signed duties "[r]epresenting the company on credit problems as necessary."

The sales or "field" representatives in the Milwaukee region, each of whom was assigned his own territory, resided in Wisconsin. They were provided with company cars, but not with offices. They were also furnished a stock of gum (with an average wholesale value of about $1,000), a supply of display racks, and promotional literature. These materials were kept at home, except that one salesman, whose apartment was too small, rented storage space at about $25 per month, for which he was reimbursed by Wrigley.

On a typical day, the sales representative would load up the company car with a supply of display racks and several cases of gum, and would visit accounts within his territory. In addition to handing out promotional materials and free samples, and directly requesting orders of Wrigley products, he would engage in a number of other activities which Wrigley asserts were designed to promote sales of its products.

He would, for example, provide free display racks to retailers (perhaps several on any given day) and would seek to have these new racks, as well as pre-existing ones, prominently located. The new racks were usually filled from the retailer's existing stock of Wrigley gum, but it would sometimes happen—perhaps once a month—that the retailer had no Wrigley products on hand and did not want to wait until they could be ordered from the wholesaler.

In that event, the rack would be filled from the stock of gum in the salesman's car. This gum, which would have a retail value of $15 to $20, was not provided without charge. The representative would issue an "agency stock check" to the retailer, indicating the quantity supplied; he would send a copy of this to the Chicago office or to the wholesaler, and the retailer would ultimately be billed (by the wholesaler) in the proper amount.

When visiting a retail account, Wrigley's sales representative would also check the retailer's stock of gum for freshness, and would replace stale gum at no cost to the retailer. This was a regular part of a representative's duties, and at any given time up to 40% of the stock of gum in his possession would be stale gum that had been removed from retail stores. After accumulating a sufficient amount of stale product, the representative either would ship it back to Wrigley's Chicago office or would dispose of it at a local Wisconsin landfill.

Wrigley did not own or lease real property in Wisconsin, did not operate any manufacturing, training, or warehouse facility, and did not have a telephone listing or bank account. All Wisconsin orders were sent to Chicago for acceptance, and were filled by shipment through common carrier from outside the state.

Credit and collection activities were similarly handled from the Chicago office. Although Wrigley engaged in print, radio, and television advertising in Wisconsin, the purchase and placement of that advertising was managed by an independent advertising agency located in Chicago.

Wrigley had never filed tax returns or paid taxes in Wisconsin; it was not licensed to do business in the state. In 1980, the department concluded that the company's in-state business activities during the years 1973-1978 had been sufficient to support imposition of a franchise tax, and issued a tax assessment on a percentage of the company's apportionable income for those years.

The court addressed the following two questions: (1) what is the scope of the term "solicitation of orders," and (2) whether there is a *de minimis exception* to the activity (beyond "solicitation of orders") that forfeits sec. 381 immunity.

"Solicitation of orders" covers those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders.

The court concluded that the term "solicitation of orders" includes not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order.

Since "solicitation of orders" covers more than what is strictly essential to making requests for purchases, the next clear line is the one between those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force.

Providing a car and a stock of free samples to salesmen is part of the

"solicitation of orders," because the only reason to do it is to facilitate requests for purchases.

Contrariwise, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen.

Section 381(c) requires one exception to this principle: Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the state, by the company or on its behalf, would go beyond the "solicitation of orders."

The court also concluded that there is a *de minimis* exception to sec. 381. Whether in-state activity other than "solicitation of orders" is sufficiently *de minimis* to avoid loss of tax immunity conferred by sec. 381 depends upon whether that activity establishes a nontrivial additional connection to the taxing state. Wisconsin asserted that at least six activities performed by Wrigley within its borders went beyond the "solicitation of orders." Since none of these activities can reasonably be viewed as requests for orders covered by sec. 381, Wrigley was subject to tax unless they were either ancillary to requesting orders or *de minimis*.

The court concluded that the replacement of stale gum, the supplying of gum through "agency stock checks," and the storage of gum were not ancillary. Because the vast majority of the gum stored by Wrigley in Wisconsin was used in connection with stale gum swaps and agency stock checks, that storage (and the indirect rental of space for that storage) was in no sense ancillary to "solicitation."

