

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:

Individual Income Taxes

- Frederick J. Blask
Fraud penalty
- Douglas Evers
Claims for refunds — statute of limitations
- Tadeusz Jaworski and Halina Jaworski
Basis of assets
- Marie L. Menacher
Interest on assessments
- Edwin J. Puissant, Jr.
Travel expenses

Corporation Franchise/Income Taxes

- Allen-Bradley Company
Worthless stock deduction
- NCR Corporation
Deductions — federal income taxes

Sales/Use Taxes

- Specialty Associates, Inc.
Construction contractors

Cigarette Tax

- George R. Elliott
Penalty — delinquent tax payment

INDIVIDUAL INCOME TAXES

Frederick J. Blask vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 21, 1984). The sole issue before the Commission is whether the department acted properly in imposing the 50% penalty provided in s.

71.11(6)(b), Wis. Stats., for 1980 and 1981.

The taxpayer was a successful insurance salesman for American Family and derived the following income:

1979	\$44,497.94
1980	\$46,357.02
1981	\$46,239.83

Up until 1979, the taxpayer filed his annual Wisconsin income tax returns and paid the tax due on a timely basis. Sometime during 1979/1980, the taxpayer attended a seminar run by Irwin Schiff, a self-avowed "tax protester". Irwin Schiff convinced the taxpayer that he had a so-called "constitutional right" not to file federal or state income tax returns or pay income taxes to the federal government or the State of Wisconsin. One of the primary justifications, which the taxpayer accepted, for non-filing and non-payment was the contention that, because U. S. currency was no longer backed by gold, it was not subject to taxation. The taxpayer now concedes that he was "duped" by Irwin Schiff and seeks to make amends.

Despite repeated requests by the department, the taxpayer refused to file timely Wisconsin individual income tax returns and pay the taxes due for 1979, 1980 and 1981. The taxpayer cited repeatedly that it was, in effect, his "constitutional right" not to file or pay income taxes to the State of Wisconsin.

On January 24, 1984, the taxpayer was indicted by a Grand Jury of the United States District Court for the Eastern District of Wisconsin on three counts of failing to file an income tax return and pay the federal income taxes due for the years 1979, 1980 and 1981. He subsequently entered a guilty plea to these charges, pursuant to a plea agreement with the United States Attorney for the Eastern District of Wisconsin.

On January 31, 1983, the taxpayer finally filed his original 1979 Wisconsin individual income tax return with the department and in February 1983, he filed his original 1980 and 1981 Wisconsin individual income tax returns.

Under date of March 28, 1983, the department issued an assessment against the taxpayer in which it imposed the 50% penalty provided in s. 71.11(6)(b), Wis. Stats., for both 1980 and 1981.

The Commission held that the fact that the taxpayer was "duped" into believing he did not have to file Wisconsin individual income tax returns and pay the taxes due for 1979, 1980 and 1981 does not relieve him of his responsibility to comply with the provisions of Chapter 71 of the Wisconsin Statutes. The department met its burden of proof to establish by clear and convincing evidence that the taxpayer's failure to file timely Wisconsin individual income tax returns for 1979, 1980 and 1981 was with the intent to defeat or evade the income tax assessment required of him by law. Under the provisions of s. 71.11(6)(b), Wis. Stats., the department's action was proper in assessing the 50% penalty.

The taxpayer has not appealed this decision.

Douglas Evers vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 21, 1984). On October 11, 1982, the taxpayer filed late Wisconsin individual income tax returns with the department for the calendar years 1977 and 1978. On his late 1977 return, the taxpayer showed an income tax overpayment of \$231, which he elected to have applied to his 1978 income tax liability. On his late 1978 return, the taxpayer showed a net tax due of \$101. He then claimed the 1977 overpayment of \$231 as a credit to arrive at a 1978 overpayment of \$130.

The department disallowed the carryover of the \$231 overpayment claimed on the taxpayer's 1977 income tax return to his 1978 return, because the 1977 return was filed beyond the four year period provided by s. 71.10(10)(bn), Wis. Stats.

