Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

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WITHHOLDING TAXES

Withholding — personal liability. *Dean O. Chapman vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 25, 1993). The issue in this case is whether the taxpayer is personally liable for unpaid withholding taxes of Creatiform Plastics Corp. for April 1987 and January through September 1989.

The taxpayer, as president and general manager who ran the day-to-day corporate operations, voluntarily entered into a "trust indenture" which purportedly transferred bill paying decision authority to the "trustee," even though the taxpayer continued to deposit funds in the corporate account and write checks therefrom to pay other creditors, including corporate employes, and ultimately sold all corporate assets to a third party, all while relying on allegedly fraudulent representations by the trustee, and all to the exclusion of corporate withholding tax payments due to the department.

The Commission concluded that the taxpayer is personally liable for the unpaid withholding taxes of Creatiform Plastics Corp.

The Commission has repeatedly held that, for the statutory penalty to be assessed against a person responsible for the payment of corporate taxes, the department must prove three elements: (1) authority to pay; (2) duty to pay; and (3) intentional breach of that duty.

Authority. This element is satisfied because, in spite of the taxpayer's claim that the trustee prevented him from paying the corporation's Wisconsin tax obligations, he continued to exercise his authority as a corporate officer to receive and deposit monies into the corporate checking account and to sign checks drawn on it.

Duty. This element is satisfied because the taxpayer continued throughout the period under review to function as president and general manager of the corporation and, as such, was responsible for monitoring the trust indenture he had entered into and duty-bound to assure that corporate withholding tax obligations, both past and present, whether or not covered by the indenture, were satisfied according to law.

Intentional Breach. This element is satisfied because the taxpayer, as president and general manager, signed corporate checks and thereby participated in the decision to pay other creditors, including employes, while knowing that taxes were owing to the department. Consistent interpretations of both state and federal officer liability statutes have held that all that is necessary for intent to be proved is to show that there was a decision to use corporate funds to pay other creditors with knowledge of taxes being due.

As to the taxpayer's claim that the trust indenture relieved him of his authority or duty in connection with payment of the taxes in question, the Commission embraced the department's citation of *Collins v. U.S.A.*, 92-2 USTC ¶50351, at p. 85,144, citing *Moore v. Credit Information Corporation of America*, 673 F. 2d 208 (8th Cir. 1982), in support of the axiom that a debtor may not escape a debt by assigning it to another without the consent of the creditor. Here, there was no showing or even

any indication of the department's consent to the trust indenture.

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

CORPORATION FRANCHISE AND INCOME TAXES

Allocation of income — business income; Statute of limitations. *Port Affiliates, Inc., vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, May 11, 1993). This is a review of a decision of the Wisconsin Tax Appeals Commission (Commission). For a summary of the Commission's decision, see *Wisconsin Tax Bulletin* 78 (July 1992), page 6.

Three issues were decided by the Commission.

A. Was the department's assessment against the taxpayer for 1984 barred by the four year statute of limitations, where the taxpayer received notice and assessment four years and two days after the department received the taxpayer's return? The Commission concluded that the assessment was not barred because notice was mailed by the department within the time allowed.

B. Was the taxpayer's 1984-87 "investment" portfolio income, generated in larger part while the CEO responsible for the activities spent most of his time in Florida, apportionable? The Commission concluded that such income was apportionable.

C. Were the taxpayer's 1984-87 office building losses from the atrium building apportionable? The Commission concluded that such losses were apportionable.

The Circuit Court concluded as follows:

A. The undisputed record shows that the department gave timely notice by mailing the assessment on the last day permitted under the statute of limitations. The Commission's conclusion that the department's assessment is not barred by the statute of limitations is affirmed.

B. There is sufficient evidence to support the Commission's finding of a minimum connection between the state and the taxpayer. The case *Allied-Signal, Inc., v. Director, Division of Taxation*, 112 S.C. 2251 (1992), must be distinguished from this case for the principal reason that due process prohibits a state from taxing a nondomiciled corporation for profits derived from activities conducted outside of the state. The department's conclusion that the investment arm was an integral part of the taxpayer's business is supported by credible evidence and meets the requirements of law to make its income apportionable under the applicable statute. The Commission's conclusion that the "investment" portfolio income is apportionable is affirmed.

C. The comprehensive nature of the business activity of the taxpayer in creating, developing, and maintaining the atrium building make it an integral part of the whole operation. The Commission's conclusion that the 1984-87 rental losses were apportionable is affirmed.