By contrast, Wrigley's in-state recruitment, training, and evaluation of sales representatives and its use of hotels and homes for sales-related meetings served no purpose apart from their role in facilitating solicitation. The same must be said of the instances in which Wrigley's regional sales manager contacted the Chicago office about "rather nasty" credit disputes involving important accounts in order to "get the account and [Wrigley's] credit department communicating." The purpose of the activity was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.

Wrigley argued that the various nonimmune activities, considered singly or together are *de minimis*. In particular, Wrigley emphasized that the gum sales through agency stock checks accounted for only 0.00007% of Wrigley's annual Wisconsin sales, and in absolute terms amounted to only several hundred dollars a year. Although the relative magnitude of these activities was not large compared to Wrigley's other operations in Wisconsin, the court concluded that they constituted a nontrivial additional connection with the state. Because Wrigley's business activities within Wisconsin were not limited to those specified in sec. 381, the prohibition on net income taxation contained in that provision was inapplicable. Accordingly, the judgment of the Wisconsin Supreme Court is reversed. □

SALES AND USE TAXES

Computer software — tangible vs. intangible; Nexus. *Wisconsin Department of Revenue vs. B.I. Moyle Associates, Inc.* (Court of Appeals, District IV, April 21, 1992). The department has filed a notice of voluntary dismissal of its appeal of a decision by the Dane County Circuit Court. For a summary of that decision, see *Wisconsin Tax Bulletin* 76, page 6. □

Occasional sales — business assets. *DVL, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 13, 1992). The issue in this case is whether the department correctly determined that the sale of the taxpayer's restaurant business did not qualify as an exempt "occasional" sale.

For a number of years the taxpayer operated a supper club in Beloit, Wisconsin. On May 29, 1990, the taxpayer sold the supper club for $600,000, including $54,000 of tangible personal property. At the time of the sale, the taxpayer held a Wisconsin seller's permit, which was turned over to its accountant on or about May 31, 1990, for surrender to the department.

By certified mail postmarked June 15 (17 days after the sale) and received by the department June 18 (20 days after the sale), the taxpayer's seller's permit was surrendered to the department. The taxpayer's accountant credibly testified that he laid the permit on his desk but did not timely mail it to the department due to human error resulting from the many other papers on his desk and his preoccupation with the sale of his own accounting business at the time.

The Commission concluded that the sale of the supper club did not qualify for exemption from the sales tax as an "occasional sale of tangible personal property" under sec. 77.54(7), Wis. Stats. (1989), because the taxpayer's seller's permit was not delivered to the department for cancellation within 10 days after the sale.

The taxpayer has not appealed this decision. □

Personal liability. *William Gould and Lois Gould vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 9, 1992). The issues in this case are:

A. Whether the taxpayers are responsible for the unpaid taxes of a corporation.

B. Whether the department was guilty of a bad faith delay, precluding the collection of interest attributable to the delay, in refusing to negotiate a settlement.

The taxpayers, who had been passive investors in the corporation, took over sole managerial control of the corporation on December 3, 1987. The taxpayers made decisions to pay various non-tax debts the corporation had.

The taxpayers operated the business until it folded on February 15, 1988, knowing that sales of the corporation's product were generating sales taxes, but both taxpayers were unaware of the particulars of the corporation's obligation to file returns and remit taxes.

Three months before the hearing in the case, the department's attorney told the taxpayers that he would consider a settlement offer from them. The taxpayers submitted an offer, but the department's attorney then decided there was no legal basis on which the department could settle the case.

The Commission concluded that:

A. The taxpayers are responsible for the corporation's unpaid taxes. The taxpayers had the authority and the duty to direct the payment of taxes. The taxpayers intentionally breached this duty by paying other creditors while knowing that sales taxes were due.

B. There was no bad faith on the part of the department by refusing to negotiate a settlement.

The taxpayers have not appealed this decision. □

Successor's liability. *Robert Kastengren vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, February 17, 1992). This is an action for judicial review of a decision of the Wisconsin Tax Appeals Commission (Commission). The issues in this case are:

A. Whether the responsibility for unpaid sales tax of a predecessor is abated when the purchase price is used to pay, not the predecessor, but the holder of a perfected security interest in the sold goods.

