, stated in a letter dated July 7, 1981 to the Director of the Legislative Reference Bureau that "My intention is to clarify only a 1975 law amendment which eliminated a deduction for federal income taxes paid."

By section 1090c of Chapter 20, Laws of 1981, s. 71.04(3), Wis. Stats. was amended to read as follows:

"Taxes other than special improvement taxes paid during the year upon the business or property from which the income taxed is derived, including therein taxes imposed by this state as income taxes, and taxes on all real property which is owned and held for business purposes whether income producing or not. Income taxes imposed by this state shall accrue for the purpose of this subsection only in the year in which such taxes are assessed. Sales and use taxes paid during the taxable year which under s. 71.043(2) and from gross income. Income, excess profits, war profits and capital stock taxes imposed by the federal government are not deductible from gross income. For taxable year 1981 and thereafter real property taxes that are related to a definite period of time may be accrued ratably over that period by accrual basis taxpayers, and the windfall profit tax under section 4986 of the Internal Revenue Code is not deductible from gross income. For the taxable year 1981 and thereafter, taxes imposed by this or any other state, the District of Columbia or measured by net income, gross income, gross receipts or capital stock are not deductible. However, gross re-

ceipts taxes assessed in lieu of property taxes are deductible from gross income."

By sections 1809wm and 1101a of Chapter 20, Laws of 1981, ss. 71.02(1)(c) and 71.11(8)(b) were amended to delete the references to federal income taxes contained therein.

The Commission held:

#### CONCLUSIONS OF LAW

"1. Sec. 71.04(3), Wis. Stats. (1975), is ambiguous on its face, and therefore, it is permissible for the Commission to look to the legislative intent of said statute.

"face, adopting petitioner's interpretation of said statute would work an absurd and unreasonable result. In such a case, it is permissible for the Commission to resort to construction of the statute for the purpose of determining the real legislative intent.

"3. The record herein establishes by clear and satisfactory evidence that the legislative objective in its 1975 amendment to sec. 71.04(3) and repeal of sec. 71.04(3a), was to eliminate entirely the deduction formerly allowed to corporations for federal income taxes paid, and, thereby, to generate additional revenue of \$38 million for the 1975-1977 biennium.

"4. Under petitioner's construction of sec. 71.04(3) Wis. Stats. (1975), instead of generating additional revenue, the state would have an actual revenue loss of at least \$100 million and possibly up to \$500 million. Such a result would be absurd and unreasonable.

"5. Adoption of the literal interpretation of sec. 71.04(3), Wis. Stats. (1975) proposed by petitioner would require the Commission to disregard the legislature's intended purpose.

"6. Deductions are matters of legislative grace and tax statutes are to be strictly construed against the granting of the same. Therefore, the petitioner must bring itself clearly within the terms of sec. 71.04(3) Wis. Stats. (1975). Petitioner has failed to do so.

"7. During the years at issue, petitioner was not entitled to a deduction under sec. 71.04(3), Wis. Stats., for federal income taxes paid.

"8. The Commission does not reach the issue of the applicability of sec. 71.04(3), Wis. Stats. (1981) to petitioner for the years at issue herein.

"Therefore,

IT IS ORDERED

That respondent's actions, as to the sole issue presented herein, on petitioner's petitions for redetermination are hereby affirmed."

The taxpayer has appealed this decision to the Circuit Court.

**Pabst Brewing Co. vs. Wisconsin Department Of Revenue** (Circuit Court of Dane County, January 31, 1984). Pabst Brewing is a Delaware corporation with a principle place of business in Milwaukee, Wisconsin. It manufactures beer and other fermented beverages which it sells to wholesalers both within and beyond Wisconsin. Some of these sales are known as "dock" sales because the wholesalers come to Pabst in Milwaukee in trucks owned or rented by these buyers to pick up their purchases. Other sales are shipped via common or contract carriers from Pabst to the wholesaler. Because Pabst derives income from sales in several states, it must apportion that income under s. 71.07, Wis. Stats., to determine its Wisconsin franchise tax liabilities. One factor in that determination deals with sales and is in the form of a fraction. The numerator consists of total corporate sales in Wisconsin for the tax period. The denominator contains the total corporate sales everywhere for that same period.

From 1973 through 1977, Pabst did not include dock sales to out-of-state wholesalers in the numerator of the sales factor. In 1979, the Department of Revenue audited Pabst and on December 4th of that year, assessed an additional \$707,729.71 in franchise taxes citing the omitted dock sales. The issue is whether dock sales to out-of-state wholesalers are in-state sales under s. 71.07(2)(c), Wis. Stats. The Tax Appeals Commission held that they were. (See WTB #35 for a summary of the Tax Appeals Commission's decision.)