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

Apportionment — factors; Dividends — deductible dividends; Foreign source income. *Wisconsin Department of Revenue vs. NCR Corporation* (Circuit Court for Dane County, April 30, 1993). See *Wisconsin Tax Bulletin* 82 (July 1993), page 21, for a summary of the Circuit Court's decision.

The appeal status was unknown on the date the July 1993 *Wisconsin Tax Bulletin* was printed. Since that date, both the department and the taxpayer have appealed the Circuit Court's decision to the Court of Appeals. The department appealed the decision with respect to the issue of deductible dividends, and the taxpayer appealed the decision with respect to the inclusion of foreign-source interest and royalties in apportionable income. □

SALES AND USE TAXES

Occasional sales — business assets. *James M. Duex vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 29, 1993). This case was before the Commission on a motion for summary judgment filed by the department. The issue in this case is whether the taxpayer owes sales tax on his sale of business assets.

In September 1983, the taxpayer applied for and received a seller's permit for the Indianhead Motel located at 501 Summit Avenue, Chippewa Falls, Wisconsin. The taxpayer has owned and operated the Indianhead Motel continuously from August 1983, to the present.

In August 1987, the taxpayer applied for a seller's permit for Dixie's, a tavern located at 3 East Spring Street, Chippewa Falls, Wisconsin. The department issued the seller's permit in September 1987.

Dixie's tavern was operated under the taxpayer's ownership from August 1987 continuously until he sold that business operation on July 1, 1991.

On October 28, 1991, the taxpayer executed the final sales and use tax return and disposition of assets report, along with a cover letter, and mailed them to the department.

On November 18, 1991, the department mailed a copy of the disposition of assets report back to the taxpayer, requesting that he fill in certain information that he had omitted when originally preparing the report. On November 27, 1991, the taxpayer mailed to the department the disposition of assets report on which he reported a value of $50,000 for the tangible personal property that was transferred to the purchaser when he sold the business assets of Dixie's tavern on July 1, 1991.

The taxpayer never notified the department of the sale of the personal property that comprised part of the business assets of Dixie's tavern prior to October 28, 1991. The taxpayer never notified the department that he had divested himself of ownership of Dixie's tavern and would no longer be operating as a retail seller at that location, prior to October 28, 1991. The taxpayer never sent a letter to or otherwise notified the department requesting cancellation of his seller's permit for Dixie's tavern, and the taxpayer never surrendered his seller's permit for Dixie's tavern to the department for cancellation.

The Commission concluded that the sale of the tangible personal property of Dixie's tavern on July 1, 1991, is subject to sales tax. The taxpayer does not qualify for the occasional sale exemptions under secs. 77.54(7) and 77.51(9)(a) and (am), Wis. Stats., since he did not surrender his seller's permit and did not even notify the department that he was out of business until he filed his final sales and use tax return/disposition of assets report on or about October 28, 1991, more than three months after the transfer involved.

The taxpayer has not appealed this decision. □

Occasional sales — business assets. *Reginald Licht vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 29, 1993). The issue in this case is whether the taxpayer's sale of business assets qualified for exemption from sales tax as an "occasional sale," as defined in sec. 77.51(9)(am), Wis. Stats. (1991-92).

Upon application, the department granted a seller's permit to the taxpayer for the business he operated in Wausau, Wisconsin.

On April 10, 1989, the taxpayer, as the seller, and Peter Tangley, on behalf of Sterling Water, Inc., as the purchaser, entered into an agreement to purchase the taxpayer's business assets.

The written terms of the agreement established April 28, 1989, as the initial closing date for sale of the business. Additionally, the agreement provided for the proration of billing responsibilities, prepayments on services, and accounts receivable between the seller and the purchaser as of the closing date. The agreement terms placed closing on the sale contingent upon the purchaser successfully obtaining financing by the closing date.

The taxpayer ceased operating its business on April 30, 1989, and transferred possession of the business assets on May 1, 1989, at which date Sterling Water, Inc., began operating the business in its own right and not as an agent of the taxpayer.

The taxpayer and the purchaser entered into successive second and third written agreements to purchase dated June 26, 1989, and February 26, 1990, respectively. Each of these agreements comprised restatements of the prior existing agreements to purchase which were in effect as of the date each subsequent agreement was executed. The restated agreements to purchase were deemed necessary because of difficulties experienced by the purchaser in obtaining necessary financing. Both parties stipulate that the financing difficulties directly contributed to the inability of the parties to close the purchase under the contingent terms originally agreed upon, although the restated agreements of June 26, 1989, and February 26, 1990, omitted entirely the financing contingency clause contained in the original agreement to purchase.

Identical terms contained in the second and third agreements to purchase required both the taxpayer and the purchaser to maintain property and liability insurance in order to protect the respective interests of each party in the property of the business to be sold. Further, each of the restated agreements provided for the reversion of possession and operation of the business to the taxpayer in the event the sale transaction was not consummated on the closing dates contained in the agreements.

From May 1, 1989, through February 26, 1990, the purchaser maintained possession and operation of the business. The taxpayer maintained property and casualty insurance on the business property according to the requirements of the modified purchase agreements.

On February 26, 1990, the taxpayer and the purchaser signed a closing statement for the sale of the business. The taxpayer received from the purchaser payment of the sale price on

closing in the form of cash, purchaser payments to creditors, and a business note payable to the taxpayer signed by the purchaser.

Title to the business assets was conveyed to the purchaser at the February 26, 1990, closing along with a bill of sale and assignment of contract rights.

In a February 26, 1990, letter to the department, the taxpayer's representative, noted that the taxpayer had ceased the operation of its business on April 30, 1989, and that the sale of the business was closed as of the date of the letter. The letter also disclosed that Sterling Water, Inc. was the new owner of the business, and noted the taxpayer's surrender of its seller's permits effective as of 12:01 a.m. on February 26, 1990.

The department contends that the statutory language of sec. 77.51(14r), Wis. Stats., dictates the deemed completion of a sale of tangible personal property at the time and place where possession of the property is transferred by the seller to the purchaser. Possession of the taxpayer's business assets was transferred by the taxpayer to Sterling Water, Inc. on May 1, 1989. Because the taxpayer did not surrender his seller's permits until February 26, 1990, the department argues the taxpayer is not eligible for the occasional sales exemption for failure to surrender his seller's permits within the 10-day limitation period.

The Commission concluded that the taxpayer's "last sale" of its business assets took place on the date of the close of the sale, February 26, 1990, according to the statutory definitions found in secs. 77.51(9)(am) and 77.51(14), Wis. Stats. (1989-90).

The taxpayer's gross receipts from its sale of business assets are not subject to state and county sales tax, as the transaction qualifies as an exempt occasional sale under sec. 77.54(7), Wis. Stats. (1989-90).

The issue of whether the seller surrendered his seller's permits "within 10 days after the last sale at that location of that personal property other than inventory held for sale" is resolved by a simple substitution of the statutory definition of "sale" found in sec. 77.51(14), Wis. Stats., for the occurrence of that word in the pertinent part of sec. 77.51(9)(am), Wis. Stats. The taxpayer's surrender of the seller's permits on February 26, 1990, was contemporaneous with the occurrence of the *last* of "any one or all of the following: the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property," as title and ownership of the taxpayer's business assets were transferred to the purchaser on that very day.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the decision. The effect of the nonacquiescence is that the decision is not binding in other cases. ☐

Service enterprises — pet sitting. *Pet Vacations, Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 24, 1993). The issue in this case is whether the taxpayer's pet sitting service is subject to sales tax.

On November 1, 1984, the taxpayer began operating a pet sitting service, arranging the placement of pets with pre-screened "sitters" in private homes. The taxpayer charged the pet owner a daily fee, some of which was in turn paid to the sitter. The daily fee covered no service other than sitting, although some sitters would walk the pets. Any food, food dishes, litter box, scratching post, etc., were furnished by the pet owner, not by the sitter.

On November 1, 1988, the taxpayer applied for and received a seller's permit and began collecting and remitting sales taxes on its gross receipts. On March 18, 1992, the taxpayer was assessed sales tax on its gross receipts for the period from November 1, 1984 to October 31, 1988.

The department's position is that the taxpayer's pet sitting service constituted the "maintenance of ... tangible personal property" within the meaning of sec. 77.52(2)(a)10, Wis. Stats., and is therefore taxable. In addition, the department's assessment states that providing boarding services is taxable pursuant to sec. Tax 11.61(1)(b), Wis. Adm. Code.

The taxpayer argues that pet sitting is not "maintenance," that the language of the tax imposition statute is not sufficiently specific to include pet sitting, and that sec. Tax 11.61(1)(b), Wis. Adm. Code, cannot apply because no boarding services were provided.

The Commission concluded that the taxpayer's pet sitting service was not the sale of a service for the "maintenance of ... tangible personal property" within the meaning of the sales tax imposition statute, sec. 77.52(2)(a)10, Wis. Stats., and was not a taxable boarding service within the meaning of sec. Tax 11.61(1)(b), Wis. Adm. Code.

The department has not appealed this decision but has adopted a position of nonacquiescence in regard to the decision. The effect of the nonacquiescence is that the decision is not binding in other cases. ☐