evidence that the taxpayer is certified or licensed as a carrier by any foreign government. Mr. Rasske is a pilot licensed with the FAA, and such license is required by the FAA for flights provided by the taxpayer.

During the period relevant to this case, the taxpayer did not lease or rent the hot air balloon system to another person in a situation where the other person would operate the hot air balloon. During all flights, Mr. Rasske operates the hot air balloon system. When the taxpayer used the hot air balloon system to give rides to passengers, the purpose was the passengers' enjoyment or amusement, not transportation. At the end of each ride, the taxpayer transported the passengers to the place where the ride began.

The Commission concluded:

A. The taxpayer's purchase of the replacement fabric envelope is not exempt under sec. 77.54(5)(b), Wis. Stats., because the taxpayer is not a carrier that is certified or licensed under the laws of the United States or a foreign government.

B. The taxpayer's purchase of the replacement fabric envelope is not exempt as a purchase for resale under sec. Tax 11.29(4)(b), Wis. Adm. Code, because in the course of the taxpayer's business, Mr. Rasske always pilots the hot air balloon system and the taxpayer does not permit passengers to pilot the hot air balloon system.

The taxpayer has not appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only. □

Containers, packaging and shipping materials – plastic garment bags. *Luetzow Industries vs. Wisconsin Department of Revenue* (Court of Appeals, District I, October 31, 1995). This is an appeal from the April 15, 1994 decision of the Circuit Court for Milwaukee County. For a summary of the Circuit Court decision, see *Wisconsin Tax Bulletin* 91 (April 1995), page 15.

The issue in this case is whether the taxpayer's gross receipts from the sale of plastic garment bags to dry cleaners for use in returning a customer's dry-cleaned items are exempt from sales tax under sec. 77.54(6)(b), Wis. Stats. The taxpayer manufactured and sold plastic garment bags, trash bags, casket bags, and miscellaneous-purpose bags. The department determined that the taxpayer had improperly exempted gross receipts from the sale of garment bags to dry cleaners, and assessed sales tax on the garment bags sold on which no sales tax had been paid.

The taxpayer appealed to the Wisconsin Tax Appeals Commission ("Commission"), which concluded that the sale of garment bags to dry cleaners was taxable. The taxpayer then petitioned the Circuit Court, which reversed the Commission's decision, concluding that it could find no rational basis to narrowly interpret sec. 77.54(6)(b), Wis. Stats., so that the sale of garment bags to dry cleaners was not exempt from sales tax. It also held that the "common usage of the terms contained" in the statute brought the taxpayer's sale of the bags within the statutory exemption.

Section 77.52, Wis. Stats., imposes sales tax on the "gross receipts from the sale, lease or rental of tangible personal property." Section 77.54(6)(b), Wis. Stats., provides an exemption for the gross receipts from the sale of and the storage, use or other consumption of:

> "(b) Containers, labels, sacks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging or shipping tangible personal property, if such items are used by the purchaser to transfer merchandise to customers ..."

The department argues that the garment bags sold by the taxpayer to the dry cleaners do not fall within the sec. 77.54(6)(b) exemption because the bags were not used by the dry cleaners "to transfer merchandise to customers." The Commission agreed with this interpretation, concluding that the items the dry cleaners transferred to their customers were not "merchandise," but instead:

> "[T]he transaction ... [was] a bailment, which involves no transfer of interest in the bailed property, but only delivery of temporary custody to accomplish a particular purpose which, when accomplished, requires the bailee either to redeliver the goods to the bailor or dispose of the property in accordance with the terms of the bailment."

The taxpayer counters, arguing that "'merchandise' includes 'goods'" which it defines as "'portable personal property.'" The taxpayer further argues that "to transfer merchandise to customers" does not require a "transfer or conveyance of title," but only "the shifting of portable personal property from one person (i.e., purchaser of plastic bags) to one who purchases some services (i.e., dry cleaning customers)."

The Court of Appeals concluded that the disputed statutory language: "to transfer merchandise to customers" was not intended to embrace the transfer of clothing or other sundries already owned by the customer, on which the dry cleaner has only performed a service. The crucial word in sec. 77.54(6)(b), Wis. Stats., is "merchandise." "Merchandise" denotes commodities or goods that are bought or sold.