This case revolves around s. 71.07(2)(c)(2), Wis. Stats., which in relevant part reads: "Sales . . . are in this State if: the property is delivered or shipped to a purchaser . . . within this State regardless of the f.o.b. point or other conditions of sale . . .".

The Circuit Court reversed the Tax Appeals Commission's decision and

ruled that dock sales to out-of-state wholesalers are not in-state sales.

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

**Wisconsin Department Of Revenue vs. Southgate Mall, Inc.** (Circuit Court of Milwaukee, January 18, 1984). The department appealed a June 10, 1983 determination of the Wisconsin Tax Appeals Commission which permitted the taxpayer to deduct certain estimated real estate taxes from its 1978 corporate tax return.

On June 28, 1978 Southgate Mall, Inc. sold its shopping center. Thereafter the corporation liquidated and distributed its assets to its shareholders. As a result of the liquidation, the taxpayer's 1978 tax year ran from March 1, 1978 to October 19, 1978. Southgate Mall, Inc. deducted \$127,986 for estimated 1978 real estate taxes on its final corporate tax return. This amount reflects a daily proration of estimated 1978 real estate taxes based on the 1977 real estate taxes for the property.

In order for an item to be deductible in a particular tax year, the party's liability must have become fixed during that tax year. The department disallowed the deduction for real estate taxes contending that the real estate taxes were not levied until November 30, 1978 when the tax roll was delivered to the local treasurer with a warrant for collection pursuant to s. 70.01, Wis. Stats. Since this date was after the end of the corporation's tax year, the deduction was improper. The taxpayer conceded that the taxes were not levied until November 30, 1978, but argued that since the tax became a lien on the property as of May 1, 1978, also per s. 70.01, Wis. Stats., the real estate tax was properly deductible for the 1978 tax year.

The Circuit Court held that the assessment date for the property and the effective date of the lien for the real estate taxes was May 1, 1978. Accordingly, the taxpayer's liability for real estate taxes was absolutely fixed during its 1978 tax year irrespective of the fact that the exact amount of liability might not have been known. Since all events necessary to fix liability for real estate taxes on the property occurred during the taxpayer's year, real estate taxes which became a lien on the property

as of May 1, 1978 are deductible on the 1978 tax year return.

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

**Wisconsin Department of Revenue vs. Theodore A. Gernaey** (Circuit Court of Oconto County, December 13, 1983). The issue in this case is one of domicile and whether or not the taxpayer was required to report and pay income taxes during the years 1974 through 1976. The Tax Appeals Commission found for the years in question the taxpayer had abandoned his Wisconsin domicile and acquired a new domicile in Alaska (see WTB #18).

The department claims that the Commission's decision is based on an erroneous interpretation of ss. 71.01(1) and 71.07(1), Wis. Stats., and relies on facts not supported by substantial evidence. The taxpayer and his wife had become residents of Wisconsin when they purchased and moved to an eighty-acre farm south of Suring, Wisconsin during the summer of 1972. In May, 1974 the taxpayer took employment with Michael Baker Jr. Company as an assistant coordinator surveyor for the Alaskan Pipeline. His presence in Alaska was (almost entirely) at isolated camps, accessible only by airplane, at facilities provided rent-free by his employer. During the period in question he testified he worked seven days for ten weeks and then received two weeks off. Every ten weeks he flew back to his farm in Suring, Wisconsin at the expense of his employer. In February, 1975 the taxpayer did rent a private cabin for his family, but his wife testified that she only stayed two months because they knew at that time that they would be returning permanently to Wisconsin.

The department claims that there were specific errors in the Commission's Findings of Fact.

The Circuit Court disagreed with the department's position, holding that the facts are clear. What these facts signify as to the taxpayer's intents is what is open to different interpretation. The acts of the taxpayer indicate an interest to become "a pioneer to that last frontier", an interest later changed but still sufficient to establish by his many overt acts, the prerequisite domicile for the years in question. The Court held that there was no reason to disturb the finding

of the Commission that the taxpayer had established a domicile in Alaska.

The department has not appealed this decision.

**Transam Warehouses Of Illinois, Inc. vs. Wisconsin Department Of Revenue** (Wisconsin Tax Appeals Commission, October 31, 1983). During the period under review, the fiscal year ending September 30, 1980, the taxpayer operated a warehousing business in Wisconsin and other states. In 1980, the taxpayer was a general partner and had a 50% interest in 7110 Santa Fe Associates, an Illinois partnership. In 1980, Santa Fe Associates constructed and sold a warehouse and office complex located in Illinois. The gain on the sale of this facility was reported on the partnership's federal tax return, Form 1065, for the year ended October 30, 1980 as a gain on a capital asset. In computing that portion of its income derived within Wisconsin, the taxpayer used the apportionment factors found in s. 71.07, Wis. Stats., but did not include in the formula for Wisconsin tax the construction and sale of the Illinois warehouse and office facility.

