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- 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 the Commission's decision).*
- The following decisions are included:
- Individual Income Taxes**
- John Clifford (p. 6)
Gain or loss—property transferred by gift
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INDIVIDUAL INCOME TAXES

Gain or loss—property transferred by gift. *John Clifford v. Wisconsin Department of Revenue* (Court of Appeals, District I, November 8, 1988). The Circuit Court had entered an order affirming the decision and order of the Wisconsin Tax Appeals Commission adverse to Clifford on June 29, 1988. On July 15, 1988, the state served a notice of entry of judgment on Clifford and filed it with the Court. Upon the entry of such notice, the time for Clifford to appeal the Circuit Court's judgment was shortened to 45 days of the entry of the judgment.

The time for filing Clifford's notice of appeal expired on August 15, 1988. Clifford filed his notice of appeal on August 16, 1988.

Clifford filed a document entitled "WRIT OF ERROR (*Coram Nobis*)" arguing that his notice of appeal was timely filed. He argued that because the notice of entry of judgment was served by mail, he was entitled to an additional 3 days to the prescribed period to file his notice of appeal.

The Court of Appeals concluded that because the prescribed period under sec.

808.04(1), Wis. Stats., runs from the date of entry of the order or judgment, and not from the date of notice of entry, sec. 801.15(5), Wis. Stats., is not applicable and, therefore, Clifford's "WRIT OF ERROR (*Coram Nobis*)" is denied.

The taxpayer has not appealed this decision.

□

Credits—taxes paid to other states. *Arthur P. and Katherine A. Garst v. Wisconsin Department of Revenue* (Circuit Court of Dane County, August 31, 1988). The taxpayers request a Chapter 227 review of the department's decision which disallowed \$353.43 of the claimed credit for income tax paid to the State of Illinois.

The taxpayers filed a federal income tax return which showed a capital gain of \$24,812 from the sale of property in Illinois. They filed income tax returns in Illinois and Wisconsin. Wisconsin taxed 40% of the capital gain, or \$9,924, as did the federal government. Illinois taxed the capital gain at 100%, or \$24,812. On their Wisconsin return, the taxpayers claimed credit for the tax paid to the State of Illinois. The department, based on its reading of sec. 71.09(8)(c), Wis. Stats., disallowed credit for 60% of the tax paid to Illinois because Wisconsin does not consider that portion income for tax purposes.

The decision was upheld by the Wisconsin Tax Appeals Commission. The taxpayers contend that Wisconsin considers 100% of the capital gain in computing taxable income but unlike Illinois, does not tax at 100%.

The Court concluded that under sec. 71.09(8)(c), Wis. Stats., the 60% deduction is not "considered income for Wisconsin tax purposes" and, therefore, affirmed the decision of the Tax Appeals Commission.

The taxpayers have not appealed this decision.

□

Personal residence, sale of. *Harry F. Peck v. Wisconsin Department of Revenue* (Court of Appeals, District II, September 14, 1988). This is an appeal, pursuant to ch. 227, Wis. Stats., of an assessment by the Department of Revenue of capital gains tax following the sale of a one-half interest in real property. Harry Peck argues that the tax was improper because, although he acquired sole title to the property from his ex-wife, Patricia Peck (Patricia), and conveyed the property in joint tenancy to himself and his fiancée, Attorney Lynn Carey (Carey), he nonetheless was never the owner. Instead, he argues that he acted throughout the transaction as an undisclosed agent through whom Carey purchased the property from Patricia.

The facts of the case reveal that the Shepard Street property in question was owned by Peck and Patricia as joint tenants. It came on the market following Peck's divorce from Patricia. While the divorce decree ordered the property sold, Patricia was reluctant to sell it, and eventually Peck and Carey decided that they could both assist Patricia and improve their own living situation if they acquired and lived in the property themselves. Subsequent to this decision, Peck learned that his ex-wife was emotionally unable to cope with Carey's purchasing Patricia's one-half interest in the property. Peck therefore purchased the one-half interest himself, using money placed in his account by Carey, and using money that Peck himself borrowed. Patricia's interest was conveyed to Peck, and title was in Peck's name as of July 30, 1980. On August 11, 1980, Peck formally conveyed the property from himself to himself and Carey as joint tenants.