On October 10, 1983, the taxpayer filed a timely appeal of the department's action, in which he claimed that the provisions of s. 71.10(10)(bn) do not apply to "credits".

The Commission held that the \$231 overpayment claimed by the taxpayer on his 1977 return was in effect a claim for refund regardless of whether he wanted it directly refunded to him or applied as a credit to his 1978 Wisconsin income tax liability. Because his 1977 Wisconsin combined individual income tax return was filed more than four years late, he is barred from claiming the refund shown as a credit against his

1978 income tax liability, per the provisions of s. 71.10(10)(bn), Wis. Stats.

The taxpayer has not appealed this decision.

Tadeusz Jaworski and Halina Jaworski vs. State of Wisconsin, Tax Appeals Commission, and Wisconsin Department of Revenue (Court of Appeals, District III, August 7, 1984). The taxpayers are appealing a judgment upholding an \$8,083 additional income tax assessment against them for 1978. The Jaworskis sold part of their farm in 1978 and deducted a portion of their FmHA mortgage in calculating their capital gain on the sale. The Tax Appeals Commission disallowed the deduction. The mortgage proceeds were used to cover the Jaworskis' farm operating costs. Although some of these costs could have been capitalized, the record shows that the Jaworskis expensed the costs as they were incurred. (See WTB #30 for a summary of the Tax Appeals Commission's decision.)

The Jaworskis claim that they should have been allowed a deduction for the amounts they spent for fertilizer and land development. In the years before 1978, the Jaworskis expensed these costs by claiming them as deductions on Schedule F of their joint federal income tax returns. During these years, the farm showed net losses. These losses reduced the Jaworskis' federal income tax and, in part, their state income tax.

The Jaworskis could have capitalized their liming, fertilizing, and land clearing costs. They cannot both expense and capitalize the costs. If the Jaworskis did not expense all of their liming, fertilizing, and land clearing costs, they could have used the unexpensed costs to reduce their 1978 capital gain. The Jaworskis, however, had to prove their unexpensed costs. They failed to do so.

The Court of Appeals did not decide any of the remaining issues.

The Court of Appeals affirmed the judgment of the Circuit Court for Marathon County.

The taxpayers have not appealed this decision.

Marie L. Menacher vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 21, 1984). The only issue in this case is

the imposition of interest on unpaid taxes.

On July 25, 1978, the taxpayer received a cash separation benefit of \$694.53 from the Wisconsin Department of Employee Trust Funds, State Teachers Retirement Bureau. Of this amount, \$657.16 was includable as income and subject to Wisconsin income tax. The taxpayer did not report this \$657.16 distribution on her 1978 Wisconsin individual income tax return.

The department issued an income tax assessment dated October 25, 1982 against the taxpayer, imposing an income tax on this distribution. The total amount of additional income tax due was \$53.00, plus regular interest of \$23.54, for a total assessment of \$76.54.

The Commission concluded that the imposition of interest on unpaid taxes, per s. 71.09(5)(a), Wis. Stats., is mandatory and the Commission does not have the jurisdiction or authority to waive its imposition.

The taxpayer has not appealed this decision.

Edwin J. Puissant, Jr. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 5, 1984). The issue for the Commission to determine is whether the taxpayer's business expenses claimed in 1978 and 1979 are allowable deductions as follows: (A) whether living expenses incurred by him in 1978 and 1979 qualify for deduction under Section 162, IRC, as "away from home" expenses or whether he is an itinerant whose tax home coincided with his temporary job sites, (B) whether union dues are deductible as a business expense if the standard deduction is claimed and (C) whether interest and depreciation on a mobile home used as a personal residence are deductible as a business expense if the standard deduction is claimed.

The taxpayer contends that his tax home is Luxemburg, Wisconsin, and that he is on temporary assignment to other job sites. Thus he is entitled to deductions for necessary travel expenses and reasonable expenses for meals and lodging. The department contends that the employee business deductions are not allowable because each place the taxpayer worked became his main place of business and his tax home.