The clothing or sundries a customer turns over to a dry cleaner are not bought or sold upon their return to the customer. The customer is paying for a service that the dry cleaner has performed on that item. Therefore, the clothing or sundries transferred back to the customer are not merchandise, but chattel originally conveyed to the dry cleaner under a bailment.

The Commission's reading of sec. 77.54(6)(b), Wis. Stats., was both rational and correct; the taxpayer's gross receipts from its sale of the garment bags to dry cleaners are not exempt from the state sales tax. Because the Commission correctly interpreted sec. 77.54(6)(b), Wis. Stats., the Circuit Court erred when it reversed the Commission's ruling on this issue.

The taxpayer has appealed this decision to the Wisconsin Supreme Court. □

Exemptions – common or contract carriers – constitutionality. *Wisconsin Steel Industries, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 23, 1996). The issue in this case is whether sec. 77.54(5)(b), Wis. Stats., as applied to the following facts, violates the equal protection clauses of the Wisconsin and United States constitutions.

During the years 1984 through 1990 ("period under review"), the taxpayer was a Wisconsin corporation engaged primarily in the business of steel treating and blasting. The taxpayer had three divisions. The largest division, Wisconsin Steel Treating & Blasting Co., accounted for the largest portion of the taxpayer's capital investment, was where most of the taxpayer's employes worked, and was the division from which the taxpayer derived most of its income. The business of this division consisted of heat treating and sand blasting steel.

Another division, the Steel Products Center, maintained an inventory of bar steel and other steel products for sale. The third division, Steel Transport Division, picked up steel from the taxpayer's customers for transport to the taxpayer's plant and then delivered the treated steel back to its customers.

During the period under review, the taxpayer was not a common or contract carrier that used the motor trucks, truck tractors, road tractors, trailers and semi-trailers it purchased exclusively as a common or contract carrier, and therefore, the taxpayer was not exempt from the use tax on such equipment under sec. 77.54(5)(b), Wis. Stats. Because the equipment mentioned above was not exempt, the repair services to such equipment were not exempt.

Had the taxpayer's Steel Transport Division been organized as a separate corporation, the primary business of such corporation would have been transportation services, and the transportation equipment of such corporation would have been used exclusively by such corporation as a contract carrier.

The Commission concluded that the sales and use tax exemption found in sec. 77.54(5)(b), Wis. Stats., as applied to these facts, does not violate the equal protection clauses of the Wisconsin and United States constitutions.

The protection afforded by Article I, Section I of the Wisconsin Constitution is substantially equivalent to the protection afforded by the equal protection clause of the 14th amendment to the United States Constitution, and, as a result, the same analysis applies under the equal protection guarantees of either constitution. In order to be a contract or common carrier for purposes of sec. 77.54(5)(b), Wis. Stats., the carrier's primary business must be transportation services and not some non-carrier business.

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

Exemptions – telephone company central office equipment. *Ameritech Mobile Communications Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 21, 1995). The issues in this case are:

A. Whether the taxpayer's cell site equipment is exempt from Wisconsin sales and use taxes under sec. 77.54(24), Wis. Stats.

B. Whether sec. 77.54(24), Wis. Stats., as it may be applied to the transactions involving the cell site equipment, is in violation of the Equal Protection Clauses of the constitutions of the State of Wisconsin and of the United States.

The taxpayer, a wholly-owned subsidiary of Ameritech Corporation, is a Delaware corporation, with its principal place of business in Illinois. During January 1, 1985 through December 31, 1988 ("the

taxable period"), the taxpayer and certain of its affiliates were engaged in the business of providing cellular telephone services in Wisconsin and elsewhere. The department has agreed not to contest the fact that the taxpayer is a "telephone company" within the meaning of sec. 77.54(24), Wis. Stats.

During the taxable period, the taxpayer's cellular telephone business in Wisconsin was conducted through two of its wholly-owned subsidiaries. Acting as procurement agent, the taxpayer purchased all of the equipment required for carrying on their cellular businesses. Such equipment, whether for use in the "MTSO" facility or the "cell sites" (as those terms are defined below), was purchased without payment of Wisconsin sales or use taxes. The department assessed sales and use taxes on the taxpayer's purchase and/or use of some of the cellular equipment. The parties have agreed that, to the extent sec. 77.54(24), Wis. Stats., is found not to apply to any such equipment, the taxpayer be responsible for any resulting sales or use taxes and interest.