The taxpayer contends that its activity as general contractor and seller for the partnership was an occasional situation and not part of its normal business activities of warehousing, and therefore was reported in its federal income tax return as a gain. For Wisconsin, it should be treated the same way and should not be part of the apportionment formula. The department contends that the construction and sale was part of the taxpayer's corporation business; therefore, the gross receipts received from the construction and sale should be part of the apportionment formula for the Wisconsin corporate franchise and income tax.

The Commission held that the taxpayer's sale of real estate, which was business assets of the corporation, is taxable under s. 71.07(1m), Wis. Stats. Therefore, the gain on the sale of business assets is apportionable in Wisconsin and should have been included in the taxpayer's corporate franchise income tax return for the year under review.

The taxpayer has not appealed this decision.

**Uniroyal, Inc. vs. Wisconsin Department Of Revenue** (Wisconsin Tax

Appeals Commission, November 1, 1983). Under date of November 16, 1981, the department issued a notice of assessment of additional income taxes against the taxpayer for the tax years ending December 31, 1973 through December 31, 1976. The taxpayer did not object to the additional taxes, but objected to the calculation of the interest charges. Interest was computed at the rate of 12% per year from the due date of the returns to the payment date set forth in the assessment notice. The taxpayer contends that the 12% interest rate should not apply for the period prior to August 1, 1981, but that the 6% per year interest rate should be applied to the period prior to October 31, 1975 and the 9% per year rate should be applied for the period November 1, 1975 through July 31, 1981.

Chapter 20, section 1090n, 1981 Laws of Wisconsin, amended s. 71.09(5)(a), Wis. Stats., by increasing the interest due on assessments from 9% per year to 12% per year. Chapter 20, section 2203(45)(g), 1981 Laws of Wisconsin, provided that the treatment of section 71.09(5)(a) "of the statutes by this act first applies to all determinations, assessments or other actions made by the department of revenue on August 1, 1981, regardless of the taxable period to which they pertain."

The Commission held that the Wisconsin legislature expressly applied the increase in interest contained in s. 71.09(5)(a) to "assessments". . . made by the department of revenue on August 1, 1981, "regardless of the taxable period to which they pertain." The department's action in applying the 12% per year interest rate to all taxable periods included in the assessment was correct.

The taxpayer has not appealed this decision.

**Warren's Turf Nursery, Inc. vs. Wisconsin Department Of Revenue** (Wisconsin Tax Appeals Commission, December 29, 1983). The issue in this case is the propriety of the department's tax treatment of the taxpayer's capital gain from the sale of real estate it owned in Illinois in the fiscal year ending November 30, 1977. The taxpayer reported the gain as nonapportionable income with situs in Illinois and, hence, not taxable in Wisconsin. The department treated the gain as apportionable taxable income under s. 71.07(1m), Wis. Stats., 1977.

The taxpayer is an Illinois corporation in the business of raising and selling sod. The taxpayer has been doing business in six states including Wisconsin. Since 1971, the taxpayer has filed annual corporate franchise or income tax returns in Wisconsin reporting its income under the apportionment method. The corporation has, for tax purposes, used the cash receipts and disbursements method of accounting and reports its income on a fiscal year basis.

Among land owned by the corporation was a 673 acre parcel in Illinois on which was located a barn and a shed. One of the taxpayer's incorporators had acquired the property in 1960 and, upon incorporation in 1967, transferred it together with other property to the corporation, in exchange for corporate stock. The buildings were fully depreciated for tax purposes no later than 1969. The land's sole use was in the growing of sod. In 1975, the taxpayers determined that the land had been exhausted for sod growing purposes. The situation was complicated by drainage problems with the land. Based on these factors, the corporation discontinued the use of the land for the growing of sod and put it up for sale. The land remained idle until January 11, 1977 when it was sold. The proceeds of the sale were utilized in the operation of the taxpayer's business.

The Commission ruled that the gain arising from the taxpayer's January 11, 1977 sale of real property located in Illinois which had been used in the corporation's unitary business of growing sod, after which time it was idle, was apportionable income under s. 71.07(1m), Wis. Stats., 1977. The real property sold by the taxpayer was "used in the production of business income" as that phrase is used in s. 71.07(1m), Wis. Stats., 1977.

The taxpayer has not appealed this decision.

## SALES/USE TAXES

**Advance Pipe & Supply Co. Inc. And Milwaukee Sewer Pipe & Manhole Co., Inc. vs. Wisconsin Department Of Revenue** (Wisconsin Tax Appeals Commission, November 1, 1983). The issue in this case is whether the taxpayers are retailers when they sell