amounts that were also reported by AI as dividends received from Sweden. Until September of 1985, AI owned 100% of the outstanding stock of Sweden, 100% of the outstanding stock of Norway, and 50% of the outstanding stock of Finland. The remaining 50% of the stock of Finland was owned by Sweden. On September 30, 1985, AI transferred the 50% of the Finland stock which it owned to Sweden. On January 29, 1986, AI transferred 100% of the stock of Norway to Sweden.

The Commission reached the following conclusions:

A. The department's inclusion in the taxpayer's apportionable income of interest and dividends received from majority-owned Subsidiaries was proper. The taxpayer's operations were unitary with those of the Subsidiaries. The taxpayer was functionally integrated with the Subsidiaries, and the taxpayer had and exercised centralized management control over the Subsidiaries. The record also showed economies of scale. There was little doubt that there was a substantial "flow of value between the entities" and that the acquisition of the Subsidiaries by the taxpayer served "an operational rather than an investment function."

B. The department's inclusion in the taxpayer's apportionable income of interest and dividends received from other sources was not proper. Except for some of these payor entities being engaged in the same line of business as the taxpayer, no characteristics of unitariness with the taxpayer were present during the period under review. These other payor entities did not serve "an operational rather than an investment function" and their activities were unrelated to those of the taxpayer in Wisconsin, therefore failing those critical tests of unitariness and apportionability set forth in the *Allied-Signal* and *Container* cases. Under these circumstances, the Commerce Clause and the Due Process Clause prohibit state apportionment of this dividend and interest income.

C. The department's inclusion in the taxpayer's apportionable income of royalties was proper. The royalty income was the result of technology and processes developed by the taxpayer's domestic research division, which was related to and supportive of its sister Appleton Wire division activities in Wisconsin and elsewhere. Although the royalties were paid by companies unrelated to the taxpayer, there was no showing by the taxpayer that the income "was earned in the course of activities unrelated to" the taxpayer's activities in Wisconsin. Under these circumstances, unitariness between the taxpayer and the payor is unnecessary, and the royalty income is properly apportionable under secs. 71.07(1m)(b)6 and/or 21, Stats. (1985-86).

D. The department's inclusion in the taxpayer's apportionable income of capital gains received was proper, except as to the gains from the sale of the taxpayer's Nordic subsidiaries, which the department properly included as apportionable dividend income.

Because the gains on the sale of trade secrets were from the sale of technology developed as a by-product of the taxpayer's domestic research division, which was related to and supportive of its Appleton Wire division activities in Wisconsin, no further unitary analysis is needed to conclude that this is apportionable income.

Because the gain on the sale of Albany Billiard was from the sale of an operational division which was an asset of the taxpayer's business and a sister to the Appleton Wire division in Wisconsin, it was by its organizational nature unitary with the taxpayer, just as was the Wisconsin-based Appleton Wire division. No analysis of unitariness with the payor/purchaser is required.

The taxpayer's evidence at the hearing showed that the capital gains relating to the transfer of interests in its Finland and Norway subsidiaries in 1985 and 1986 were included in amounts reported by the taxpayer as dividends received from Sweden. These amounts were, therefore, properly included by the department as dividends from unitary subsidiaries which were apportionable.

The gain on the redemption of the note resulted from a sale of assets to an unrelated company. Because the assets sold were business assets of the taxpayer's domestic business, which included its Wisconsin operations, and because there was no showing by the taxpayer that the gain was unrelated to its Wisconsin operations, the gain is properly apportionable.

E. The inclusion in the taxpayer's apportionable income of dividends, interest, royalties, and gain received by the taxpayer from foreign corporations did not violate the Foreign Commerce Clause of the U.S. Constitution.

F. The inclusion in the taxpayer's apportionable income of dividends, interest, royalties, and gains without the proceeds received by the taxpayer from the sale of intangible assets, and the property, payroll, and sales of the

payor corporations and the divested corporations giving rise to the gains being represented in the Wisconsin apportionment factors did not violate the Due Process or Commerce Clauses of the U.S. Constitution.

G. The department's inclusion in the taxpayer's apportionable income of dividends received by the taxpayer from corporations that apportion less than 50% of their income to Wisconsin violates the Interstate Commerce Clause of the U.S. Constitution.

H. Since there is not Wisconsin statutory provision authorizing the Commission to award attorneys fees and expenses pursuant to 42 U.S.C. sec. 1988, the Commission lacks subject matter jurisdiction to do so and must deny the taxpayer's claim.

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

**Foreign sales corporations (FSCs).** *Kimberly-Clark Corporation as successor to Kimtech Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 12, 1994). The issue in this case is whether the taxpayer is entitled to deduct the sales commissions it paid to Kimberly-Clark Sales Corporation during the years 1985, 1986, and 1987 or, stated another way, whether that foreign sales corporation was a mere "paper" corporation with no real economic substance.

Kimberly-Clark Corporation is the successor to Kimtech Ltd. as a result of Kimtech Ltd.'s liquidation into the taxpayer on January 1, 1988. Kimtech Ltd., a wholly owned subsidiary of Kimberly-Clark Corporation, was a Delaware corporation with its principal place of business in Neenah, Wisconsin. Kimtech Ltd. designed, manufactured, and installed machinery, and provided mechanical maintenance service.

Kimberly-Clark Sales Corporation (Sales) was incorporated on November 20, 1984, under the laws of the Virgin Islands. Kimberly-Clark Corporation (Kimberly-Clark) is the sole shareholder of Sales. For the years at issue, Sales qualified as a foreign sales corporation (FSC) under section 922 of the Internal Revenue Code. Sales was formed for the purpose of centralizing export operations, increasing foreign sales, increasing profitability of exports, and obtaining the benefits accorded under sections 926-927 of the Internal Revenue Code in order to be more competitive with foreign sellers in compliance with the General Agreement on Tariffs and Trade (GATT).

Sales was party to an Export Services Agreement with the taxpayer whereby, in return for a sales commission, Sales agreed to perform or have performed certain services with respect to the taxpayer's export sales.

Kimtech Ltd. reported a FSC commission expense to Sales of $18,350 for 1985, $2,387 for 1986, and $16,296 for 1987. The department has denied a deduction for all commissions paid to Sales.

Sales had its own officers and directors. Its officers and directors were all employes of Kimberly-Clark or its affiliates, with the exception that one citizen of the Virgin Islands was named as a director to fulfill the minimum legal requirements to obtain the tax benefits of the FSC.

During 1985, Sales leased an office in St. Thomas, Virgin Islands. Sales owned office equipment located in the office and leased other equipment. The office was staffed by a full-time resident employe who devoted all his time to the activities of Sales and was paid by Sales. The books and records of Sales were maintained at this office.

For 1986 and 1987, Sales moved its office to The Netherlands. There, it rented office space and business services from Kimberly-Clark Benelux under a Services and Facilities Agreement. Pursuant to the agreement, Sales obtained the services of John Schuller, who devoted approximately one-half of his time to the business of Sales, and obtained the services of other personnel as required.

Sales maintained bank accounts in both the Virgin Islands and in The Netherlands with substantial cash balances.

Sales conducted substantial business activities in its own right, including mailing thousands of catalogs, price lists, and other advertising and promotional materials to potential customers of Kimberly-Clark's exporting units. In addition, it answered inquiries from customers or forwarded them to the appropriate Kimberly-Clark unit. It mailed order acknowledgements to customers, which were the formal acceptance of the customers' orders. It incurred a variety of normal business expenses and paid those expenses from its own accounts. It paid its own taxes, including substantial U.S. taxes and payments to the Virgin Islands and The Netherlands.

In addition, Sales had performed on its behalf other export-related activities by various selling units of Kimberly-Clark pursuant to Export Services Agreements. Under these agreements, the operating units acted as the agent of Sales. Such services were compensated on an arm's-length basis, and the commissions to which Sales was entitled were determined on an arm's-length basis.

Virtually all of Kimtech Ltd.'s customers were affiliates of Kimberly-Clark or Kimberly-Clark itself. All of Kimtech Ltd.'s foreign customers were affiliates of Kimberly-Clark.

Wisconsin did not federalize its corporate income and franchise tax system until 1987. When Wisconsin did federalize its corporate income and franchise tax system, it provided a specific modification of federal adjusted gross income under sec. 71.26(3)(r), Wis. Stats., because it did not recognize IRC sections 921-927 (FSC) as part of the Internal Revenue Code for computation of a corporation's income for Wisconsin income tax purposes.

By definition under federal FSC law, Sales had economic substance. In operative terms, it also was more than a mere "paper" corporation in many respects, including but not limited to the following. Sales:

- had its own officers and directors;
- had employes and offices, either directly or via service agreements;
- maintained substantial active bank accounts;
- conducted business activities in its own right;
- incurred and paid taxes;
- paid its own organizational costs.

In both form and substance Sales, unlike Kohler under previous DISC legislation, was a viable business enterprise.

The Commission concluded that Sales was a separate corporation formed for substantial business reasons and which carried on substantial business activities. It earned the commissions paid to it, and there is no basis for denying the taxpayer a deduction for such commissions. There is no basis under Wis. Stats. sec. 71.11(7m), applicable to 1985, and sec. 71.30(2), applicable to 1986 and 1987, for reallocating the commission income of Sales to the taxpayer.

The department has not appealed this decision. □

## SALES AND USE TAXES

**Coin-operated laundry machines.** *Charles M. Malone vs. Wisconsin Department of Revenue* (Circuit Court for Eau Claire County, March 31, 1994). This is a review of a decision by the Wisconsin Tax Appeals Commission. For a summary of that decision, see *Wisconsin Tax Bulletin* 82 (July 1993), page 26.

The issues in this case are:

A. Whether sec. 77.52(2)(a)6, Wis. Stats., exempts from sales tax the gross receipts from washers and dryers which are activated by tickets and not by coins.

B. If not, whether the department should be estopped from collecting the sales tax from the taxpayer.

C. Whether the department has retroactively applied sec. Tax 11.72, Wis. Adm. Code, to the taxpayer.

The taxpayer is the sole proprietor of a self-service laundry business which contains both ticket-operated and coin-operated washers and dryers. The taxpayer consulted various tax professionals to determine whether his self-service, ticket-operated laundry machines were subject to sales and use tax, but he did not request the opinion of the Department of Revenue. The department assessed additional sales and use taxes to the taxpayer for the period of January 1987 through December 1990.

The Circuit Court concluded as follows:

A. Because the taxpayer's machines are ticket-operated, he has not brought himself within the clear and unambiguous language of sec. 77.52(2)(a)6, Wis. Stats.

   Section 77.52(2)(a)6, Wis. Stats is a narrow exemption to sales and use tax which exempts laundry services when three elements are present:

   1) The service must be performed by the customer;

   2) The service must be performed on a coin-operated machine; and

   3) The machine must be a self-service machine.

B. Estoppel is not applicable in this case. There are three elements of estoppel:

   1) Action or non-action by the party to be held estopped;

   2) Reliance on that action or non-action by the individual seeking estoppel; and

   3) Detrimental reliance on the action or non-action by the individual seeking estoppel.

C. The Tax Appeals Commission correctly found there was no retroactive application in this case. The rule, sec. Tax 11.72(1)(b), Wis. Adm. Code, does not alter the requirements of the statute.

The taxpayer has not appealed this decision. □

**Exemptions — water, bottled.** *Artesian Water Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 8, 1994). The issue in this case is whether the taxpayer's sales of bottled artesian spring water qualify for exemption from sales and use tax under sec. 77.54(20), Wis. Stats.

The taxpayer is a Wisconsin corporation and since its inception in 1986 has been primarily engaged in the sale of bottled artesian spring water. During the periods involved herein, the taxpayer did not collect and/or remit sales tax on its primary product.

The key question to resolve is whether the taxpayer's primary product, bottled artesian spring water, is a "beverage for human consumption" within the intent and meaning of sec. 77.54(20)(a), Wis. Stats. The bottled water in question was destined for human consumption, leaving for the Commission's determination only whether or not it is a "beverage."

Section 134.77(1)(a), Wis. Stats., defines "beverage" to include bottled drinking water, as defined under sec. 97.34(1)(a), Wis. Stats. That section defines "bottled drinking water" as "... all water packaged in bottled or similar containers and sold or distributed for drinking purposes. This term includes distilled water, artesian water, spring water and mineral water, whether carbonated or uncarbonated."

Section Tax 11.51(2)(a), Wis. Adm. Code, provides that sales of bottled water are subject to sales tax.

The Commission concluded that bottled artesian spring water is a "beverage for human consumption" within the intent and meaning of sec. 77.54(20)(a), Wis. Stats. and is, therefore, exempt from sales tax. An administrative rule may not supersede a statute, and the Commission determined that sec. Tax. 11.51(2)(a), Wis. Adm. Code, supersedes the statute as far as bottled artesian spring water is concerned.

The Commission also concluded that the legislature, in enacting sec. 77.54(20), Wis. Stats., did not intend to exempt beverages like milk and juice but not water.

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

**Successor's liability.** *Robert Kastengren vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, October 7, 1993). This is an appeal from an order of the Circuit Court for Dane County. For a summary of the Circuit Court decision, see *Wisconsin Tax Bulletin* 78 (July 1992), page 11.

The issue is whether the taxpayer, as the purchaser of Uncle Harry's Fine Food Products, Inc. (UHFFP), is personally liable for UHFFP's unpaid sales and use taxes.

On December 22, 1988, the taxpayer entered into an "Asset Purchase Agreement" with Harry Dembroski to purchase UHFFP's equipment and inventory. UHFFP owed sales tax to the state. The taxpayer paid the purchase price to UHFFP and its secured creditor, the Bank of Burlington. The bank received all of the proceeds of the purchase price. The taxpayer did not withhold any of the proceeds to pay the unpaid taxes and did not submit to the department a written request for a sales and use tax clearance certificate.

The department could document eleven contacts with UHFFP attempting to collect the delinquent taxes. However, the department ceased its efforts to collect the taxes from UHFFP because it concluded that the corporation was defunct and had no assets. The department did not attempt to collect the taxes from Harry Dembroski.

On August 30, 1989, the department assessed delinquent sales taxes against the taxpayer, who petitioned the department to redetermine the assessment on the grounds that his liability was abated by his payment of the purchase price to UHFFP's secured creditor, and on the further grounds that the department had not first proceeded against Dembroski.

The Circuit Court ruled that the department could not direct collection efforts against the taxpayer until it had attempted to collect the unpaid sales taxes from Dembroski.

The Court of Appeals concluded that the language of sec. 77.52(18), Wis. Stats. and sec. Tax 11.91(4), Wis. Adm. Code, unambiguously make the taxpayer, as purchaser of UHFFP's business and inventory, liable for UHFFP's unpaid sales taxes.

In view of the purpose of sec. 77.52(18), Wis. Stats., the department could reasonably construe "predecessor" as used in sec. Tax 11.91(4), Wis. Adm. Code to refer to the retailer who "quits the business."

The Court of Appeals further concluded that the Commission had correctly ruled that the taxpayer was not excused from complying with sec. 77.52(18), Wis. Stats., merely because UHFFP's secured creditor had a lien against the corporation's equipment and inventory, which equalled or exceeded the purchase price.

The taxpayer has not appealed this decision. □