The Court found that Peck failed to carry his burden of showing that he was not the property owner at the time he conveyed the property to Carey, and affirmed the decision of the trial court.

The taxpayer has not appealed this decision.

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CORPORATION FRANCHISE OR INCOME TAXES

Appeals, petition for redetermination; interest—assessments, 12%. *Brunswick Corporation v. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 17, 1988). Brunswick Corporation (Brunswick) is a Delaware corporation with its principal place of business in Skokie, Illinois, and is engaged in the manufacture and sale of products relating to health, defense, recreation, and education.

During and prior to 1960, neither Brunswick nor any subsidiary of Brunswick conducted any material activity in Wisconsin other than the solicitation of orders which were accepted outside of Wisconsin. Brunswick's first material activity in Wisconsin occurred in September 1961 when it acquired the Kiekhaefer Corporation which manufactured and sold Mercury outboard motors and accessories. Kiekhaefer, which had plants in Wisconsin, was merged into Brunswick in 1966. The only other activities conducted by Brunswick in Wisconsin from 1960 through 1974 involved the operation of a leisure mart and four bowling centers. The leisure mart, which primarily sold billiard equipment, was started in 1974 and was deactivated in 1978. The Wisconsin bowling centers were acquired in 1965, 1966, and 1970.

In 1960, Brunswick entered into a joint venture with Mitsui Bussan K.K., a large Japanese trading company, to form a new company Nippon-Brunswick K.K. (NBK) for the purpose of selling Brunswick brand bowling equipment in Japan.

During the period of 1970 through 1974, Brunswick's Wisconsin operations did not in any way contribute to or depend on the NBK operations. On December 19, 1977, the department issued to Brunswick a notice of assessment of additional franchise tax which resulted from the dividends Brunswick received from NBK in 1970, 1971, 1973, and 1974 but not 1972. Applying the "interest offset" provision in sec. 71.07(2), Wis. Stats., the department determined that in 1970, 1971, 1973, and

1974 the total interest and dividends received by Brunswick did not exceed the total interest paid and, therefore, the dividends were includable in apportionable income. In those years, a portion of the NBK dividends, to the extent of Brunswick's apportionable percentage, was subject to tax in Wisconsin. For the year 1972, the department determined that the total interest and dividends received by Brunswick exceeded the total interest paid and, therefore, a sum larger than the total dividends received was treated as nonapportionable income and not taxed by Wisconsin.

Brunswick claimed that the NBK dividends should have been allocated outside Wisconsin and that the department's failure to do so in every year in the audit period constituted a violation of the Wisconsin and federal constitutions.

On July 2, 1982, the department issued to Brunswick a notice of franchise tax assessment for the calendar years 1975 through 1979, indicating additional tax due of \$605,111.88 and interest due of \$408,680.62. In response to this notice of franchise tax assessment, Brunswick filed with the department a petition for redetermination. On August 27, 1986, the department issued a notice of action granting the portion of the petition for redetermination that contended that Brunswick's sales of International Mercury Outboard, Ltd., should be excluded from the numerator of Brunswick's sales factor. The remainder of the petition for redetermination including Brunswick's objection to the application of a 12% as opposed to a 9% interest rate under sec. 71.09(5)(a), Wis. Stats., was denied.

On January 6, 1987, at the same time it filed its election to use sec. 71.07(1m) as amended by 1985 Wisconsin Act 120, Brunswick also filed with the department claims for refunds as offsets under the doctrine of equitable recoupment as set forth in *American Motors Corporation v. Wisconsin Department of Revenue*, 64 Wis. 2d 337, 219 N.W. 2d 300 (1974) for the years 1972, 1973, and 1974. The basis for these claims for refunds as offsets were the sales to International Outboard, Ltd., a wholly owned subsidiary, which the de-

partment in its notice of action conceded should not have been treated as Wisconsin sales for purposes of the sales factor in the apportionment formula. At the January 8, 1987, hearing before the Commission, Brunswick asserted for the first time that it was entitled to offset the refunds it claimed against the taxes assessed.

After a payment by Brunswick on August 26, 1986, of additional tax of \$92,052.39 and interest of \$137,552.89, the only issue remaining with respect to the August 31, 1982, petition for redetermination was whether a 12% or a 9% tax deficiency interest rate would apply for the period prior to August 1, 1981.

On October 20, 1986, Brunswick filed a timely appeal with the Commission objecting to the application of the 12% interest rate on the grounds that the department's interpretation of sections 2203 and 2204 of Chapter 20, Laws of 1981, relating to the effective date of the interest rate change under sec. 71.09(5)(a), Wis. Stats., was incorrect and would violate the Due Process and Equal Protection clauses of the United States Constitution.

At the January 8, 1987, hearing before the Commission and in its subsequent briefs, Brunswick argued a number of issues which were based upon its election to apply the law under sec. 71.07(1m), Wis. Stats., as amended by 1985 Wisconsin Act 120, and its claims for refunds as offsets under the equitable recoupment doctrine, despite the fact that none of these issues had been previously raised or addressed in its petition for redetermination.

The Commission concluded that it lacked jurisdiction to consider or decide claims which have not been timely and properly raised by the taxpayer in its petition for redetermination, or during the redetermination. The only claim timely and properly raised in the taxpayer's petition for redetermination or during the redetermination process was the taxpayer's constitutional challenge to the department's interpretation of sec. 71.07(2), Wis. Stats., and accordingly the Commission lacks jurisdiction to address or decide any other issues subsequently raised by taxpayer.

The 12% interest rate on unpaid income taxes under sec. 71.09(5)(a), Wis. Stats., as amended by Laws of 1981, Chapter 20, section 1090n applies to all assessments made on or after August 1, 1981, "regardless of the taxable period to which they pertain." The Commission has construed parallel language pertaining to interest on income and franchise taxes as well as sales and use taxes to require the 12% rate to cover all the years those taxes have been outstanding, or in other words, from the original due date. While the Commission lacks jurisdiction to do so, the constitutionality of sections 2203(45)(g) and 2204 which mandate that the 12% interest rate under sec. 71.09(5)(a), Wis. Stats., apply to all assessments made on or after August 1, 1981, has been reviewed and upheld.

The taxpayer has appealed a portion of this decision to the Circuit Court in regard to the Commission's conclusion that it lacks jurisdiction to decide the taxpayer's argument of equitable recoupment.

□

Nexus—not established. *General Robotics de Puerto Rico, Inc. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, December 8, 1988). The Wisconsin Department of Revenue appeals from a judgment reversing the Wisconsin Tax Appeals Commission's decision that General Robotics de Puerto Rico, Inc. (GRPR) was engaged in business within Wisconsin. The issue is whether the Commission's decision depends on findings of fact which are not supported by substantial evidence.

GRPR was a corporation organized under the laws of the State of Wisconsin whose headquarters and principal place of business during 1978-81 was Puerto Rico. It was a wholly-owned subsidiary of General Robotics Corporation (GRC), whose headquarters and principal place of business is Hartford, Wisconsin.

GRPR manufactured and assembled microcomputers, subassemblies, and component parts. All of its products were manufactured or assembled at the direc-

tion and order of GRC, and all products were sold and shipped by GRPR to GRC. GRPR purchased some of the parts used in the manufacturing and assembly process from GRC. GRPR conducted its business activities in rented facilities in Puerto Rico. All of its personal property was located in Puerto Rico. At the close of business in 1981, all 12 people on GRPR's payroll were residents of and employed at the plant in Puerto Rico. GRPR employed an accountant in Puerto Rico who performed certain functions. However, its tax returns were prepared by Price Waterhouse. All of GRPR's manufacturing and assembly activities were conducted in Puerto Rico. Its products were warehoused in Puerto Rico until shipped to GRC. GRPR's Puerto Rico employees arranged the shipment.

GRPR did not engage in any sales or marketing activities either within or outside of Puerto Rico and it did not directly engage in any business activities outside of Puerto Rico.

GRPR objects to the Commission's finding that GRPR and GRC shared some, if not all, corporate officers who were headquartered in GRC's home office in Wisconsin and that all orders for GRPR's products originated in Wisconsin and were accepted and approved in Wisconsin, and that this constituted sales activities in Wisconsin where management functions were undertaken by GRPR's officers and other administrative duties were performed on its behalf.

The Court concluded that it could not set aside these findings if they are supported by substantial evidence. The parties stipulated that GRPR was not engaged in any sales activities within or outside Puerto Rico. A finding that GRPR is not involved in any sales activities coupled with a finding that GRPR did not directly engage in business activities outside of Puerto Rico precludes a conclusion that it was engaged in business within the state under sec. 71.07(2), Wis. Stats. Inferences drawn by the Commission from the exhibits cannot override this stipulation.

The department has not appealed this decision.

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Manufacturer's sales tax credit. *L & W Construction Co., Inc. v. Wisconsin Department of Revenue* (Circuit Court of Waukesha County, May 24, 1988). The matter is before the Court for judicial review of a decision and order by the Wisconsin Tax Appeals Commission dated January 21, 1987.

L & W Construction Co., Inc., is a corporation duly organized under the laws of the State of Wisconsin. The taxpayer is also one of two co-equal general partners in North Lake Sand and Gravel Co. (North Lake) and is one of three general partners in Standard Asphalt Products (Standard Asphalt).

North Lake and Standard Asphalt each deducted the amount of sales and use tax paid on fuel and electricity in arriving at the partnership's ordinary income or loss. The taxpayer contends that it is entitled to a sales tax credit under sec. 71.043(2), Wis. Stats., equal to its prorated share of the sales and use tax paid by the partnerships under Chapter 77 of the Statutes on fuel and electricity consumed in manufacturing tangible personal property in this state.

The Court concluded that the statute is clear and unambiguous. The tax must be paid by the corporation itself. The taxpayer did not pay the sales tax itself. It remained liable only if the partnerships could not pay the tax. The taxpayer did not bring itself within the clear terms of sec. 71.043(2), Wis. Stats., as it paid no sales or use tax itself. Therefore, the taxpayer is not entitled to the sales and use tax credit under sec. 71.043(2), Wis. Stats.

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

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Liquidating corporations—distributions. *Jeanne F. Polan v. Wisconsin Department of Revenue and State of Wisconsin Tax Appeals Commission* (Court of Appeals, District IV, November 23, 1988). (See Wisconsin Tax Bulletin 44, page 8, for a summary of the decision of the Wis-

consin Tax Appeals Commission.) The Wisconsin Department of Revenue appeals from an order of the Circuit Court of Dane County declaring that sec. 71.337(1), Wis. Stats. (1975-76), violates the constitutional rights of Jeanne F. Polan. This statute provides that a gain or a loss by a liquidating corporation on the sale of its property is not recognized to the corporation for purposes of computing the Wisconsin franchise tax, to the extent that the gain or loss is participated in by Wisconsin resident shareholders. Polan is a nonresident shareholder of the corporation. The order reverses the decision of the Wisconsin Tax Appeals Commission which had affirmed an assessment of the corporation's tax (which the corporation had not paid) against the shareholder under sec. 71.11(21n), Wis. Stats. (1975-76).

The issues are:

- A. Whether the assessment against the shareholder is barred by the 4-year statute of limitations in sec. 71.11(21)(bm), Wis. Stats. (1975-76).
- B. Whether sec. 71.337(1), Wis. Stats. (1975-76), applies so as to recognize gain to the corporation when its nonresident and only shareholder will sustain a loss by reason of the liquidation distribution.
- C. Whether the shareholder has standing to challenge the constitutionality of sec. 71.337(1), Wis. Stats. (1975-76).
- D. Whether the shareholder is estopped from raising the constitutional issue.
- E. Whether sec. 71.337(1), Wis. Stats. (1975-76), violates the rights of nonresident shareholders under the privileges and immunities clause of the United States Constitution.

The assessment against the taxpayer is made under sec. 71.11(21n), Wis. Stats. (1975-76). That statute provides that if all or substantially all of the property of a corporation is transferred to one or more persons and the corporation is liquidated, any tax imposed by Chapter 71 (which imposes the franchise tax) on the corporation may be assessed against the transferees. The statute provides for notice of the

additional assessment under sec. 71.11(22), Wis. Stats. (1975-76).

The shareholder contends that because the notice was given more than 4 years from the date the franchise tax return was filed, the assessment against her is barred under sec. 71.11(21)(bm), Wis. Stats. (1975-76). The department contends that the appropriate statute of limitations is 6 years under sec. 71.11(21)(g)1, Wis. Stats. (1975-76). Notice was given within that period.

The shareholder submits that sec. 71.337(1), Wis. Stats. (1975-76), is ambiguous because it can be differently understood when, as here, the liquidating corporation has a gain on a sale but its nonresident and only shareholder will sustain a loss on the final distribution. She asserts that the legislative history of sec. 71.337(1), Wis. Stats. (1975-76), shows a purely remedial purpose: to allow Wisconsin to capture a tax which would otherwise not be collected from nonresidents. She concludes that the statute was not meant to create a new tax on nonresident shareholders or to tax a nonresident shareholder when a similarly situated Wisconsin shareholder would not be taxed, and that the statute should be construed accordingly.

The shareholder contends, and the trial court agreed, that as applied to her, sec. 71.337(1), Wis. Stats. (1975-76), violates her rights under U.S. Const. Article IV, sec. 2, cl. 1, which provides, "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

The trial court followed the privileges and immunities analysis outlined in *Taylor v. Conta*, 106 Wis. 2d 321, 327-36, 316 N.W. 2d 814, 818-822 (1982). That analysis examines the distribution of the tax burden between citizens and noncitizens to determine whether the law disadvantages noncitizens, determines whether the discrimination violates a fundamental right, and determines whether the state's discriminatory treatment of noncitizens is within the bounds set by the Constitution.

The trial court concluded that when a corporation realizes a gain and its only

shareholder a loss, the practical effect of sec. 71.337(1), Wis. Stats. (1975-76), is to place a substantially more onerous tax burden on a nonresident shareholder than on a similarly situated resident shareholder. The court noted that had shareholder Polan resided within Wisconsin, she would have escaped taxation entirely. The court concluded that the statute, as applied, disadvantages nonresidents.

The state argues that sec. 71.337, Wis. Stats. (1975-76), imposes no tax. It simply prescribes the circumstances under which a gain or loss is recognized to a liquidating corporation and imposes no tax upon either resident or nonresident shareholders. If, however, as here, the liquidating corporation fails to pay the franchise tax resulting from recognition of gain to the corporation, then the nonresident shareholder may be assessed the amount of the unpaid tax under sec. 71.11(21n), Wis. Stats. (1975-76).

The Court of Appeals concluded that the 4-year statute of limitations is inapplicable; sec. 71.337(1), Wis. Stats. (1975-76), applies whether or not a nonresident shareholder has a loss; the shareholder has standing to challenge sec. 71.337(1), Wis. Stats. (1975-76), and is not estopped from raising the constitutional issue; and under the circumstances, the statute denies to the shareholder the privileges and immunities guaranteed to her by the Constitution. Therefore, the Circuit Court order was affirmed.

The department and the taxpayer have not appealed this decision.

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SALES/USE TAXES

Services—incidental sale of property. *Wisconsin Department of Revenue v. Dow Jones & Company, Inc.* (Court of Appeals, District IV, January 26, 1989). The Department of Revenue appeals from a judgment affirming an order of the Wisconsin Tax Appeals Commission. The issue is whether Dow Jones Company, Inc., is required to pay sales tax on the teleprinters

it provided to certain of its "news service" clients. The Commission concluded that the provision of the teleprinters to Dow Jones' clients was incidental to the performance of a service within the meaning of sec. Tax 11.67(1), Wis. Adm. Code, and was therefore exempt from sales tax.

Dow Jones is the publisher of the Dow Jones News Service. Until the mid-1960's, all news service subscribers received the news service information exclusively from teleprinters. These teleprinters worked automatically, were not interactive, and were used solely to deliver the news service. Subscribers paid a single charge for the news service, including its delivery on a teleprinter. Dow Jones owned, insured, repaired, and maintained the teleprinters, and retained the right to replace or remove them at any time.

Later, some subscribers preferred to receive the news service on video display devices instead of teleprinters. Dow Jones began to itemize on its invoices a separate, flat "equipment charge" for providing and maintaining the teleprinters to those subscribers who still used them. However, complete "hard copy" news service was available only on the teleprinters. Dow Jones would terminate the news service to any subscriber found using unauthorized equipment and would not hook up a subscriber to the news service if the subscriber wanted to get a hard copy of the news service information through a delivery mechanism other than a Dow Jones teleprinter.

The Commission reasoned that since the transaction in this case encompassed both a transfer of tangible personal property to a purchaser in conjunction with the rendition of services by the seller, it should look at the essence of the transaction to determine if it is fundamentally a sale of property or one of services. The Commission relied on *Janesville Data Center v. Dept. of Revenue*, 84 Wis. 2d 341, 346, 267 N.W. 2d 656, 658 (1978), which held that it is the essence of a transaction, and not the nature of any one constituent part of a transaction, which determines the taxability of it.

The department claims that the transfer of a teleprinter should be taxed as a separate transaction because news service subscribers have an option whether or not to use the teleprinters, and can receive the news service without accepting the teleprinters. The department also argues that because Dow Jones made a separate "equipment charge" on its monthly invoices for maintenance of the teleprinter, sec. Tax 11.67(1), Wis. Adm. Code, should not apply, and the transaction should be taxed as a lease or rental under sec. 77.52(1), Wis. Stats.

The Court concluded that the Commission's conclusion was reasonable, did not conflict with agency rules, policies, or practices, and it did not violate statutory or constitutional provisions. Therefore, the Court upheld it.

The department has not appealed this decision.



Newspapers and periodicals—shoppers' guides. *Woodward Communications, Inc., f/k/a Telegraph Herald, Inc., v. Wisconsin Department of Revenue* (Court of Appeals, District IV, February 19, 1988). Woodward Communications, Inc., appeals from an order affirming a decision of the Wisconsin Tax Appeals Commission. The Commission affirmed the decision of the Department of Revenue to deny Woodward's petition for a redetermination of the department's assessment of sales and use taxes against Woodward for 1977 through 1979.

Woodward questions:

- A. Whether the trial court unduly deferred to the Commission's construction of the statutes.
- B. Whether Woodward's printing shopping guides for others is a taxable service.
- C. Whether Woodward's receipts from the sale of printing services for others is exempt under sec. 77.54(2), Wis. Stats., as destined for sale.

D. Whether the materials and supplies Woodward used to print its own shoppers' guides are subject to use tax.

E. Whether Woodward is exempt from use tax for materials and supplies used to print its own shoppers' guides under sec. 77.54(2), Wis. Stats.

F. Whether Woodward is exempt from the use tax after July 1, 1978, under sec. 77.54(15), Wis. Stats., for supplies and materials used to print its own shopping guides.

G. Whether Woodward has been denied its rights under the United States and Wisconsin Constitutions.

Woodward is in the publishing business. Between 1976 and 1978 it published and printed its own shoppers' guides for communities in Wisconsin and Iowa. It sold advertising space to its customers who placed advertisements in the shoppers' guides, designed and laid out the shoppers' guides, and printed and distributed the guides. The layout, typesetting, and paste up work for its Iowa shoppers' guides was performed in Iowa, but all printing for its own shoppers' guides was done at Platteville. During the same period, the Shopping News Division also printed shoppers' guides for others who published them. The division purchased supplies and materials used to produce the guides, whether for itself or for others.

The department assessed Woodward for use tax on the purchases of supplies and materials used to print and produce its own shoppers' guides. It also assessed Woodward for sales tax on the gross receipts for charges for printing shoppers' guides for others.

The Commission concluded that between January 1, 1976, and June 30, 1978, Woodward's gross receipts from printing shoppers' guides for others was a taxable service under sec. 77.52(2)(a)11., Wis. Stats. Woodward was the consumer of the materials and supplies used in the printing and publication of its own shoppers' guides and thus was subject to tax under sec. 77.53(1), Wis. Stats. The Commission

further concluded that Woodward had not shown it qualified for any of the the exemptions it claimed. Specifically, the Commission concluded that the guides were not "destined for sale" within the sec. 77.54(2), Wis. Stats., exemption; the materials and supplies Woodward used after July 1, 1978, to print its own guides were not exempt under sec. 77.54(15), Wis. Stats.

The Court of Appeals affirmed the Commission's decision and concluded that:

A. When material facts are not in dispute and only matters of law are in issue, the Court may review the record *ab initio* and substitute its judgment for that of the Tax Appeals Commission.

B. The physical form of the shoppers' guide is essential to the advertising it contains. Consequently, the sale of Woodward's shoppers' guides is the sale of the service of printing of tangible personal property under sec. 77.52(2)(a)11., Wis. Stats.

Section 77.51(4), Wis. Stats., defines "sale at retail." It does not define "resale."

However, by virtue of subs. (k), the transfer by Woodward's purchasers of the shopping guides to members of the public free of charge does not prevent Woodward's sales from being retail sales.

C. Having already held that Woodward's sale of its shopping guide printing services to others is a sale under sec. 77.52(2)(a)11., Wis. Stats., to hold that sec. 77.51(4), Wis. Stats., not only makes Woodward's sale to its purchasers a retail sale but also makes the same sale exempt as "destined for sale" would render sec. 77.51(4)(k), Wis. Stats., meaningless. The same section would both cause the tax to be imposed and exempt the transaction from the tax, an absurd result.

D. Woodward's "destined for sale" contention is rejected for the same reasons stated above. That Woodward gives away its own shoppers' guides free of charge does not constitute a resale.

E. For reasons previously stated, the Court has held that the shoppers' guides Woodward prints for itself or others are not "destined for sale." The exemption Woodward relies on does not apply.

F. Section 77.54(15), Wis. Stats., as amended, exempts shoppers' guides from the sales and use tax, but not the materials and supplies used to print shoppers' guides. Because the statute is silent with respect to materials and supplies, and because the Court must strictly construe an exemption against the taxpayer, the materials and supplies Woodward used on and after July 1, 1978, were not exempt from the use tax.

G. The record is silent as to whether after July 1, 1978, Woodward distributed no less than 48 issues in a twelve-month period. Because of the strong presumption favoring constitutionality and Woodward's failure to show that the post-July 1, 1978, classification disparately treats Woodward, its challenge to the Commission's construction of sec. 77.54(15), Wis. Stats., also fails.

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

□

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.)

The following Tax Releases are included:

Individual Income Taxes

1. Basis Adjustment Under Wisconsin's Marital Property Law (p. 11)

Corporation Franchise or Income Taxes

1. Carryovers in Certain Corporate Acquisitions (p. 14)
2. Manufacturing for Purposes of the Manufacturer's Sales Tax Credit (p. 15)

3. Unrelated Business Income - Exemption for State and Other Units of Government (p. 15)

Sales/Use Taxes

1. Cooling Towers - Real or Personal Property/Manufacturing (p. 16)
2. Discount Cards (p. 16)

County Sales/Use Taxes

1. County Tax: Transitional Provisions Relating to Services (p. 16)

INDIVIDUAL INCOME TAXES

1. Basis Adjustment Under Wisconsin's Marital Property Law

Statutes: Section 71.05(10)(e), Wis. Stats. (1987-88)