The taxpayer filed Wisconsin income tax returns for the years 1978 and 1979, reporting income earned as a boiler-maker as Wisconsin taxable income. He reported net taxable income in 1978 of \$12,543 and deducted business expenses of \$11,667. In 1979, he reported net taxable income of \$9,979 and deducted business expenses of \$13,026. The department disallowed these expenses in full.

In 1978, the taxpayer claimed union dues of \$725.87 as a business expense; he did not list his deductions as itemized deductions. The remainder of the business expenses (or \$10,941.13) are composed of expenses for meals, rent, telephone, utilities, motels, and mileage incurred at various temporary job sites in 1978.

The expenses claimed for 1979 are for the same items identified as expenses in 1978. The taxpayer also claimed interest and depreciation on a mobile home used as a personal residence as an additional business expense in 1979. The standard deduction was also claimed in 1979.

In 1974 or 1975, the taxpayer became a boiler-maker and described his work locations as "traveling the countryside". He secured jobs through his union located in Kansas City, Kansas. He had no control over his job locations and did not know in advance where he would be sent.

In 1978, the taxpayer worked for Grove Tank and Manufacturing and lived in New York for five months. The remainder of the year he lived in Texas and worked for Brown-Minneapolis Tank. Expenses for motels, rent, utilities, and telephone were for living expenses incurred at these temporary job sites. He resided in motel rooms or in a mobile home he owned and towed to his job sites. Meal expenses in 1978 were calculated by multiplying 48 weeks by 7 days by a cost of \$12 per day. Business mileage was calculated on the basis of local mileage for daily commuting and long distance travel between Wisconsin and his job sites in Texas or New York.

In 1979, the taxpayer worked in Tulsa, Oklahoma for 11 weeks; La-Porte, Texas for 24 weeks; and Bay City, Texas for 16 weeks. Living expenses, again, included motels and expenses for his mobile home. His wife resided with him "some of the

time" and spent the remainder living with her parents in Green Bay. Meal expenses were calculated by multiplying 358 days by \$14 a day. In 1979, interest and depreciation were claimed on the mobile home as business expenses. He testified he did not return to Wisconsin at any time in 1979.

The Commission ruled that the taxpayer was an itinerant worker who was not "away from his tax home" in Wisconsin while working at various job sites in Texas, New York, and Oklahoma. He acquired a tax home in each of his temporary job locations, and his living expenses and commuting expenses were personal expenses not deductible under Section 262 of the Code.

In addition, union dues, interest expenses, or depreciation on nonbusiness assets are not deductible in arriving at "adjusted gross income", but are only deductible as itemized deductions. Because the taxpayer elected the standard deduction in each of the years in question, these deductions are properly disallowed.

The taxpayer has not appealed this decision.

CORPORATION FRANCHISE/INCOME TAXES

Wisconsin Department of Revenue vs. Allen-Bradley Company (Circuit Court of Milwaukee County, September 13, 1984). This matter is before the Court on review of a Decision and Order of the Wisconsin Tax Appeals Commission, which concluded that Allen-Bradley Company properly claimed a worthless stock loss deduction on its corporate income tax return for its fiscal year ending November 30, 1974.

In November 1969, Allen-Bradley purchased a majority of the outstanding common stock of MOS Technology, Inc. (MOS), increasing its holdings to 81.4% by December 1971. Additionally, it loaned money to MOS. From its inception through March 31, 1974, MOS experienced severe financial difficulties. Allen-Bradley was its sole available source of financing.

In 1973 and 1974, Allen-Bradley attempted to sell its interest in MOS without success. On October 9, 1974, a meeting was arranged between Allen-Bradley and National Cash Reg-

ister Company, which expressed a tentative interest in MOS. Negotiations broke off when it became apparent that any offer would result in only repayment of a small fraction of Allen-Bradley's outstanding loans and receipt of nothing for its stock.

On October 16, 1974, Allen-Bradley advised MOS that it would provide no further financing. At this time, one of its directors proposed that the assets and liabilities of MOS, excluding its debt to Allen-Bradley, might be sold to MOS minority shareholders. On October 30, 1974, the Allen-Bradley Board of Directors resolved to vote its shares in favor of the sale of MOS assets. Further, the Board of Directors passed a resolution declaring the shares it held in MOS to be worthless. On November 20, 1974, the Allen-Bradley Board of Directors voted to inform MOS that unless an offer to purchase the assets of the corporation were received by January 1, 1975, Allen-Bradley would unilaterally liquidate MOS.

On January 31, 1975, the assets of MOS were sold to PJM Technology, Inc., a corporation formed by the minority shareholders.

On its tax returns for the fiscal year ending November 30, 1974, Allen-Bradley claimed a worthless stock deduction for its MOS holdings. The department determined that the MOS stock became worthless during the fiscal year ending November 30, 1975.

The question presented for the Court is whether the facts as found by the Commission are sufficient to conclude there were "closed and completed transactions" which were "fixed by identifiable events" occurring in fiscal year 1974, within the meaning of the law. The Court concluded that the Order of the Commission is supported by substantial evidence and correctly applies the law.

The department has not appealed this decision.

NCR Corporation vs. Wisconsin Department of Revenue (Circuit Court of Dane County, August 16, 1984). The issue before the Court is whether the taxpayer was entitled to a deduction for federal income taxes paid for the years 1975 through 1980 under the provisions of s. 71.04(3), Wis. Stats.

Prior to 1975, s. 71.04(3), Wis. Stats., permitted corporations required to

file Wisconsin franchise tax returns a deduction for federal income taxes paid within the year covered by the income tax return. Section 71.04(3a) limited that deduction to 10% of the taxpayer's net income for that year.

In 1975, the Wisconsin Legislature repealed s. 71.04(3a). In the same year, the Legislature amended s. 71.04(3) to delete the reference to federal income taxes. However, s. 71.02(1)(c), Wis. Stats., which made reference to the basis on which federal income taxes were to be deducted and s. 71.11(8)(b) which incorporated the rules set forth in s. 71.02(1)(c), were left unchanged.

It is the taxpayer's contention that these statute sections, when read in harmony, unambiguously allow for a full corporate deduction of federal income taxes. It is the department's contention and the finding of the Tax Appeals Commission that s. 71.04(3) (1975) is ambiguous and that the Court may, therefore, look to legislative intent in interpreting it, that intention having been to eliminate, in its entirety, the corporate deduction for federal income taxes paid. The Commission also concluded that even if s. 71.04(3) was not ambiguous, giving it the meaning proposed by the taxpayer, would lead to an absurd and unreasonable result which justified construing it contrary to its plain meaning. (See WTB #37 for a summary of the Tax Appeals Commission's decision.)

The Circuit Court agreed with the findings of the Commission that it was the objective of the Legislature in 1975 not merely to repeal the 10% limitation for deduction of federal income taxes, but to eliminate entirely the federal income tax deduction and thereby to generate additional revenue for the state general fund. The Court, therefore, finds that s. 71.04(3) does not include a deduction for federal income taxes for the years 1975 through 1980.

The Circuit Court found that to give s. 71.04(3) the meaning advocated by the taxpayer would lead to an absurd and unreasonable result. Section 71.04(3) does not allow the taxpayer a deduction for federal income taxes paid for the years 1975 through 1980. The decision of the Commission is confirmed.

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

SALES/USE TAXES

Specialty Associates, Inc. vs. Wisconsin Department of Revenue

(Wisconsin Tax Appeals Commission, July 31, 1984). During the period under review, the taxpayer, a Wisconsin corporation with its principal place of business in West Allis, Wisconsin, was a roofing contractor doing real estate improvements. The issue for the Commission to determine is whether or not the taxpayer used construction materials to make real estate improvements for certain tax-exempt entities, and is thus liable for the use tax under s. 77.53(1), Wis. Stats. The department contends that the taxpayer cannot meet its burden to show that it purchased and sold building materials to specific tax-exempt entities. It is the department's position that the taxpayer used these building materials to make real estate improvements, and that the user of these materials is responsible for the sales and use tax on the materials.

