50% of its revenues from interstate commerce.

The department appealed this decision to the Court of Appeals but subsequently withdrew its appeal. □

**Occasional sales — business assets.** *Mail N' More, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, August 11, 1993). This is a review of the December 4, 1992, decision of the Wisconsin Tax Appeals Commission. For a summary of this decision, see *Wisconsin Tax Bulletin* 81 (April 1993), page 12.

The issue in this case is whether the taxpayer is entitled to an occasional sales exemption on its sale of business fixtures and equipment when the taxpayer's seller's permit was not delivered to the department for cancellation within 10 days after the sale of the property.

On December 31, 1990, the taxpayer sold its business and ceased operations. The taxpayer reported the sale of its business on its sales and use tax returns for the months of November 1990, and December 1990, filed respectively on December 31, 1990, and January 31, 1991. In March of 1991, the department responded to the taxpayer's notification of sale by mailing a Notice of Sales and Use Tax Account Inactivation Form and a Disposition of Assets Report. The taxpayer returned these forms, along with the seller's permit, to the department with a letter dated March 26, 1991.

The taxpayer contends that he substantially complied with the statute with the timely notification of the business sale to the department on its sales and use tax returns, albeit not in the procedure mandated in sec. 77.51(9)(am), Wis. Stats. The taxpayer further contends that sec. 77.51(9)(am), Wis. Stats., adding the 10 day grace period for surrender of the seller's permit, overrules the denial of the occasional sales exemption as found in the holdings of *Fiedler Foods v. Rev. Dept.*, 142 Wis. 2d 722 (Ct. App. 1987); *Midcontinent Broadcasting Co. v. Dept. of Rev.*, 98 Wis. 2d 379 (1980); and *Ramrod Inc. v. Dept. of Rev.*, 64 Wis. 2d 499, 505 (1974), all of which were decided under the old statute.

The Court concluded that the taxpayer's failure to deliver its seller's permit within 10 days of the sale of the property in question constituted noncompliance with the qualifications required to claim an occasional sales exemption.

The taxpayer has not appealed this decision. □

**Service enterprises — car washes.** *Dale W. Lamine and Knutson & Lamine Partnership vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 27, 1993). The issues are as follows:

A. Whether the taxpayers' operation of coin-operated self service and automatic vehicle wash facilities and provision of supplies to customers constituted the rental of tangible personal property or the providing of a taxable service.

B. Whether the taxpayers' use of the equipment, parts, materials, and supplies, which were purchased without sales tax from a retailer located outside Wisconsin, were subject to Wisconsin use tax.

C. Whether the taxpayers' sales of equipment, parts, materials, and supplies to others who operated similar vehicle wash facilities in Wisconsin, without collecting sales and use tax exemption certificates, was subject to Wisconsin sales tax.

D. Whether the department's assessments of additional sales and use tax violated the taxpayers' right of equal protection guaranteed by Article I, Section 1 of the Wisconsin Constitution.

During the period at issue, the taxpayers operated several car wash facilities. At a facility, a customer would drive his or her vehicle onto the premises and directly into one of the two types of vehicle cleaning bays.

Within one type of bay, the taxpayers had installed coin-operated vehicle washing equipment. The customer, by insertion of the proper amount of coins and turning a dial, was able to control the output of a gun or wand that was freely suspended in the bay. The gun or wand sprayed pressurized soap suds, rinse water, or wax as selected by the customer. After the customer completed cleaning the vehicle, the customer would reenter the vehicle and drive the vehicle out of the facility.

At each facility, the taxpayers also had installed automatic coin-operated vehicle washing equipment within the other type of cleaning bay. After the customer deposited the proper amount of coins, the equipment would systematically move over and around the vehicle, dispensing water, soap, and wax onto the vehicle and scrubbing the vehicle. After the equipment finished a cleaning cycle, it would retract and the customer would drive the vehicle out of the facility.

The customers provided all of the manual labor associated with cleaning their vehicles. The taxpayers neither offered nor were expected to provide any services in assisting a customer in actually cleaning the vehicle.

The taxpayers also provided soap, wax, and other supplies to customers through dispensing equipment.

The equipment and supplies described above are used by the customer on the taxpayer's premises. The customers cannot remove such equipment from the premises.

The coin-operated vehicle cleaning equipment, as well as all other equipment and supplies, were purchased by the taxpayers from a retailer located outside Wisconsin. No sales or use tax was paid when the taxpayers purchased the equipment and supplies. Some of the equipment and supplies were used by the taxpayers in Wisconsin and the rest were resold by the taxpayers to other owners and operators of vehicle wash facilities located in Wisconsin.

The taxpayers collected no sales tax from the owners and operators of those facilities on such sales, and the owners and operators of those facilities did not provide the taxpayers with sales and use tax exemption certificates.

The Commission concluded:

A. The taxpayers' operation of the vehicle wash facilities and provision of incidental supplies constituted the providing of a taxable service under sec. 77.52(2)(a)10, Wis. Stats., and sec. Tax 11.67(3)(m), Wis. Adm. Code.

B. Because the taxpayers were the ultimate consumers of the tangible personal property used in their business of providing a customer-operated vehicle wash service, the taxpayers were subject to the Wisconsin use tax imposed by sec. 77.53, Wis. Stats., to the extent of their purchases of such items from retailers outside Wisconsin without the payment of sales tax.

C. Because the taxpayers sold tangible personal property for use in similar businesses without collecting a sales or use tax and without obtaining sales and use tax exemption certificates, the taxpayers were subject to the sales tax imposed by sec. 77.52, Wis. Stats., on such sales.

D. The taxpayers have not shown that the assessments of sales and use tax under review have violated their right of equal protection guaranteed by Article I, section 1 of the Wisconsin Constitution.

The taxpayers have not appealed this decision. □

**Service enterprises — horseshoeing/farrier.** *Mark Espersen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 24, 1994). The issue in this case is whether a farrier's services are subject to Wisconsin sales tax under sec. 77.52(2)(a)10, Wis. Stats.

In 1977, the taxpayer attended a farrier school for three months, where he was taught the anatomy of the hooves and legs of horses, along with how to shoe and trim them. The taxpayer subsequently completed continuing education courses on the care of horses' legs and hooves.

In 1978, the taxpayer started a farrier/horseshoeing business in Wisconsin, which he continued during the years under review. His services as a farrier included the trimming and shoeing of horses' hooves.

The taxpayer did not obtain a seller's permit from the department or collect and remit sales taxes on the gross receipts he received from his farrier business, because he was unaware they were taxable.

The question for the Commission to decide is whether a farrier is a veterinarian within the intent and meaning of sec. 77.52(2)(a)10, Wis. Stats. The last sentence of sec. 77.52(2)(a)10, Wis. Stats., which states "'Service' does not include services performed by veterinarians.", is in effect an exemption from tax.

The Commission concluded that the taxpayer does not fit clearly within the exemption language of sec. 77.52(2)(a)10, Wis. Stats., and, thus, the services he performed as a farrier are subject to sales tax.

Before an individual can become a licensed veterinarian in Wisconsin, he or she must graduate from a college of veterinary medicine and also pass a national and state board examination.

A farrier/horseshoer is not a veterinarian, whether licensed or not. The educational requirements and the responsibilities of the two occupations are enormously dissimilar.

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

## TEMPORARY RECYCLING SURCHARGE

**Temporary recycling surcharge — constitutionality.** *Love, Voss & Murray vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 8, 1994). This case was before the Commission on cross motions by the parties for summary judgment. The issue in this case is whether secs. 77.92, 77.93, 77.94, 77.95, and 77.96, Wis. Stats. (1991-92), are unconstitutional as violative of the Fourteenth Amendment to the United States Constitution and Article I, section 1, of the Wisconsin Constitution by denying the taxpayer the equal protection of the laws, and

further violative of the tax uniformity provisions of Article VIII, section 1, of the Wisconsin Constitution.

The taxpayer is a Wisconsin partnership engaged in the practice of law, with offices in Waukesha. As such, it filed a Form 3S Wisconsin Partnership Temporary Surcharge return for calendar year 1991 on which it reported Wisconsin net business income that resulted in the calculation of an amount owing of $694.22. The taxpayer refused to pay this amount, declaring that the surcharge was unconstitutional, which resulted in the assessment at issue.

The taxpayer claims the law taxes various entities "in a substantially disparate fashion, solely on the basis of whether they are or are not a noncorporate entity engaged in farming . . ." and that no rational justification exists for excluding noncorporate farming entities from the recycling surcharge.

The statutory scheme attacked by the taxpayer imposes, "[f]or the privilege of doing business in this state," a "temporary recycling surcharge" which is differentially calculated for four categories of taxpayers: (1) "C" corporations; (2) "S" corporations; (3) sole proprietorships, partnerships, estates, and trusts *not engaged in farming*; and (4) sole proprietorships, partnerships, estates, and trusts *engaged in farming*.

In the first three categories, the surcharge is calculated as a percent either of the Wisconsin income tax or of net income, with a minimum surcharge of $25 and a maximum surcharge of $9,800.

But, the taxpayer complains, in category 4 the surcharge is a nominal $25 regardless of income or tax and is imposed only if net income exceeds $1,000, thus denying the taxpayer (who falls in category 3) the equal protection of the laws merely because the taxpayer is not engaged in farming.

The Commission found several reasonable rationales to sustain the statutory classification scheme attacked by the taxpayer. Given the language of Article VIII, section 1, of the Wisconsin Constitution and the many United States and Wisconsin Supreme Court cases upholding legislative prerogative in making classifications when enacting tax laws and other public-purpose legislation, together with the many longstanding statutory tax preferences accorded farmers in Wisconsin, the Commission was compelled to rule against the taxpayer's challenge.

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

## OTHER

**Appeals — appeal procedure.** *Laurence H. Grange vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, September 16, 1993).

The taxpayer seeks review of a decision by the Wisconsin Tax Appeals Commission denying his petition for redetermination. The issue is whether the taxpayer's petition for redetermination of a sales tax assessment issued by the department was timely filed with the Tax Appeals Commission.

The Commission received the taxpayer's petition for redetermination one day past the 60 day statutory filing period. The taxpayer claims his petition should be considered timely filed because it was postmarked one day prior to the expiration of the 60 days.

The Court concluded that, although the statute provides an exception if the petition is sent via certified mail, the taxpayer's petition sent by regular mail is deemed filed when *received* by the Commission.

The taxpayer has not appealed this decision. □

**Appeals — tax appeals commission.** *Northern States Power Company vs. Mark D. Bugher, Secretary of Revenue*, et al. (Court of Appeals, District IV, October 28, 1993). The taxpayer appeals from an order dismissing its petition for review of the Wisconsin Tax Appeals Commission's denial of its request for redetermination of its 1975 and 1976 franchise tax assessment. The issue is whether the taxpayer's failure to raise the constitutional issue before the Wisconsin Tax Appeals Commission prevented it from obtaining judicial review of the issue.

The taxpayer began this 42 U.S.C. sec. 1983 action against the present and former Secretaries of the Wisconsin Department of Revenue in their official and personal capacities. The taxpayer seeks injunctive and declaratory relief and monetary damages, claiming that the present Secretary seeks to collect an unconstitutional tax from it.

The taxpayer claimed as a charitable deduction under sec. 71.04(5)(a) and (d), Wis. Stats. (1975), the value of land donated to the federal government for the St. Croix National Scenic Riverway. The department disallowed the deduction and assessed an additional tax. The Commission denied the taxpayer's petition for redetermination.

The taxpayer argued that the tax imposed on it denied it equal protection because its donation was deductible for federal income tax purposes, but not deductible for Wisconsin state income tax purposes.

The Court of Appeals concluded that because the taxpayer did not raise the equal protection issue before the Wisconsin Tax Appeals Commission, it failed to exhaust its administrative remedies and cannot attack the additional franchise tax on constitutional grounds in this action.

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:



## INDIVIDUAL INCOME TAXES

### 1 Wisconsin Historic Rehabilitation Credits for Property Used for Both Business and Personal Purposes

**Statutes:** Section 71.07(9m) and (9r), Wis. Stats. (1991-92)

**Note:** This tax release applies for taxable years beginning on or after January 1, 1991.

**Background:** Wisconsin law provides two historic rehabilitation credits for preserving or rehabilitating historic property located in Wisconsin:

(1) *Supplement to the federal historic rehabilitation tax credit.* This credit equals 5% of the "qualified rehabilitation expenditures" for certified historic structures used for business purposes. To qualify for the credit, the rehabilitation project must be begun after December 31, 1988, and the rehabilitated property must be placed in service after June 30, 1989.

Under section 47(c)(2) of the Internal Revenue Code (IRC), "qualified rehabilitation expenditure" means any amount chargeable to capital account for property for which depreciation is allowable under IRC section 168 and which is nonresidential real property, residential rental property, real property with a class life of more than 12.5 years, or an addition or improvement to such property in connection with the rehabilitation of a qualified rehabilitated building.

A qualified rehabilitated building is one which has been "substantially rehabilitated." This means that the qualified rehabilitation expenditures within a 24-month (or, in certain cases, 60-month) period must be more than the greater of $5,000 or the adjusted basis of the building and its structural components. IRC section 47(c)(1).

(2) *State historic rehabilitation credit.* For taxable years beginning on or after January 1, 1991, an individual may claim a credit equal to 25% of the costs of preservation or rehabilitation of an owner-occupied personal residence. The residence cannot actively be used in a trade or business, held for the production of income, or held for sale or other disposition in the ordinary course of the claimant's business.