Extension of time — additional assessments and refunds. *Paramount Farms Incorporated vs. Wisconsin Department of Revenue* (Circuit Court for Portage County, June 27, 1994). The question presented is whether an extension for assessing taxes for years 1976 to 1981 until "3 months after receiving the final results of the Internal Revenue Service's audit of these years" runs for 1976 and 1977 when the final audit for each year is received, or when the last of the audits for all of the included years is received. For a summary of the Wisconsin Tax Appeals Commission's decision, see *Wisconsin Tax Bulletin* 78 (July 1992), page 8.

The IRS sent a letter to the taxpayer on May 4, 1979, regarding the taxpayer's income tax returns for 1976 and 1977. Over the next three years there were various findings, protests, agreements, amendments, adjusted assessments, and other correspondence between the taxpayer and the IRS. On August 25, 1982, the taxpayer received a notice of audit from the Wisconsin Department of Revenue. On September 28, 1982, the taxpayer agreed with the IRS as to a 1976 and 1977 adjustment, and on the same day entered into an extension agreement for additional assessments with the Wisconsin Department of Revenue. By the terms of the extension, the taxpayer and the department agreed to extend the time for assessing taxes for the years of 1976 through 1981 until three months after receiving the final results of the Internal Revenue Service's audit of these years. On February 20, 1987, the Wisconsin Department of Revenue made its assessment. The final Internal Revenue Service audit was received on October 31, 1988.

The Tax Appeals Commission held that the extension agreement did not require the Wisconsin Department of Revenue to issue a piecemeal assessment for any one of the six years involved when it had sufficient information to do so. Instead, the Commission held that the department could wait until receiving the final results of the federal audit for the entire period covered by the audit before acting.

The Circuit Court concluded that the Commission's findings are reasonable. Because the department made its assessment prior to the final results being provided, the assessment was timely. Therefore, the Circuit Court affirmed the Commission's decision.

The taxpayer has not appealed this decision. □

SALES AND USE TAXES

Construction contractors — use tax. *Oscar J. Druml vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 8, 1994). The issue in this case is whether the taxpayer is exempt from sales and use tax under sec. 77.54(2) and (6)(b), Wis. Stats., on its purchases of materials and equipment.

During 1982 through 1986 ("the period under review"), the taxpayer had an integrated business in which he produced hollow core concrete slabs and incorporated the finished slabs in real property construction activities as a contractor. All concrete slabs produced by the taxpayer were utilized in the taxpayer's real property construction activities. No part of the taxpayer's concrete slab production activity was undertaken in order to resell the slabs at retail independent of the taxpayer's real property construction activities.

During the period under review, the taxpayer did not hold a Wisconsin seller's permit or charge sales tax to customers, nor did he remit sales taxes directly to the department.

The taxpayer claimed he was a manufacturer of products which were sold to construction companies for their projects and as a manufacturer is exempt from sales tax.

The taxpayer disclosed the following:

a) Masticord he purchased was used as packaging for delivery to customers.

b) Concrete slab, beam, and column manufacture was the extent of any manufacturing activity conducted by the taxpayer.

c) That steel wire, strand, and cable were utilized by him in the manufacture of concrete slabs as a reinforcement material. The taxpayer's claimed exemption on these materials is the ingredients and components exemption available to manufacturers under sec. 77.54(2), Wis. Stats.

d) The taxpayer's sole use of the concrete mix, grout, and concrete was as a component in the taxpayer's manufacture of concrete slabs, beams, and columns.

e) The taxpayer owned a tractor and purchased repair parts and services. The taxpayer claimed that the tractor was directly utilized in his manufacturing activity because the tractor was regularly used as a first site of storage.

f) ½" steel "weld" plates were incorporated by the taxpayer in the manufacture of the concrete slabs, beams, and columns. The weld plates were subsequently modified by the taxpayer in the course of his real property construction activities.

g) Some of the wood purchased by the taxpayer was used as forms in the making of concrete beams and slabs, but this wood did not lose its identity in this capacity or use.

h) The taxpayer purchased grout which was used to fill in the ends of concrete slabs, beams, etc.

i) The crane was not exclusively used in his manufacturing processes.

j) Liquid and latex flooring material and purchase order sets were not entitled to exemption from sales tax.

The taxpayer claimed that certain radio equipment purchased by him is exempt from sales tax because the equipment is exclusively and directly used in a manufacturing process under sec. 77.54(6), Wis. Stats. The radio equipment consisted of a base station and several remote handsets which were used for communication among the taxpayer's employes during production of the concrete slabs and beams.

The Commission concluded that the taxpayer may not claim an exemption for packaging materials under sec. 77.54(6)(b), Wis. Stats., because all items transported with the aid of the claimed materials were used in the taxpayer's real property construction activities.

Similarly, materials or components which the taxpayer alleged to have been consumed in his production activities are not eligible for exemption under sec. 77.54(2), Wis. Stats., because none of the resulting components produced were "destined for sale," as the statute requires.

The radio equipment is not eligible for exemption because it was not directly used in a manufacturing process. The crane and tractor are not eligible for exemption because the taxpayer admitted the absence of exclusive and direct use of the crane and tractor in a manufacturing process.

The taxpayer has not appealed this decision. □

Exemptions — common or contract carrier vehicles; Government purchases; Use tax — liability of user. *R-K Towing, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 20, 1994). The issues in this case are:

A. Whether the taxpayer was assessed additional sales and use taxes on certain purchases of office supplies from New England business Supply ("NEBS"), for which sales tax was remitted by the taxpayer at the time of the purchases.

B. Whether the taxpayer was assessed additional sales and use taxes on certain purchases from All Color Sign/Arts, for which sales tax was remitted by the taxpayer at the time of the purchases.

C. Whether the taxpayer's purchase of an engine from A-Able Butler Auto Salvage was a nontaxable purchase for resale.

D. Whether interest may be assessed against the taxpayer to the extent that liabilities against it are affirmed.

E. Whether the taxpayer is entitled to a credit for sales taxes collected and remitted by it on sales of towing services to the Cudahy Policy Department.

The taxpayer was engaged in business providing tow truck services for hire. The taxpayer's towing services consisted primarily of towing disabled automobiles to third party repair shops or, in some instances, to a storage yard maintained at the taxpayer's place of business in Cudahy, Wisconsin, to be stored on a temporary basis. The taxpayer's president performed incidental private auto repair services for relatives and acquaintances at the taxpayer's place of business, but the taxpayer did not hold itself out to the public for business as an auto or truck repair service during the period under review.

The department conceded that the taxpayer's use of tow trucks in the provision of towing services qualified it as an exempt "contract carrier" as that term is used in sec. 77.54(5)(b), Wis. Stats. Accordingly, all lease payments on tow trucks as well as purchases of parts, repairs, accessories, attachments, and supplies relating to the taxpayer's tow trucks which were originally included in the measure of the department's assessment are exempt from sales or use tax.

The taxpayer conceded that its purchases of mobile communications equipment and remote paging services and equipment during the period under review were properly subject to sales or use tax.

The taxpayer produced a letter from NEBS, as support for the contention that the taxpayer paid sales tax on purchases from NEBS which were included in the measure of the department's use tax assessment. The letter indicates that "NEBS has charged, and R.K. Towing has paid 5.5% sales tax on all orders that have been shipped... All three invoices enclosed have been paid in full and include tax." The letter itself is not specific as to the date of the transactions addressed, nor has the taxpayer provided those invoices to which the letter makes reference.

The taxpayer produced a notation dated May 5, 1993 on a sales invoice form of All Color Sign/Arts to support the contention that the taxpayer had previously paid sales tax on purchases from All Color Sign/Arts which were included in the measure of the department's use tax assessment. The notation indicates "All signs bought from [All Color Sign/Arts] by R.K. Towing are charged sales tax." The notation contains no reference to specific invoices and indicates no time frame to which its assertion applies.

A notation found in the schedules supporting the department's assessment in this case indicates that a portion of the taxpayer's purchases from All Color Sign/Arts was attributable to lettering applied to the exterior of the taxpayer's tow trucks.

The taxpayer produced two invoices—the first, for the purchase of a "390 Motor and C.G. Trans." from A-Able Butler Auto Salvage; the second, a sales invoice of the taxpayer indicating full payment for repairs to a 1977 Pontiac Firebird — to support the contention that the motor purchased was incorporated in the invoiced repair. The taxpayer testified at the hearing that the motor purchased was not subsequently resold as a component of the taxpayer's sale of repair services but that another invoice, which was not produced, could corroborate the resale.

During the period under review, the taxpayer performed towing services at the request of certain municipalities, including some law enforcement agencies. During the hearing, the taxpayer introduced several invoices relating to services performed for the Cudahy Police Department.

The department offered a credit to the taxpayer based upon sales taxes collected and remitted on the taxpayer's sales of towing services to the Cudahy Police Department.

The Commission concluded:

A. The purchases from NEBS were subject to use tax. The transactions comprised purchases of tangible personal property which was subsequently stored, used, or otherwise consumed in Wisconsin and no sales tax was demonstrated to have been paid. The taxpayer did not present any source documents or testimony which demonstrated by clear and convincing evidence that any tax was previously paid on those purchases.

B. The taxpayer is not liable for sales or use tax on purchases from All Color Sign/Arts which involved lettering on the taxpayer's tow trucks. Such purchases are exempt under sec. 77.54(5)(b), Wis. Stats.

   The taxpayer's remaining purchases from All Color Sign/Arts, which do not relate to the contract carrier exemption, have been appropriately included in the department's assessment because the taxpayer has failed to demonstrate by clear and convincing evidence that tax was previously paid on those purchases.

C. The taxpayer is liable for use tax assessed against it on its purchase of an engine from A-Able Butler Auto Salvage because the taxpayer failed to present clear and convincing evidence that the engine was resold or incorporated into a taxable service provided by the taxpayer to third parties.

D. To the extent that this decision affirms the department's actions, as modified by stipulation, interest has been appropriately assessed on the remaining amounts of tax.

E. The taxpayer is entitled to an offset for taxes collected and remitted on services provided to the Cudahy Police Department. The services are exempt from sales or use tax under sec. 77.54(9a), Wis. Stats., as a sale of taxable services to an "instrumentality of one or more units of government in this state."

Neither the taxpayer nor the department have appealed this decision. □

Rebates; Sovereign immunity. *John Grall, et al., vs. Mark Bugher, Secretary of the Wisconsin Department of Revenue* (Court of Appeals, District IV, December 16, 1993). This is an appeal from an order of the Circuit Court for Dane County. For a summary of that decision, see *Wisconsin Tax Bulletin* 81 (April 1993), page 12. The dispositive issue in this case is whether the department is immune from suit.

The taxpayers purchased new automobiles from Wisconsin dealers under a "manufacturer's rebate" program, and the state sales tax was applied to the full, undiscounted price of the vehicles. The taxpayers sued the department, claiming that the manufacturer's rebates should not have been subject to sales tax. They sought a refund of the additional sales taxes paid and a declaration that the department's taxing scheme, as it applies to automobile manufacturer's rebates, was unconstitutional and void.

The department argued that the case should be dismissed on the grounds that the claims were barred by principles of sovereign immunity. The taxpayers argued that immunity should not apply, asserting that a United States Supreme Court decision, *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco*, (1990), states a "rule of federal law" that states must refund unconstitution-

ally collected taxes, and that this rule "overrides the State's sovereign immunity defense" under the mandate of the supremacy clause of the United States Constitution. The taxpayers further argued that the Wisconsin Constitution itself "waives" immunity by consenting to suits such as this. They point to Article VIII, section 1, which provides that "[t]he rule of taxation shall be uniform."

The Circuit Court dismissed the case, ruling that *McKesson* was inapplicable because the taxpayers — unlike the distributors in *McKesson* — were not the parties who paid the sales taxes to the state. Under sec. 77.52(1), Wis. Stats., the sales tax "is imposed upon all *retailers*" on "the *gross receipts* from the sale ..." (emphasis added).

The Court of Appeals concluded that the Circuit Court properly held that the *McKesson* case was inapplicable and properly dismissed the taxpayers' claims on sovereign immunity grounds. It did not consider the "uniformity clause" to have waived the department's immunity from this lawsuit. There is nothing in that clause even remotely authorizing suits against the state under the circumstances presented here.

The taxpayers have appealed this decision to the Wisconsin Supreme Court. □

TEMPORARY RECYCLING SURCHARGE

Temporary recycling surcharge — constitutionality. *Love, Voss & Murray vs. Wisconsin Department of Revenue* (Circuit Court for Waukesha County, May 22, 1994). The taxpayer petitioned for judicial review of a Wisconsin Tax Appeals Commission decision and order dated February 8, 1994. The taxpayer claimed that the Wisconsin temporary recycling surcharge, subch. VII of ch. 77, Wis. Stats., is unconstitutional in that it gives different treatment to noncorporate farmers and all other noncorporate businesses. The taxpayer argued that the surcharge is a violation of the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Article I, Section 1, of the Wisconsin Constitution. For a summary of the Wisconsin Tax Appeals Commission's decision, see *Wisconsin Tax Bulletin* 86 (April 1994), page 20.

In regards to challenges of a statute under the Equal Protection Clause, "[t]he general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." Further, in equal protection challenges, the petitioner has the burden of proving that there is abuse of legislative direction beyond a reasonable doubt.

The surcharge is designed to deal with the recycling of solid waste. The taxpayer argued that the surcharge rate should not be reduced for farmers as they significantly contribute to the pollution addressed by the surcharge in the form of toxic agricultural products. The taxpayer's argument is not related to the solid waste problem addressed by the surcharge but to hazardous waste.

The department also submitted that the difference in the surcharge is in furtherance of a legitimate state interest in that it aids the protection and preservation of the family farm, which historically has been a recognized legitimate interest of the State of Wisconsin.

Additionally, the partial exemption for noncorporate farmers is sufficiently rationalized in the farmers' inability to pass on the surcharge in the price of their product, as their prices are set by standards.

The Circuit Court concluded that the Wisconsin temporary recycling surcharge is constitutional as it rationally furthers a legitimate state interest.

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