Specialty Associates, Inc. contends that it was acting simply and solely as an agent for SAI Wholesale Distributors, Inc., which is a separate Wisconsin corporation formed solely for the purpose of selling wholesale roofing materials. In any contract with a tax-exempt entity, Specialty Associates was performing two separate contracts: one by Specialty Associates for the purpose of installing materials, and two as an agent for SAI as a retailer selling and delivering the materials directly to the tax-exempt entity.

The taxpayer entered into contracts with tax-exempt and non-tax-exempt entities for installing roofing materi-

als to real property. The contract may or may not have included specifications. If the contract was with a tax-exempt entity, Specialty Associates would request its tax number. The roofing materials were purchased from SAI, Inc. and other suppliers without payment of the sales and use tax by the taxpayer's use of the tax-exempt entity's number for jobs involving the tax-exempt entity. If the materials were purchased for a non-tax-exempt entity, the tax was paid in most cases. The taxpayer billed the entity for the entire job. Specialty Associates received 100% of the funds for the construction work. The taxpayer then paid its suppliers.

Specialty Associates used its name and credit to purchase the roofing materials. The taxpayer installed the materials with its employees. The taxpayer was not selling tangible personal property but rather real estate improvements using tangible personal property.

The Commission held that under s. 77.51(18), Wis. Stats., Specialty Associates was a contractor who purchased and was the consumer of tangible personal property used by it in real property construction activities and the use tax applies to the sale of materials used by it. Under s. 77.51(18), Wis. Stats., the taxpayer did not issue proper exemption certificates because it had such reason to believe it would sell the materials to customers for whom it would perform real property construction activities involving the use of the materials. The taxpayer is liable for the use tax under s. 77.53(1), Wis. Stats., on the purchase of the materials

which it sold to and installed for real estate improvements to tax-exempt entities.

The taxpayer has not appealed this decision.

CIGARETTE TAX

George R. Elliott vs. Wisconsin Department of Revenue

(Circuit Court of Dane County, September 6, 1984). In response to a newspaper ad, George Elliott ordered 63 cartons of cigarettes from Tobacco Land, USA. Because Tobacco Land does not maintain an office in Wisconsin, it did not collect Wisconsin excise taxes from Mr. Elliott on his purchase. Instead, Tobacco Land reported the sale of tax-free cigarettes to the Wisconsin Department of Revenue as required by 15 U.S.C. ss. 375-376. Based on this report, the department advised Mr. Elliott that he owed \$100.80 in Wisconsin excise taxes. Mr. Elliott promptly paid the amount due. The department then notified him that a penalty of \$25 per carton had been assessed under s. 139.33(3), Wis. Stats., for his failure to pay the excise taxes within 15 days of his receiving the cigarettes. Mr. Elliott challenged the penalty assessment before the Wisconsin Tax Appeals Commission, which affirmed the assessment. (See WTB #37 for a summary of the Tax Appeals Commission's decision.)

The Circuit Court affirmed the decision of the Wisconsin Tax Appeals Commission.

The taxpayer has not appealed this decision.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

Individual Income Taxes

1. The Determination of "Federal Adjusted Gross Income" for Computing Taxable Unemployment Com-

pensation, the Earned Income Credit, and the Child and Dependent Care Credit for Wisconsin

2. Minimum Tax Limited by Tax Benefit Rule
3. Minimum Tax When Taxpayer Has a Net Operating Loss
4. Wisconsin Net Operating Loss

Corporation Franchise/Income Taxes

1. ACRS Depreciation Not Allowable on Non-Wisconsin Assets
2. Wisconsin Net Operating Loss and Wisconsin Net Operating Loss Carryforward