B. Whether the record establishes that the department has attempted adequate collection efforts from the predecessor.

On December 22, 1988, the taxpayer and his wife entered into an "Asset Purchase Agreement" with Harry Dembrowski "President" to purchase certain equipment and inventory of "Uncle Harry's Fine Food Products, Inc.," a Wisconsin corporation engaged in the production and sale of frozen custard, ice cream, sorbet, and other related products. At the time of sale, Uncle Harry's Fine Food Products, Inc., owed sales taxes to the State of Wisconsin.

The check in payment of the purchase price was drawn on the Bank of Burlington and ran from R.H. or J. Kastengren to the Bank of Burlington and Uncle Harry's Fine Food Products, Inc. At the time of the asset purchase, the Bank of Burlington held a perfected security interest in all of the assets of Uncle Harry's Fine Food Products, Inc.; and was entitled to and did, in fact, receive all the proceeds of said asset purchase.

The taxpayer did not withhold any of the purchase price to cover possible unpaid sales and use taxes and did not submit a written request for a sales and use tax clearance certificate from the department.

The sales tax liability of Uncle Harry's Fine Food Products, Inc., has not been paid; its seller's permit has been revoked, and the collection efforts have been terminated because the department has reached the conclusion that the corporation is defunct, has no assets, and the tax is uncollectible. The department can document eleven contacts with Uncle Harry's Fine Food Products, Inc., in collecting and attempting to collect delinquent tax. On August 30, 1989, the department issued a successor sales and use tax assessment against the taxpayer, who challenges his personal liability for it.

In its July 25, 1991 decision, the Commission concluded that the taxpayer is personally liable for the unpaid sales and use taxes incurred by his predecessor, Uncle Harry's Fine Food Products, Inc., because he neither withheld from the purchase price nor requested clearance from the department as required by sec. 77.52(18), Wis. Stats. There is no exception from successor liability in a situation where the entire sales proceeds were distributed not to the seller, but to a secured creditor in satisfaction of its secured lien rights.

The Circuit Court concluded that:

A. Responsibility for the unpaid sales tax of a predecessor under sec. 77.52(18), Wis. Stats., is not abated even when the purchase price is used to pay, not the predecessor, but the holder of a

perfected security interest in the sold goods.

B. Before the department may be found to have attempted adequate collection efforts from the predecessor, the department must also attempt collection efforts from Uncle Harry's president, Harry Dembrowski; and any other officer, employe, or responsible person pursuant to sec. 77.60(9), Wis. Stats. Since the department made no collection efforts against Dembrowski, it may not proceed against the taxpayer.

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

DRUG TAX

Drug tax — double jeopardy. *State of Wisconsin vs. Quinn J. Riley* (Court of Appeals, District IV, December 19, 1991). The issue in this case is whether the tax assessed against the taxpayer by the department under sec. 139.95, Wis. Stats., for possession of controlled substances, was punishment within the meaning of the double jeopardy clauses of the United States and Wisconsin Constitutions.

The taxpayer appeals from a judgment convicting him of delivery of cocaine and possession of drugs without paying the requisite drug tax. The taxpayer pled guilty to both counts. Between the plea hearing and sentencing, the department notified him that he owed taxes, interest, and a penalty based on his possession of the cocaine. He was taxed at a rate of $200 per gram on 217 grams for a total of $43,600. He was also notified that he owed $2,616 in interest and a $34,600 penalty, for a total of $89,816.

The taxpayer was sentenced to five years in jail on the delivery charge and placed on probation for fifteen years for failing to pay the drug tax. The taxpayer moved the court for reconsideration, arguing that he had been punished twice for the same crime. The Circuit Court denied the motion, and this appeal followed.

The Court of Appeals concluded that the tax assessed against the taxpayer was not punishment within the meaning of the double jeopardy clauses of the United States and Wisconsin Constitutions. The penalty assessed against the taxpayer was merely equal to the tax he failed to pay.

The taxpayer appealed this decision to the Wisconsin Supreme Court. The petition for review was denied. □

Tax Releases

"Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. In situations where the facts vary from those given herein, the answers may not apply. 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: