cies were due to reasonable cause and not wilful neglect.

The actions of the taxpayer's daughter/bookkeeper in not filing timely tax returns cannot reasonably be imputed to the taxpayer for penalty purposes under these circumstances, since her embezzlement was the cause of the taxpayer's failure to file returns and pay the tax.

The imposition of the 25% negligence penalty is not justified under these facts.

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

CORPORATION FRANCHISE AND INCOME TAXES

Allocation of income — apportionable vs. nonapportionable. *Transportation Leasing Co., f/k/a Greyhound Lines, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, October 26, 1991). The Wisconsin Tax Appeals Commission issued a decision on July 16, 1990, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 70, page 14, for a summary of the July 16, 1990, decision.

The department and the taxpayer entered into a written agreement in October 1991, and based on the written stipulation, the Circuit Court dismissed the appeal on October 26, 1991. □

Business loss carryforward — merger. *Wisconsin Department of Revenue vs. Appleton Papers, Inc.* (Court of Appeals, District IV, March 28, 1991). See *Wisconsin Tax Bulletin* 72, page 5, for a summary of the March 28, 1991, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court in April 1991. The Supreme Court denied the petition for review on June 5, 1991. □

Business loss carryforward — merger. *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). See *Wisconsin Tax Bulletin* 70, page 14, for a summary of the September 6, 1990, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court in October 1990. The Supreme Court denied the petition for review on November 5, 1990. □

Interest Income — imputed; Estoppel; Allocation of income — business income. *Ladish Co., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 1, 1992). The issues in this case are:

A. Whether monies transferred in increments from the taxpayer, a subsidiary corporation, to its parent, were interest free loans on which Wisconsin could impute interest, or dividends.

B. Whether the taxpayer had nexus in Ohio.

   1. Did the presence of a car in Ohio give Ohio nexus?

   2. Was Ohio's ruling that it had jurisdiction over the taxpayer entitled to full faith and credit in Wisconsin?

   3. Was Ohio's ruling that it had nexus over the taxpayer entitled to "comity," observance of another state's judgments out of courtesy, in the department's 1987 audit of tax years 1980-1984, given a statement from the department in 1984 that it would honor the nexus determinations of other states when the other state issues a written opinion claiming nexus and when the taxpayer agrees with the opinion?

C. Whether the gain realized by the taxpayer on its 1983 sale of Texas real estate should be treated as business income (apportionable in Wisconsin) or as nonbusiness income (allocable to Texas).

None of the formalities of a lender-borrower relationship were observed with respect to the monies transferred during the period of February 1982 up to September 10, 1984. The parent sent "thank you" notes to the taxpayer for the transfers and the transfers were shown on the taxpayer's books and Wisconsin tax returns as a debt owing from parent to taxpayer. The taxpayer neither declared any dividends contemporaneously with the transfers nor contemporaneously reduced its retained earnings account to reflect dividend payments.

On September 10, 1984, more than 2½ years after the first of the transfers, the taxpayer declared a $180 million dividend to the parent, a dividend that was "paid" by the taxpayer zeroing out the account receivable, thereby canceling the putative debt from parent to taxpayer shown in that account. The parent did not report the transfers as dividends on its Wisconsin tax returns until its 1984 return was filed.

The parties agree, as an abstract proposition at least, that Wisconsin has the authority to impute interest when a controlled subsidiary in a

bona-fide loan transaction lends money on an interest-free basis to its parent, even when the imputation creates new income rather than reallocates existing income.

In 1980 through 1984, the taxpayer owned a car used by an Ohio based salesman employed by the taxpayer. The taxpayer received a written ruling from the State of Ohio that Ohio had nexus over the taxpayer, a ruling the taxpayer did not appeal.

The Texas real estate sold was a 12-acre parcel of vacant land adjoining a 34-acre business facility the taxpayer operated in Texas. The parcel was acquired in 1956 and sold to Texas authorities in lieu of condemnation. The parcel was never physically used in business operations.

From 1977 through 1983, the taxpayer claimed Wisconsin tax deductions for real estate taxes for both the 12-acre parcel and the 34-acre parcel and weed cutting expenses for the 12-acre parcel and included the cost of both parcels in the denominator of the property factor of its Wisconsin apportionment formula.

A. The Commission affirmed the imputed interest portion of the assessment. Because the taxpayer originally booked the transfers as repayable debt, carried those transfers for as much as 2½ years as debt, showed the transfers as debt on its Wisconsin tax returns, and failed to declare the transfers to be dividends or to account for them as dividends, the monies transferred were interest-free loans.

