gible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

B. The transaction under scrutiny was not an "activity in the regular course of the taxpayer's trade or business" but was rather a once in a lifetime restructuring of its acquisition debt.

C. The $621,596 income related to the early extinguishment of debt is nonbusiness income which is not subject to apportionment and is not taxable in Wisconsin.

The department has not appealed but has adopted a position of nonacquiescence in regard to this decision.

❐

Unitary business. *Chilstrom Erecting Corp. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 14, 1990). The issue in this case is whether the department, during the period under review, 1981 through 1985, properly assessed the business of the taxpayer within Wisconsin as an integral part of a unitary business, within the meaning of sec. 71.07(2), Wis. Stats.

The taxpayer is a Wisconsin corporation whose principal place of business is located in Wisconsin, and which is engaged exclusively in the business of placing reinforcing steel ("rebar") in concrete as part of the process of constructing roads, bridges, buildings, and various other types of structures. It acts as a subcontractor, which entered into construction contracts with general contractors to perform rebar work on building projects in Wisconsin. In addition, it entered into joint venture agreements with one other rebar subcontractor for out-of-state construction contracts. In a broad sense, the type of work performed, placing rebar, was the same on construction projects in Wisconsin as in other states.

During the years 1981 through 1985, the taxpayer placed reinforcing steel in construction projects outside Wisconsin as a joint venturer; it entered into eight joint venture agreements with other rebar subcontractors. The taxpayer controlled the performance of the construction activities covered by the construction contracts under the joint venture agreements by its control over the project managers. The operations of the taxpayer in Wisconsin were integrated with the operations of the joint ventures by the fact that the taxpayer provided half the capital for each joint venture.

The taxpayer and the joint ventures together utilized the same working capital, the same management, and the same bidding and contracting operations. This effected certain economies that would be more expensive if undertaken individually by the Wisconsin operations or the out-of-state operations. At the same time, the costs of such functions were allocated totally to the Wisconsin operations. During the period 1976 through 1985, the taxpayer reported net losses each year from its Wisconsin operations and net income each year from its out-of-state operations. Since the taxpayer was absorbing major expenses of the operations of its out-of-state operations, it under-reported its income to Wisconsin for tax purposes.

The department did not allow the taxpayer to allocate and separately account for Wisconsin franchise tax purposes its income derived from its out-of-state operations in several joint ventures, on the basis that it constituted a unitary business. The department argued that the taxpayer's Wisconsin operations were clearly dependent upon the out-of-state operations through joint ventures, since for a decade the Wisconsin operations lost money for the entire period according to the income reported on its Wisconsin tax returns, and that only the profits from the out-of-state projects resulted in the taxpayer being a viable business enterprise. The department also argued that the taxpayer contributed to the operation of the business outside the state, provided top management for it, capitalized it, organized it, and obtained construction contracts for it in the same way it provided those same functions to the Wisconsin operations.

The Commission concluded that the taxpayer's operations in Wisconsin were dependent upon or contributory to the operation of its business out-of-state, and that therefore, its business is an integral part of a unitary business, within the meaning of sec. 71.07(2), Wis. Stats. It also held that the department exercised its discretion in refusing to permit the taxpayer to continue using separate accounting.

The taxpayer has appealed this decision to the Circuit Court.

❐

Filing requirement — franchise or income tax. *Freedom Savings & Loan Association, n/k/a Federated Financial Savings & Loan Association vs. Wisconsin Department of Revenue* (Circuit Court of Waukesha County, April 17, 1990). This case involves an issue of law with respect to a special franchise tax law imposed by the Legislature on April 30, 1986, for the taxable year 1986, and whether or not a return filed by the taxpayer is for the year 1985, as it contends, or for the year 1986, as the department contends.

The taxpayer filed a tax return for 1984 on a calendar year basis ending December 31, 1984, and filed for all prior years on a calendar year basis. It then changed its filing status from a calendar year basis to a fiscal year basis commencing January 1, 1985 and ending September 30, 1985, without permission of the department, in violation of sec. 71.10(3m)(a), Wis. Stats. Section Tax 2.165(2)(b), Wis. Adm. Code, which covers the same subject matter, also requires permission or approval from the department. The taxpayer thereafter filed a tax return for the period January 1, 1985 through September 30, 1985, for the tax year 1985.

The taxpayer, Freedom Savings & Loan Association, was merged with the Elm Grove Savings & Loan, and a new name was created as Federated Financial Savings & Loan Association, effective January 31, 1986.

The taxpayer wishes to tack on a second 1985 year tax return for the period October 1, 1985 to January 31, 1986, calling it a 1985 year tax return because the taxpayer went out of business on January 31, 1986. This would mean that the 1985 tax year would total 13 months, which is contrary to sec. 71.10(3m)(b), Wis. Stats.

The legislation which became law on April 30, 1986, amended sec. 71.01(2), Wis. Stats. as follows:

> "... In addition, except as provided in subs. (2m) and (3), a corporation that ceases doing business in this state shall pay a special franchise tax according to or measured by its entire net income for the income year during which the corporation ceases doing business in this state at the rates under s. 71.09(2m). ..."

The initial applicability language stated that:

> "The treatment of section 71.01(2) of the statutes by this act first applies to taxable year 1986."

Thus, it is conceded by both the taxpayer and the department that if the determination is that the period January 1, 1985 through September 30, 1985 is the tax return for the year 1985 and the period October 1, 1985 to September 30, 1986 is a 1986 year tax return, that the taxes paid by the taxpayer were appropriate and no refund can be allowed by the department.

The Circuit Court concluded that the Wisconsin Tax Appeals Commission defined the Wisconsin Statutes and Wisconsin Administrative Code correctly according to the law, and that the period of time from October 1, 1985, through September 30, 1986, was a 1986 tax year on a fiscal year basis, which the taxpayer itself changed on its own volition. The Court held that there is no other conclusion that can be supported on any basis in accordance with the law and, therefore, affirmed the decision of the Commission, denying the refund requested by the taxpayer.

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

❑

Dividends — consent. *The Goodyear Tire & Rubber Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 19, 1990). The issues in this case are:

A. Whether consent dividends reported as part of the taxpayer's federal gross income pursuant to sec. 565 of the Internal Revenue Code of 1954 (IRC), in taxable years 1981-85 were subject to Wisconsin franchise tax as dividends or other income of any kind within the meaning of sec. 71.03(1)(d) and (k), Wis. Stats.

B. Whether the consent dividends were gross income allocable from the taxpayer's subsidiaries to the taxpayer under sec. 71.11(7m), Wis. Stats.

The taxpayer is a Delaware Corporation having its principal place of business in Akron, Ohio. For taxable years 1981 through 1985, among others, the taxpayer filed Wisconsin franchise tax returns with the department.

For federal income tax purposes, the taxpayer lawfully consented pursuant to sec. 565, IRC, to report as dividend income certain amounts based on stock ownership in various corporations wholly owned by the taxpayer. The taxpayer did not actually receive any money or other property from any of the companies with respect to the amounts reported as dividends. For federal income tax purposes, these "consent dividends" to the taxpayer generated no taxable income because of the taxpayer's claim of the dividends received deduction from gross income in amounts identical to the consent dividends pursuant to sec. 243, IRC.

The taxpayer did not report the consent dividends as income for 1981-85 Wisconsin franchise tax purposes. The department took the position that the consent dividends were includible in the taxpayer's income for taxable years 1981-1985 and issued a Notice of Assessment. The taxpayer filed a motion for summary judgment setting aside the assessment of franchise tax on the consent dividends.

The Commission concluded as follows:

A. The consent dividends in question did not constitute "dividends" for purposes of sec. 71.03(1)(d), Wis. Stats., as defined in sec. 71.316(1), Wis. Stats. The consent dividends also did not constitute "gross income" within the meaning of sec. 71.03(1)(k), Wis. Stats.

B. The department's action including the taxpayer's consent dividends within taxable income, if viewed as a reallocation of gross income, deductions, credits, or allowances between two or more commonly owned or controlled organizations, trades, or businesses under sec. 71.11(7m), Wis. Stats., was not necessary in order to prevent evasion of taxes or to clearly reflect their income.

The department has not appealed this decision.

Note by the Department of Revenue: For taxable years 1987 and thereafter, Wisconsin net income of corporations is determined under the Internal Revenue Code (IRC), with certain modifications. Since sec. 565, IRC, is not modified it applies for Wisconsin. Therefore, for taxable years 1987 and thereafter, consent dividends are includible in gross income for Wisconsin purposes. However, the dividends may be deductible if the conditions in sec. 71.26(3)(j), Wis. Stats. (1987-88), are met.

❑

Appeals — failure to raise issue in proceedings. *Northern States Power Company vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, January 19, 1990). Northern States Power Company seeks judicial review of that part of a March 31, 1989, Order of the Tax Appeals Commission which denied its request for redetermination of a Department of Revenue franchise tax assessment. This assessment was based on the disallowance by the department of the taxpayer's deduction for its donation of certain real estate to the federal government. The singular issue raised by the taxpayer is whether sec. 71.04(5)(a) and (d)1, Wis. Stats. (1975), is

unconstitutional in denying a deduction for a gift to the federal government while permitting a deduction for an identical gift to the State of Wisconsin. The taxpayer asserted that such disparate treatment runs afoul of the doctrine of intergovernmental tax immunity, citing lines of U.S. Supreme Court decisions.

The taxpayer conceded that this issue was not raised in the proceedings before the Commission. For this reason, the department argued that the taxpayer waived the issue and is thereby precluded from raising it now.

The Circuit Court concluded that the constitutional issue has been waived and cannot be decided in these proceedings. The matter was therefore dismissed.

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

❒

Allocation of income — apportionable vs. nonapportionable. *Transportation Leasing Co., f/k/a Greyhound Lines, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 16, 1990). The issue in this case is whether dividends received by the taxpayer from Greyhound Lines of Canada, Ltd., are apportionable business income or nonapportionable investment income.

The taxpayer, Greyhound Lines, Inc., is the largest intercity passenger bus carrier in the continental United States, serving all 48 continental states and providing service to Canada. During the years at issue, 1977 through 1981, the taxpayer owned a controlling interest of 61+% of the stock of Greyhound Lines of Canada, Ltd., its subsidiary. The remaining 38.7% was publicly held. Greyhound Lines of Canada, Ltd. was the largest intercity passenger bus carrier throughout the dominion of Canada and also provided service to Alaska.

The taxpayer is a wholly owned subsidiary of The Greyhound Corporation. The Greyhound Corporation is a holding company with numerous subsidiaries whose business activities in the years at issue were divided into four to seven general groups, including the Transportation Group. The Greyhound Corporation did not own any stock or any other interest in Greyhound Lines of Canada, Ltd.

The Greyhound Bus System operates five thousand intercity buses in regular service throughout the continental United States, Canada, and Alaska over a total of 120,000 route miles. It owns or leases 225 bus terminals and 61 garage maintenance facilities. The taxpayer owns three bus terminals in Wisconsin; they are located in Milwaukee, Madison, and La Crosse.

The two key subsidiaries in The Greyhound Corporation's Transportation Group are the taxpayer and Greyhound Lines of Canada, Ltd. The annual reports of The Greyhound Corporation clearly represent that the entire Greyhound Bus System, which operates throughout the continental U.S., Canada, and Alaska, is all part of the same business enterprise. The combined financial reports for the taxpayer and Greyhound Lines of Canada that appear in each of the Annual Reports indicate that the entire Greyhound Bus System is all part of the same business operation. The Form 10-K Report that The Greyhound Corporation filed with the Securities and Exchange Commission also identifies the taxpayer and Greyhound Lines of Canada as part of one large bus transportation network providing bus transportation service throughout the United States and Canada. The Annual Reports of The Greyhound Corporation clearly represent to the world that the taxpayer and Greyhound Lines of Canada are all part of *The Greyhound Network* bus passenger service throughout the North American continent.

The taxpayer does operate its buses into Vancouver, British Columbia, Canada, and Winnipeg, Manitoba, Canada, where it discharges and boards passengers at terminal facilities owned by Greyhound Lines of Canada. The taxpayer also operates its buses as far as 70 miles beyond the U.S./Canadian border when it travels to Montreal, Canada, and again when it travels to Vancouver, British Columbia, Canada. Likewise, Greyhound Lines of Canada buses operate as far south into the U.S. as Chicago, Illinois, on routes owned and operated by the taxpayer. When these buses owned by Greyhound Lines of Canada are operated into the U.S., they are driven by a driver employed by the taxpayer.

The Commission concluded:

1. Greyhound Lines of Canada, Ltd. is an integral part of The Greyhound Corporation's and the taxpayer's North American unitary bus transportation system.

2. The gain and dividends the taxpayer received from its subsidiary, Greyhound Lines of Canada, Ltd., during the years at issue are includible in its apportionable income and are subject to taxation within the intent and meaning of sec. 71.07(1m), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

❒

Business loss carryforward — mergers. *Wisconsin Department of Revenue vs. United States Shoe Corporation, and United States Shoe Corporation vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, September 6, 1990). This is an appeal from an order of the Circuit Court of Dane County, in which the Circuit Court concluded that United States Shoe Corporation (U.S. Shoe), under sec. 71.06(1), Wis. Stats. (1975-76), may not offset against its 1976 and 1977 Wisconsin net business income, the net business losses sustained by corporations with which it merged, and that a closing agreement between the Department of Revenue and U.S. Shoe to compromise the taxpayer's franchise tax liability under a June 19, 1984 additional assessment did not settle U.S. Shoe's franchise tax liability for fiscal years 1976 and 1977. See *Wisconsin Tax Bulletin* 55, page 7 and *Wisconsin Tax Bulletin* 61, page 7, for background and prior reviews of this case.

The Court of Appeals concluded as follows:

A. With respect to the closing agreement issue, the agreement was intended to apply only to tax years July 31, 1978 to January 31, 1983, as it settled a dispute with respect to the additional assessment directed to fiscal years 1978-83. The agreement had no application to the department's March 7, 1980, additional franchise tax assessment for fiscal years 1976 and 1977.

B. With respect to the loss carryover issue, the reenactment of sec. 71.06(1), Wis. Stats., by ch. 224, Laws of 1975, does not clearly and unambiguously mandate that the "business continuity" test be applied to the carryforward of business losses of pre-merger corporations, as ruled by the Commission. There is no clear legislative intent to eliminate the "identical taxpayer" requirement of *Fall River Canning* in its 1975 repeal and recreation of sec. 71.06(1), Wis. Stats. The *Fall River Canning* "identical taxpayer" requirement is still in effect, since neither the Supreme Court nor the Legislature has acted to abandon or modify the requirement.

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

❑

SALES/USE TAXES

Farming — ginseng raising. *Arndt Enterprises, Inc. vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, February 21, 1990). The issue in this case is whether the taxpayer's sales and use of ginseng cloth, cable, cable stretchers, cable splicers, and wire are exempt "machines" under sec. 77.54(3), Wis. Stats.

On August 30, 1989, the Tax Appeals Commission affirmed the department's assessment of 1982-86 sales and use tax against the taxpayer. The tax was mainly for sales of ginseng cloth, cable, cable splicers (tarp apparatus), and cable stretchers to ginseng growers for use in providing shade for ginseng crops. A small portion of the tax was for the use of wire in the construction of drying racks for ginseng and in the construction of pens for raising mink. See *Wisconsin Tax Bulletin* 65, page 14, for a review of this case.

The Circuit Court concluded that the Commission's decision was reasonable and well-founded in law and affirmed the Commission's order.

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

❑

When and where sale takes place. *Republic Airlines, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, November 20, 1990). Republic appeals from a judgment which affirmed a Wisconsin Tax Appeals Commission order denying Republic's petition for redetermination of the department's $68,769.58 plus interest deficiency assessment. The assessment arose from Republic's failure to pay taxes on liquor it sold, and on food, peanuts, and occasionally liquor it gratuitously provided to overflight passengers. The department cross-appeals that part of the judgment that affirmed the Commission's assumption of jurisdiction and determination of exemption over the issue of use taxation of Republic's complimentary peanuts served to its passengers.

Between 1981 and 1984, Republic Airlines, Inc. (Republic) sold liquor and provided complimentary food, soft drinks and peanuts, and occasionally liquor, to its overflight passengers. Overflights are flights that neither take off from nor land in Wisconsin but fly over the state. Republic formerly reported gross receipts on food, beverages, and peanuts based on a ratio of revenue passenger miles (RPMs) flown in Wisconsin (the numerator), to its RPMs everywhere (the denominator). The numerator included flights that landed in or took off from Wisconsin, but did not include overflights. The department adjusted the numerator of this fraction upward to include overflights.

The Court of Appeals concluded that the statutes and administrative rule then in existence did not provide for a sales tax on sale of liquor or use tax on complimentary food and beverages and reversed that part of the trial court's judgment upholding the assessment of the Wisconsin Department of Revenue. The Court affirmed the judgment as it sustained the Wisconsin Tax Appeals Commission's determination that the complimentary peanuts were exempt from use tax.

The department has not appealed this decision.

Note by the Department of Revenue: As a part of the Omnibus Budget Reconciliation Act of 1990 (P.L. 101-508), a provision was added which prohibits any state from charging any tax on or with respect to any flight of a commercial aircraft or any activity or service on board such an aircraft unless it takes off or lands in that state. Thus the tax would not have been allowable after the effective date of that provision, even if the Court of Appeals had ruled in the department's favor.

❑