The taxpayer's cellular system in Wisconsin consisted of three components: (1) the mobile units used by the taxpayer's customers (either hand-held or vehicle-installed devices); (2) company-owned facilities known as "cell sites," consisting of structures and equipment, one of which was located in each of the "cells" into which the taxpayer's service area was divided; and (3) a single, company-owned "Mobile Telephone Switching Office" ("MTSO").

One of the cell sites was "co-located" in the same structure as housed the MTSO. The department has agreed that the assessment with respect to the equipment at this "co-located" cell site will be reversed.

The equipment at issue consists solely of equipment purchased for and used at the cell sites (other than the "co-located" MTSO cell site). The department has not assessed any taxes with respect to the MTSO equipment. The department has agreed that the cell site equipment at issue is "apparatus, equipment and electric instruments, other than station equipment" and is used in "transmitting traffic and operating signals," as those phrases are used in sec. 77.54(24), Wis. Stats. Consequently, the only issue is whether such equipment is "in central offices" within the meaning of the exemption.

Mobile units can communicate with, and only with, cell sites. Mobile units cannot communicate directly with the MTSO and can communicate therewith only through a cell site. A cell site relays signals to the MTSO which, through switching equipment, connects the mobile to another mobile sitting adjacent to the first in the same cell site service area. Similarly, all connections between mobiles and land line telephone users are switched through the MTSO.

Cell site equipment does not perform the functions of "switching," as that term is used in the commonly accepted parlance of telephony, although it is clear that cell sites are necessary links in the communication chain which may be involved in prompting or subsequently implementing switching decisions. "Switching," as defined in the parlance of telephony, is the process of "interconnecting circuits in order to establish a temporary connection between two or more stations."

A "central office," in the common parlance of telephony, is "the facility housing the switching system and related equipment that provides telephone service for customers in the immediate geographical area."

The Commission concluded:

A. The cell site equipment at issue was not exempt from Wisconsin sales and use taxes under sec. 77.54(24), Wis. Stats., during the taxable period, because the equipment was not located in the taxpayer's "central offices" as that term is commonly used in the parlance of telephony.

   Accepted parlance of telephony and the interpretation of experts clearly indicates that the "central office" is a place where matrix switching, i.e., the construction of multiple channel input paths to multiple output paths, takes place. Expert testimony further indicated that in the context of cellular telephony, switching occurs at the MTSO level of the telecommunications link and does not take place any further "downstream" from the MTSO toward the mobile units. Because expert testimony also indicated that no switching occurs at the cell site in the technical sense, remote cell sites may not be considered to be "in central offices" as that phrase is used in sec. 77.54(24), Wis. Stats., and the exemption is not applicable to such cell equipment.

B. Section 77.54(24), Wis. Stats., as it may be applied to the transactions involving the cell site equipment here under review, is not found to be in violation of the Equal Protection Clauses of the constitutions of the State of Wisconsin and of the United States, as these constitutional issues were not timely raised in either the petition for redetermination or the petition for review in this case.

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

Services subject to the tax — repair and maintenance. *Badger U.S.A., Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 11, 1995 and February 9, 1996). The issue in this case is whether the taxpayer is liable for Wisconsin sales and use tax on its charges for:

A. Installation by the taxpayer of custom-designed reflectors in properties other than residential or non-commercial properties, including installation in some office areas of its customers.

B. Installation by the taxpayer of new fluorescent tubes, ballasts, and similar items when it installs reflectors.

The taxpayer manufactures reflectors that increase the amount of light emitted by light fixtures. These reflectors are installed in light fixtures, usually in existing structures throughout Wisconsin and elsewhere, including office areas.

A fluorescent light fixture typically has four bulbs and two ballasts. In the typical installation process, the taxpayer removes two of the bulbs and one ballast from an existing light fixture and installs a custom-made reflector along the inside of the light fixture. The reflector fits the contour of the inside of the light fixture and is held in place with four screws. Two of the bulbs are then replaced in the light fixture. With the exception of the removal of two of the bulbs and a ballast, the original light fixture remains unchanged.

The taxpayer custom manufactures reflectors for each location using lighting level data to optimize the product for each particular location. The reflector is manufactured at the taxpayer's Baraboo plant from reflector material purchased by suppliers and then shipped to the customer's facility.

Completed reflectors vary significantly because they are custom-designed for the facility for which they were sold. Two reflectors may have the same blank size but may have differing configurations dictated by, among other things, depth and shape of the light fixture housing and distribution of light.