B. The Commission reversed the Ohio sales throwback portion of the assessment, concluding that:

   1. Ohio was incorrect in ruling that it had nexus over the taxpayer. The mere presence of a company car in the hands of a salesman who uses the car in his solicitation activities does not destroy otherwise immune solicitation as defined by federal statute.

   2. The Ohio ruling does not, by the full faith and credit clause, bind Wisconsin, because Wisconsin was not a party to the proceedings.

   3. Wisconsin, by its 1984 statement, is statutorily precluded from now arguing that Ohio's ruling is non-preclusive. Section 227.20(8), Wis. Stats. (1983-84), provides that a court shall reverse or remand the action of an agency if the agency's exercise of discretion is inconsistent with an agency rule, an officially stated agency policy, or a prior agency practice, if deviation therefrom is not explained satisfactorily.

C. The Commission affirmed the Texas property gain portion of the assessment, concluding that the gain on the real estate sold is business income and, therefore, apportionable. The 12-acre parcel is conceptually inseparable from the contiguous 34-acre income-producing parcel.

The taxpayer filed a petition for rehearing with the Commission. The petition was denied on June 18, 1992.

Both the taxpayer and the department have appealed this decision to the Circuit Court. □

Leases — 1986 and prior — safe harbor rules. *International Paper Company vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 8, 1992). The issue in this case is whether cash payments the taxpayer received from the transfer of federal tax benefits under "safe harbor leases" were includable in its gross income under sec. 71.03(1)(k), Wis. Stats. (1981).

During the years 1981 and 1982, Internal Revenue Code (IRC) sec. 168(f)(8) allowed "leases," which would not have otherwise qualified as leases for federal income tax purposes, to be treated as leases for federal income tax purposes so as to permit a "seller/lessee" of property to transfer to a "buyer/lessor" the benefit of federal depreciation deductions and federal investment and other tax credits. Such transactions are referred to herein as "safe harbor leases."

During the years 1981 and 1982, the taxpayer, as seller/lessee, sold and leased back certain property under sec. 168(f)(8), IRC, for the purpose of transferring to the buyer/lessor the federal income tax benefits related to such property. The Wisconsin franchise tax laws were not federalized for those years and did not recognize the benefits of sec. 168(f)(8), IRC.

The safe harbor leases entered into by the taxpayer as seller/lessee with the various buyer/lessors were substantially the same in form and effect. In each, specified property owned by the taxpayer was sold to the buyer/lessor for an amount equal to the original cost of such property to the taxpayer. An "initial payment" representing the price to be paid for the tax benefits (described in the safe harbor leases as a percentage of the original cost of such property) was made by the buyer/lessor to the taxpayer. The remainder of the purchase price was represented by a nonrecourse "installment obligation" owed by the buyer/lessor to the taxpayer over the term of the lease. The buyer then, as lessor, leased back to the taxpayer, as lessee, the same property for terms

ranging from 10 to 19.5 years. The "installment obligation" and the "rent" payable under the leases called for identical payments which offset each other without any requirement for actual payments to be made. Under the leases, the legal and equitable title to the property remained with the taxpayer. For all purposes other than federal income taxation, all burdens and benefits of ownership of the property remained with the taxpayer. The only money that changed hands between the taxpayer and the buyer/lessor was the initial payment.

From the taxpayer's standpoint, the purpose of the safe harbor lease transactions was solely to take advantage of sec. 168(f)(8), IRC, which allowed it to sell the federal tax benefits related to the equipment to another taxpayer. This allowed the taxpayer to realize immediate cash in lieu of the right to claim federal tax credits and federal depreciation deductions.

In conformity with the position of the department, stated in its July 1984 *Wisconsin Tax Bulletin* 38 tax release entitled "Wisconsin Tax Treatment of Safe Harbor Leases," the taxpayer for the years 1981 and 1982 did not claim a deduction for rent under the safe harbor leases, did not recognize any interest income under the installment obligations, and deducted depreciation based on its original cost of the property. However, contrary to the position expressed in the tax release, in 1981 and 1982, the taxpayer did not recognize the money, i.e. the initial payments, received in exchange for the transfer of the federal tax benefits as income to the taxpayer in those years.

Wisconsin did not, for the years 1981 and 1982, impose a franchise or income tax on the reduction in the amount of federal tax paid as the result of claiming federal tax credits or depreciation deductions.

The taxpayer contends that the initial payments received under the safe harbor leases are not properly treated as part of either allocable or apportionable income for Wisconsin franchise tax purposes.

The department contends that the money the taxpayer received as initial payments under the safe harbor leases are properly treated as apportionable income for the purposes of the Wisconsin franchise tax.

The Commission concluded that:

A. The initial payments received by the taxpayer under the safe harbor leases were for the sale of a property right associated with the leased equipment, namely the right to certain federal tax benefits, and as such constituted a partial recovery of the taxpayer's basis in the leased assets rather than gross income under sec. 71.03(1)(k), Wis. Stats. (1981).

B. The denominator of the taxpayer's sales factor used in its apportionment formula should be increased by the amount of the initial payments.

C. None of the initial payments is includable in the numerator of the taxpayer's sales factor because none of the property involved in the safe harbor lease transactions had a situs in Wisconsin.

The department has appealed this decision to the Circuit Court. □

Liquidating corporations. *Wisconsin Department of Revenue vs. Ins. Serv. Liquidating, Inc. and Insurance Services, Inc.* (Court of Appeals, District IV, January 6, 1992). The Circuit Court for Dane County issued a decision on July 23, 1991, which the taxpayer appealed to the Court of Appeals, in October 1991. See *Wisconsin Tax Bulletin* 75, page 12, for a summary of the July 23, 1991, decision.

The department and the taxpayer reached a settlement agreement in January 1992, and based on the agreement, the appeal was dismissed by the Court of Appeals on January 6, 1992. □

SALES AND USE TAXES

Occasional sales — business assets. *Carrion Corporation vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 15, 1992). This is an action for judicial review of a decision by the Wisconsin Tax Appeals Commission (Commission), which sustained the department's sales and use tax assessment.

The issues in this case are:

A. Whether the taxpayer's sales of the assets of the retail division on January 17, 1983, and the assets of the commercial division on February 18, 1983, were exempt as occasional sales.

B. Whether the taxpayer was entitled to exemption of any portion of the sales price of either the retail division assets or the commercial division assets, because the bank to which the sales proceeds were assigned might not have received full payment of those proceeds.

C. Whether the measure of the sales tax on the commercial division sale was $400,000 as the taxpayer claims, or $458,100, as the department claims.

D. Whether the true seller of the retail and commercial divisions was the bank or the taxpayer.

E. Whether the taxpayer was liable for sales tax on miscellaneous equipment sales to out-of-state buyers occurring during the period October 23, 1981, through October 15, 1982.

F. Whether the taxpayer was liable for use tax on the taxpayer's purchases of property from out-of-state sellers during the calendar years 1979-82.

G. Whether the taxpayer should have been assessed a negligence penalty on the equipment sales in Issue E and on the equipment purchases in Issue F.

The taxpayer had conducted business through its retail and commercial divisions. The retail division provided laundry and dry cleaning services to hotels, restaurants and the general public through a network of stores and truck routes. The commercial division serviced mainly hospitals and nursing homes on a pick-up and delivery basis.

In early 1982, the taxpayer was in substantial default on its loans from its secured lender, the First Wisconsin National Bank of Milwaukee. The taxpayer maintains that the bank ordered it to liquidate its operations and that pursuant to the order, it sold the retail division's assets to D.S. Nicholas of Wisconsin, Inc. (Nicholas) on January 17, 1983, for $1,401,618, and the commercial division's assets to Tousey Laundry Corporation (Tousey) on February 18, 1983, for $600,000. The taxpayer received notes of $1,361,618 and $600,000 from the buyers which were then assigned to First Wisconsin.

Less than one hour before completing the sale to Nicholas, the taxpayer surrendered its seller's permit to the department, believing that both asset sales would qualify as occasional sales under sec. 77.51(10), Wis. Stats., and be exempt from sales tax under sec. 77.54(7), Wis. Stats. The taxpayer filed sales and use tax returns in January and February, 1983, and reported taxable sales for both months.

The department audited the taxpayer's sales and use tax returns for the period January 1, 1979 to February 18, 1983, and issued an assessment for additional sales and use tax as follows: (1) $30,126.65 for the sale of the retail division's assets; (2) $22,905.00 for the sale of the commercial division; (3) $5,883.34 for miscellaneous equipment sales in 1981 and 1982; and (4) $7,993.82 for out-of-state purchases of tangible personal property. The department also assessed a 25% penalty ($3,469.28) on items (3) and (4), under sec. 77.60(3), Wis. Stats.

The Circuit Court affirmed the Commission's decision, concluding that:

A. Substantial evidence supports the Commission's finding that the taxpayer was required to hold a seller's permit at the time of the asset sale and did not qualify for the occasional sale exemption.

B. The taxpayer failed to meet its burden of proof that it should be relieved of certain sales tax liabilities on the basis that accounts were worthless because the taxpayer never wrote off the accounts for income tax purposes and received full credit from First Wisconsin, which constituted valid consideration.

C. Substantial evidence supports the $458,100 measure of sales tax.

D. Substantial evidence supports the Commission's finding that the taxpayer was the true seller of the retail and commercial divisions, although the bank dictated the terms of the sale.

E. No credible evidence was presented to support the taxpayer's claim that certain sales were made outside Wisconsin.

F. In order for the taxpayer's out-of-state purchases to be exempt from use tax, the taxpayer would have to have been a nondomiciliary and the property purchased must not have been used in the taxpayer's Wisconsin business. The taxpayer did not claim either condition to be the case.

G. The Commission clearly acted within the range of discretion delegated by law when it determined that the taxpayer had not met its burden of proving that the inaccurate returns were due to good cause.

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

Telecommunication services — billing and collection services. *Wisconsin Bell, Inc., American Telephone and Telegraph Co., and AT&T Communications of Wisconsin, Inc. vs. Wisconsin Department of Revenue, and Mark D. Bugher* (Court of Appeals, District IV, July 25, 1991). See *Wisconsin Tax Bulletin* 75, page 14, for a summary of the July 25, 1991, decision.

The taxpayer appealed the Court of Appeals decision to the Wisconsin Supreme Court. The Supreme Court denied the petition for review on October 8, 1991. ☐

Waste reduction and recycling. *Wisconsin Department of Revenue vs. Parks-Pioneer Corporation* (Court of Appeals, Dis-

trict IV, June 25, 1992). This is an appeal from an order of the Circuit Court for Dane County, which found that certain machinery and equipment used in the taxpayer's business is exempt from Wisconsin sales and use taxes under the exemption for recycling activities set forth in sec. 77.54(26m), Wis. Stats. See *Wisconsin Tax Bulletin* 71, page 12, for a summary of that decision.

The issue in this case is whether the taxpayer's machinery and equipment purchases, and its purchase of engine starting fluid, come under the recycling exemption.

The taxpayer recycles solid waste. It prepares, sorts, weighs, and processes scrap metal for use by smelters, foundries, and steel mills. In 1984, 1985, and 1986, it purchased lugger boxes and roll-off boxes; tarps and bands to cover the lugger boxes; truck scales, including repair and replacement parts; platform scales; a dead-lift roll-off hoist mounted on one of its trucks; replacement hydraulic hose for its trucks; and starting fluid used to start crane engines. It paid no sales or use tax on those purchases.

The taxpayer uses the lugger and roll-off boxes solely to collect scrap metal at its suppliers' premises, to transport the scrap to its premises, and to deliver recycled metal to its customers. Customer delivery does not exceed 10% of the total use of the boxes. The record shows that the taxpayer places the boxes at scrap collection sites. It picks up the full boxes, leaves replacement boxes, and transports the scrap metal in the boxes to its premises.

Tarps and bands are used solely to cover the boxes to prevent the metal from falling out in transit. Truck and platform scales are used solely to weigh the metal to determine its purchase or sale price. Dead-lift roll-hoists are mounted on trucks and used to lift the boxes onto and off the trucks. Hydraulic hoses are replacement parts for the trucks. Starting fluid is used in cold weather to start engines on cranes the taxpayer has on its premises to move heavy pieces of scrap metal.

The recycling exemption applies to the gross receipts from the sale and use of "recycling machinery and equipment . . . exclusively and directly used for . . . recycling activities . . ." The department contends that the machinery and equipment at issue are not "exclusively and directly used for" the taxpayer's recycling business, and that the starting fluid is not machinery or equipment and, in any event, the fluid is not used in connection with the machinery or equipment coming within the exemption.

The Court of Appeals concluded that the machinery and equipment are not directly used for recycling activities, within the meaning of sec. 77.54(26m), Wis. Stats., and are therefore not exempt, and the starting fluid is not machinery, equipment, or parts therefor, and is not exempt under that statute.

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. 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:

Sales and Use Taxes

1. Advertising Material Printed Out-of-State and Delivered in Wisconsin (p. 18)
2. Processing Contaminated Soil (p. 19)
3. Purchases and Sales by Pet Stores, Pet Breeders, and Kennels (p. 20)
4. Repair of Machinery and Equipment Purchased for Research and Development and Subsequently Used in Manufacturing (p. 20)
5. Sales and Purchases by School Districts (p. 21)
6. Statute of Limitations When Person Reports Use Tax on Individual Income Tax Return (p. 23)
7. Taxability of Computer Programs (Software) (p. 23)
8. Winterizing and Dewinterizing a Residence (p. 28)