Reflectors may be shipped by the taxpayer to other manufacturers for installation in new light fixtures manufactured for customers. In these cases, the light fixture is then shipped by the manufacturer to the customer's facility.

After the manufacturing process is complete, the order is shipped to the customer's facilities where the taxpayer retains an electrical subcontractor to install the reflectors. The taxpayer oversees and manages the installation, usually by telephone, at least once per week.

The reflectors allow light fixtures to produce the same amount of light as before installation but with less energy. Where the installation of reflectors results in a higher reflectivity level than the original reflecting surface, the installation may be an enhancement to the value of the property but will not affect the value of the property to any significant degree.

The taxpayer frequently installs new fluorescent tubes, ballasts, and other items when installing reflectors. Some of the taxpayer's sales were directly to the owners of buildings, not to contractors who would install the reflectors for the owners of buildings.

The Commission concluded, in its December 11, 1995 ruling and its February 9, 1996 modifying order, that:

A. The sales tax applies to the taxpayer's receipts for installation of reflectors into office, restaurant, and tavern type lighting equipment. To the extent the taxpayer's reflectors have been installed into office, restaurant, and tavern type lighting equipment, the exemption in sec. 77.52(2)(a)10, Wis. Stats., does not apply.

B. The sales tax applies to the taxpayer's receipts for the installation of new fluorescent tubes, ballasts, and similar items. Receipts for installation of these items fall squarely within the definition of "gross receipts" in sec. 77.51(4)(c)4, Wis. Stats., subject to taxation under sec. 77.52(1), Wis. Stats.

The taxpayer has not appealed this decision. □

FUEL TAXES

Assessments — authority; Assessments — statute of limitations. *Jones Oil Company, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 12, 1995). The issue in this case is whether the department properly assessed the taxpayer for special fuel taxes and general aviation fuel taxes under Ch. 78, Wis. Stats., and any applicable statutes of limitation.

The taxpayer was a telemarketer who sold and delivered special fuel and general aviation fuel to various customers in Wisconsin and other states during the period under review, which is January 1, 1986 through December 31, 1989 with respect to special fuel and January 1, 1988 through December 31, 1989 with respect to general aviation fuel. The taxpayer's sales to its customers included a charge for the appropriate Wisconsin fuel tax; i.e., the special fuel tax or the general aviation fuel tax.

The taxpayer held a general aviation fuel license pursuant to sec. 78.56, Wis. Stats. (1989-90). It was required to hold but did not hold a special fuel license pursuant to sec. 78.47, Wis. Stats. (1989-90). Although the department requested "numerous times" that the taxpayer file the special fuel tax reports required by sec. 78.49, Wis. Stats., the taxpayer did not do so. It did make some payments on account of its special fuel tax liability, but such payments are not at issue in this appeal.

In 1992, after receiving information from the Internal Revenue Service regarding fuel sales made by the taxpayer to customers in Wisconsin during the period under review, the department conducted a field audit to determine whether the fuel taxes due on such sales had been correctly reported and paid. As a result of the audit, the department issued assessments for special fuel tax and for general aviation fuel tax, both assessments including negligence penalties and interest.

The taxpayer was represented by its president, Terry L. Jones, at the hearing; he was the only witness who testified on behalf of the taxpayer. Although the taxpayer has objected to the assessments on various grounds, including non-delivery of fuel into motor vehicle tanks (special fuel), estoppel (special fuel), and statute of limitations (special and aviation fuels), no evidence or exhibits in support of its position were presented, other than Mr. Jones' testimony, which included the following statement: "My entire defense is on the basis of these [assessments] exceeding the statute [of limitations]."

The Commission concluded that the assessments by the department were proper and were not barred by any statute of limitations. Because the taxpayer offered no evidence at the hearing except the testimony of its president, it failed to meet the burden of proof set forth in sec. 78.70(4), Wis. Stats., which states that "the burden of proof shall be upon the licensee to show that the assessment was incorrect and contrary to law." The taxpayer's statute of limitations argument is grounded in sec. 78.66, Wis. Stats., which, the taxpayer claims, imposes a 3-year limitation on the assessments under review. However, sec. 78.66, Wis. Stats., is a record keeping requirement, not a limitation on assessments. Therefore, the taxpayer's position is without basis in fact or law.

The taxpayer has appealed this decision to the Circuit 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: