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:

INDIVIDUAL INCOME TAXES

Alimony. *Terance and Patricia Boerner, and Donald F. and Cynthia M. Legler, Jr. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 9, 1996). The issue in this case is whether payments made by Donald F. Legler to Patricia Boerner for the years 1990 through 1992 were alimony and therefore deductible by Mr. Legler and reportable as income by Ms. Boerner under Internal Revenue Code sections 71 and 215, or whether those payments were child support and therefore neither deductible by Mr. Legler nor reportable as income by Ms. Boerner.

On or about February 22, 1984, taxpayers Patricia Boerner and Donald F. Legler, Jr., were granted a judgment of divorce. The divorce decree provided that family support shall be paid starting September 1, 1983, until further order of the Court. Maintenance was not waived by either party. In 1994, the divorce decree was modified to terminate "Family Support" and to establish "Child Support" for the remaining minor child.

On their 1990, 1991, and 1992 Wisconsin income tax returns, Terance and Patricia Boerner reported no alimony received. However, prior to 1990, Patricia Boerner reported alimony received on her Wisconsin income tax returns.

In May 1994, Donald F. and Cynthia M. Legler, Jr., filed amended 1990, 1991, and 1992 Wisconsin income tax returns with the department, deducting amounts as alimony paid in each of those years.

In May 1995, the department sent assessment notices to Terance and Patricia Boerner, and to Donald F. and Cynthia M. Legler, Jr. The assessments are assessments in the alternative, covering the years 1990, 1991, and 1992 (the "period under review").

Noting that the tax treatment of family support payments for Wisconsin and federal income tax purposes is determined under secs. 71 and 215 of the Internal Revenue Code, (IRC), the Commission concluded that the "family support" payments made by Mr. Legler to Ms. Boerner during the period under review qualify as alimony under the pre-1985 language of IRC sec. 71, because they meet all of the requirements of sec. 71(a)(1), and the payments do not qualify as "payments to support minor children" under sec. 71(b), because the divorce decree does not "fix" an amount or percentage to be for such support. The definition of alimony under IRC sec. 71 is determined solely by reference to the language of the

divorce decree entered on February 22, 1984, and because that decree makes no mention of child support and the payments otherwise qualify as alimony under IRC sec. 71, they are income to Ms. Boerner and deductible by Mr. Legler.

The assessment against taxpayers Terance and Patricia Boerner is affirmed, and the assessment against taxpayers Donald F. and Cynthia M. Legler, Jr. is reversed.

Taxpayers Terance and Patricia Boerner have appealed this decision to the Circuit Court. The department and taxpayers Donald F. and Cynthia M. Legler, Jr. are joined as necessary parties to the appeal. □

Domicile. *Troy D. and Amy L. Holmen vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 1, 1996). The issue in this case is whether taxpayer Amy L. Holmen was a resident of Wisconsin during all of 1993 and is thus liable for Wisconsin income taxes on income she earned in 1993.

Taxpayer Troy D. Holmen enlisted in the United States Air Force in April 1989. He was stationed in California when the taxpayers were married, in October 1991.

Troy Holmen was transferred to an Air Force base in Florida, and the taxpayers moved to Florida in June 1992. They were placed on a waiting list for base housing, and they moved to base housing in 1993.

The Air Force base in Florida was used for special operations, and the Air Force desired to have special operations personnel stationed there on a long-term basis. As a result, the taxpayers expected to reside on or near the Florida base for several years.

Taxpayer Amy L. Holmen obtained a job in Florida in July 1992. She voted in Wisconsin via absentee ballot in November 1992 but did not vote in any Florida election, because she felt she was not well enough informed about local and state races in Florida.

Amy Holmen did not obtain a Florida operators license because she did not need a local license for cashing checks at the base exchange, and she wanted to save the expense. She intended to obtain a Florida operators license when her Wisconsin operators license expired in December 1995. In 1993, she purchased, registered, and insured a truck in Florida. Prior to 1993, she had closed all of her bank accounts in Wisconsin and opened one or more accounts in Florida, and all her personal possessions were moved to Florida.

In 1992, Troy Holmen decided to make the Air Force his career. As a result, the taxpayers did not expect to return to Wisconsin as residents, because Wisconsin has no Air Force bases at which he could be stationed. During the time the taxpayers resided in Florida, however, Troy Holmen maintained his Wisconsin residency.

Shortly before his tour of service in the Air Force was scheduled to expire in September 1994, Troy Holmen decided not to re-enlist and informed Amy Holmen of his decision. She wanted him to remain in the Air Force, and she wanted to remain in Florida. This disagreement was one of the events that eventually led to divorce proceedings.

Troy Holmen obtained his discharge in September 1994, and Amy Holmen returned to Wisconsin with him in an effort to save their marriage.

On their amended 1993 Wisconsin income tax return, Amy Holmen was designated as a resident of Florida. Prior to 1993, Amy Holmen intended to make Florida her permanent domicile and took steps to establish Florida as her permanent domicile.

The Commission concluded that taxpayer Amy L. Holmen abandoned her domicile in Wisconsin and established a new domicile in Florida prior to January 1, 1993, and she continued to be domiciled in Florida throughout 1993. Therefore, she is not liable for Wisconsin income taxes on income earned during 1993.

When Amy Holmen moved to Florida she intended to make Florida her home for the indefinite future, and she took the ordinary steps one would take when moving to a new permanent residence. She clearly did not intend to return to Wisconsin, because it had no Air Force base at which Troy Holmen could be stationed.

The department has not appealed this small claims decision.

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

Retirement benefits – U.S. interest. *Leonard H. and Ardis Erickson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 15, 1996). The issue in this case is whether Wisconsin is prohibited by 31 U.S.C. sec. 3124 (a) from taxing that portion of the taxpayers' annuity dividends that reflects interest earnings on obligations of the United States government.

The taxpayers are former public employes and currently are annuitants in the Wisconsin Retirement System ("WRS"). Each of their initial annuities were based on a formula that takes into account years of service, highest three years of earnings, and age at retirement. In addition to these initial annuities, each taxpayer has received dividends based upon a calculation that is influenced by the surpluses experienced by certain reserves within the Public Employe Trust Fund ("PETF").

For the years 1988 through 1991, the taxpayers filed joint income tax returns, including in their income all of their respective annuities and dividends received from the WRS. They later filed a claim for refund for those years, on the basis that a portion of the income earned by the PETF was derived from obligations of the U.S. government and was thus exempt from taxation by the state. They did not claim a refund associated with their **initial** WRS annuities, but rather just on that portion of the **dividends** they believed was derived from interest on U.S. government obligations. The department denied their claim for refund, asserting that tax exempt interest does not retain its character when it passes through a qualified retirement plan, such as the WRS.

During the period for which the taxpayers claimed a refund, an undetermined portion of the investment return credited to the PETF was based on interest on obligations of the U.S. government. Wisconsin taxed the taxpayers' annuities (including dividends) by imposing the income tax on the total annuity received, reduced by any unrecovered cost basis. Their Wisconsin income tax liability was not measured by, computed by, or affected in any way by the income the PETF receives on U.S. government obligations.

The Commission concluded that Wisconsin's taxation of the taxpayers' WRS annuity dividends did not violate 31 U.S.C. sec. 3124(a), because the amount of interest on U.S. government obligations was not considered, either directly or indirectly, in the calculation of the tax.

The taxpayers' reliance on *Capital Preservation Fund, Inc. v. Department of Revenue*, 145 Wis. 2d 841 (Ct. App. 1988), in which the Court of Appeals held that income derived by a money market fund from U.S. government obligations and distributed to the fund's shareholders could not be subjected to tax by the State, is misplaced in two respects. First, unlike the fund in *Capital Preservation*, the PETF is not a conduit or pass-through entity. Moreover, since the Employe Trust Funds Board is not obligated to distribute surpluses equally to all classes of annuitants, the amount of the taxpayers' dividends is not necessarily proportional to the amount of interest credited to the PETF deriving from U.S. government obligations. Secondly, the taxpayers do not have an ownership interest in the U.S. government securities at issue. In *Capital Preservation*, the Court of Appeals held that 31 U.S.C. sec. 3124(a) protects only the taxpayer who has the right to dispose of the government securities and who bears the risk of profit or loss.

The taxpayers have not appealed this decision. □

Retirement funds exempt. *Donald and Janet Groschel vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 19, 1996). The issue in this case is whether or not annuity payments received by taxpayer Donald Groschel (the taxpayer) were "paid on the account of [a] person who was a member of [the Milwaukee teachers' annuity and retirement fund] as of December 31, 1963," and are thus exempt from Wisconsin income taxation under sec. 71.05(1)(a), Wis. Stats.

The taxpayer was a teacher in the City of Milwaukee Public School system from September 1958 until June 1967, and he became a member of the Milwaukee teachers' annuity and retirement fund ("MRF") beginning about September 1958. He left the Milwaukee Public School system in June 1967 to take a teaching position in another school district, and he became a member of the State Teachers Retirement System ("STRS") on or about July 1, 1967. The MRF and STRS were merged into the Wisconsin Retirement System ("WRS") in 1982.

In September 1968, the taxpayer withdrew from the MRF all of his contributions to the MRF, leaving on account for him no contributions from either him or the state. On May 24, 1990, the taxpayer purchased from the WRS nine years of previously forfeited Milwaukee teaching service.

The taxpayer retired on June 9, 1990, and began receiving a retirement annuity based on his age, three highest years of income as a teacher, service under the STRS, and his years of creditable service purchased in May 1990. In August 1994, taxpayers Donald and Janet Groschel filed with the department joint amended income tax returns for 1990 through 1993, claiming refunds of income taxes for taxes previously paid on Mr. Groschel's retirement annuity from he WRS.

The Commission concluded that even though the taxpayer was a member of the MRF on December 31, 1963, that alone is not sufficient to qualify for the exemption under

sec. 71.05(1)(a), Wis. Stats., because the statute exempts payments "***paid on the account*** of any person who was a member of [the MRF] as of December 31, 1963." [Emphasis supplied.] When the taxpayer withdrew his contributions from the MRF, there was nothing in his MRF account, either in the form of his contributions or state contributions. Therefore, his WRS annuity payments are not exempt from the income tax, because they are not paid on his MRF account that existed as of December 31, 1963. The taxpayer's repurchase of previously forfeited MRF years of creditable service does not reinstate credit in his retirement deposit fund.

The taxpayers have appealed this decision to the Circuit Court. □

Tax Appeals Commission – class action claims; Petition for judicial review – timeliness. *Wisconsin Department of Revenue vs. J. Gerard and Delores M. Hogan, et al.* (Court of Appeals, District IV, December 21, 1995). See *Wisconsin Tax Bulletin* 96 (April 1996), page 15, for a summary of the Court of Appeals decision.

The taxpayers appealed the Court of Appeals decision to the Wisconsin Supreme Court, which denied their petition for review. In *Wisconsin Tax Bulletin* 98 (July 1996), page 18, it was reported that the taxpayers filed a petition for writ of certiorari with the United States Supreme Court.

In October 1996, the United States Supreme Court denied the taxpayers' petition for writ of certiorari. The case will not be heard by the United States Supreme Court. □

CORPORATION FRANCHISE AND INCOME TAXES

Apportionment – air carriers – interstate. *United Parcel Service Co. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, July 31, 1996). United Parcel Service Company (UPSCO) appeals from a Circuit Court order affirming a decision of the Wisconsin Tax Appeals Commission. The Commission upheld UPSCO's franchise tax assessments for 1985 and 1986 imposed by the Wisconsin Department of Revenue using the apportionment formula under Wisconsin Administrative Code section Tax 2.46. For summaries of the prior decisions, see *Wisconsin Tax Bulletins* 90 (January 1995, page 20) and 95 (January 1996, page 25).

UPSCO contends:

(1) the apportionment formula, as applied by the department, violated the Due Process and Commerce Clauses of the United States Constitution because one of the factors used in the apportionment formula (the arrivals and departures factor) is unrelated to UPSCO's Wisconsin income, and the use of that factor attributed income to Wisconsin out of all proportion to the business transacted in Wisconsin;

(2) the department erroneously refused to modify the arrivals and departures factor under sec. 71.07(3) and (5), Wis. Stats. (1985-86); and

(3) Wisconsin Administrative Code section Tax 2.46 should be interpreted to require the arrivals and departures factor to be calculated using the takeoff and landing weight of arriving and departing aircraft, rather than the raw number of such aircraft.

The Court of Appeals rejected each of these contentions and affirmed the decision of the Circuit Court.

(1) UPSCO has failed to meet its burden of proving by clear and cogent evidence that the apportionment formula, as applied by the department, attributed income to Wisconsin "out of all appropriate proportion" to the business transacted in Wisconsin, or "led to a grossly distorted result." As noted by the Circuit Court, the average variance in the percentage of UPSCO's income apportioned to Wisconsin between the parties' disputed methods in the years 1985 and 1986 is approximately 1.5 percent. In light of the Wisconsin Supreme Court's conclusion in *Consolidated Freightways*, 164 Wis. 2d 764 (1991), that a 1.1 percent increase was constitutionally acceptable, the Court of Appeals cannot conclude that a 1.5 percent increase constitutes clear and cogent evidence that the apportionment formula under Wisconsin Administrative Code sec. Tax 2.46, as applied to UPSCO, is unconstitutional.

In *Consolidated Freightways*, the Wisconsin Supreme Court looked at whether the overall apportionment formula produced a fair apportionment. Following *Consolidated Freightways*, the focus of inquiry is on the apportionment formula as a whole, not on a single factor. Moreover, even if the arrivals and departures factor were looked at in isolation, the Court of Appeals would conclude it bears a reasonable relationship to the taxpayer's business.

(2) Section 71.07(3), Wis. Stats. (1985-86), does not apply to UPSCO. By its plain terms, it

applies only to the apportionment formula that is applied to corporations, nonresident individuals, and nonresident estates and trusts. That formula is set out in sec. 71.07(2)(a)-(cr), Wis. Stats. (1985-86). The apportionment of financial organizations and public utilities, such as UPSCO, is separately provided for in sec. 71.07(2)(e), Wis. Stats. (1985-86), and Wisconsin Administrative Code section Tax 2.46. For the same reason, sec. 71.07(5), Wis. Stats. (1985-86), does not apply. That section provides an alternative method of apportionment, but only for corporations, nonresident individuals, and nonresident estates and trusts.

(3) Wisconsin Administrative Code section Tax 2.46(1) plainly provides that the factor consists of "aircraft arrivals and departures." There is no suggestion in the rule that the arrivals and departures should be weighted. While a weighted factor may be more accurate, it is up to the department, not the Court of Appeals, to change its rule.

The taxpayer appealed this decision to the Wisconsin Supreme Court, which denied the petition for review. □

Nexus – business loss carryforward. *Extrusion Dies, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 21, 1996). The issue in this case is whether EDC International Corp. had sufficient activity within the state of Wisconsin to constitute nexus and may, therefore, be considered "doing business" or "engaged in business" here for purposes of Wisconsin's franchise tax during the fiscal year ending January 31, 1989.

The taxpayer is arguing nexus existed and the department is claiming that it did not. The parties take up these positions because the taxpayer seeks to take advantage of a net business loss carried forward from the year in question. The taxpayer may claim this loss only if it was doing business in Wisconsin and, therefore, subject to the Wisconsin corporate franchise or income tax during the taxable year in which the loss was sustained. Section 71.26(4), Wis. Stats.

In 1986, John Altmann formed EDC International Corp. to purchase the shares of Extrusion Dies, Inc., a Wisconsin corporation.

EDC Acquisition Corp. purchased all of the stock of EDC International Corp. on October 14, 1988. Prior to and after being acquired by EDC Acquisition Corp., EDC International Corp. held 100% of the stock of Extrusion Dies, Inc. EDC Acquisition Corp. merged into EDC International Corp. on October 14, 1988. The surviving corporation was called EDC International Corp.

EDC International Corp. was a corporation organized and formed under the laws of Delaware and authorized to do business in the state of Wisconsin. The corporation's primary business during the period under review was that of a holding and management company.

Extrusion Dies, Inc., was a Wisconsin corporation that existed from 1971 to January 18, 1989. It was a manufacturer of dies and die parts sold primarily to plastics manufacturers. On January 18, 1989, Extrusion Dies, Inc., merged into EDC International Corp. EDC International Corp. changed its name to Extrusion Dies, Inc., a Delaware corporation, on January 18, 1989. Extrusion Dies, Inc., a Delaware corporation, is the only surviving entity of the three corporations.

The surviving corporation, Extrusion Dies, Inc., a Delaware corporation, is a manufacturer of dies and die parts that are sold primarily to plastics manufacturers.

EDC International Corp. filed a corporate income tax return in the state of Delaware for the period February 1, 1988, to January 31, 1989, claiming 100% of the following:

Interest Expense (Bonds)	$ 986,107
Loan Fees	74,532
Non-Compete Agreement Amortization	142,857
Additional Interest Expense	106,302
Due	260
Total Loss Claimed	$1,310,058

The expenses described above were added into federal income on the corporate franchise tax return filed by Extrusion Dies, Inc., a Wisconsin corporation, for the tax year ending January 31, 1989. This return was signed on April 17, 1989.

A Wisconsin Department of Revenue Form 5 for the tax year ended January 31, 1989, was filed by Extrusion Dies, Inc., a Delaware corporation, on April 15, 1993, claiming the following expenses:

Interest Expense (Bond)	$ 986,107
OID Amortization	208,615
Amortization of Loan Fees	74,532
Amortization of Non-Compete Agreement	142,857
Total Expenses Claimed	$1,412,111

This return was amended and filed on or about May 15, 1995.

The officers and directors of EDC International Corp. prior to October 14, 1988, were John Altmann, a Wisconsin resident and president of Extrusion Dies, Inc., a Wisconsin

corporation; D.E. Minard, a New York resident; and E.L. Hoffman, a New York resident.

After the merger of EDC International Corp. and Extrusion Dies, Inc., a Wisconsin corporation, the officers and directors were John Altmann (a Wisconsin resident), Arthur Wadman (a New York resident), James L. Flanagan, a certain Mr. Postlewaite, Vernon J. Krupa, David A. Decker, James P. Thornton, Harry G. Lippert, Carl D. Gengelbach, John P. Boxtrom, Darold R. Schuster, and Donald R. Garton (all Wisconsin residents). All officers and directors, with the exception of Mr. Postlewaite, were employes of Extrusion Dies, Inc.

The records of EDC International Corp. were kept in the offices of Extrusion Dies, Inc., in Chippewa Falls, Wisconsin. Extrusion Dies, Inc., did not charge EDC International Corp. for the use of its space.

The accounting functions for EDC International Corp. were performed by Darold Schuster, a Wisconsin resident. Extrusion Dies, Inc., a Wisconsin corporation, did not charge EDC International Corp. for Mr. Schuster's services. Tax returns and other financial reports were prepared by Virchow, Krause, Hegelson & Co., in Eau Claire, Wisconsin.

EDC International Corp. maintained its banking accounts at Fleet National Bank, Boston, Massachusetts.

The meetings of the Board of Directors of EDC International Corp. were held in Wisconsin.

EDC International Corp. did not have any paid employes and did not own or lease an office in any state. The mailing address for EDC International Corp. was 911 Kirth, Chippewa Falls, Wisconsin.

EDC International Corp. and Extrusion Dies, Inc., prior to 1988 maintained separate financial and banking accounts.

The Commission concluded the during its taxable year ending January 31, 1989, EDC International Corp. was not "engaged in business" or "doing business" in Wisconsin within the meaning of secs. 71.22(11) and 71.23, Wis. Stats.

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

SALES AND USE TAXES

Computer software — tangible vs. intangible. *Wisconsin Department of Revenue vs. Manpower International, Inc.* (Court of Appeals, District IV, August 22, 1996). See *Wisconsin Tax Bulletin 99* (October 1996), page 19, for a summary of the Court of Appeals decision that stated the taxpayer's sales of prewritten computer software, from 1987 though 1990, were not subject to Wisconsin sales or use tax.

As reported in *Wisconsin Tax Bulletin 99* (October 1996), page 19, the department appealed the Court of Appeals decision to the Wisconsin Supreme Court. The Wisconsin Supreme Court denied the department's petition for review in a notice dated December 17, 1996. Therefore, the Court of Appeals decision is final. □

Manufacturing – testing the manufactured product. *Cherney Microbiological Services, Ltd. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 23, 1996, May 3, 1996, and July 15, 1996). The issues in this case are:

A. Whether one may claim exemption from Wisconsin sales and use tax under sec. 77.54(2), Wis. Stats., for purchases of materials which are consumed or destroyed in the process of quality control testing of product samples drawn from a manufacturing line, where the purchaser of the materials is not itself a manufacturer but consumes the materials in performing its testing service for a manufacturer.

B. Whether the taxpayer has demonstrated by clear evidence that it is entitled to the consumed materials exemption under sec. 77.54(2), Wis. Stats.

During the period from January 1, 1989 through December 31, 1992 ("the period under review"), the taxpayer was a Wisconsin corporation engaged in the business of providing microbiological testing services to its customers. The taxpayer's services predominantly included testing sample materials provided by its customers for the presence of certain pathogens, including but not limited to salmonella, listeria, E. coli, and staphylococcus aureus. In many cases, these tests were either required to be performed by the taxpayer's customers according to the regulations of either the United States Department of Agriculture ("USDA") or the Food and Drug Administration ("FDA") or according to protocol determined from the pronouncements of these agencies. As such, these tests were part of the quality control program of the taxpayer's customers.

In the process of performing its various tests upon the samples provided to it by customers, the taxpayer consumed or used various supplies and equipment, including test kits, culture media, chemicals, and sterile containers. In many cases, the

equipment or supplies consumed had been purchased from out-of-state vendors, and no Wisconsin sales tax was self-assessed or paid. These materials were purchased and stored in bulk, and were not necessarily allocated to specific jobs.

Virtually all of the tests conducted by the taxpayer during the period under review were performed upon samples provided by food manufacturers which were drawn from the customer's production lines, i.e., that portion of the manufacturing process after the raw material phase but before the packaging and placement in inventory of finished goods.

During the period under review, the taxpayer at times performed tests upon customer samples not drawn from manufacturing production processes. These included: (1) proficiency tests which were coordinated by the taxpayer to gauge and calibrate the accuracy of sample test methods, (2) tests performed upon well water samples of certain non-manufacturing customers, and (3) tests performed upon samples provided by manufacturing customers which were drawn from outside the manufacturing process, i.e., from the raw material or finished goods phase of the production process.

Based upon a ratio of proficiency test revenue to total revenue in 1992, a representative year, the taxpayer's proficiency testing activity comprised approximately 2.1% of its business. By reasonable inference, the taxpayer's proficiency testing activity comprised approximately 2.1% of its consumption of equipment and supplies.

Well water testing for non-manufacturing customers comprised 0.5% of the taxpayer's tests performed during 1992, a representative year. By reasonable inference, the taxpayer's non-manufacturing well water tests comprised 0.5% of its consumption of equipment and supplies.

The taxpayer at times performed tests upon raw material samples provided by its customers, and also performed tests upon finished goods samples, for example, as a potential product recall precaution. These types of tests occurred in rare instances, however, during the period under review.

The Commission concluded:

A. One may claim the consumed materials exemption from Wisconsin sales and use tax under sec. 77.54(2), Wis. Stats., for purchases of materials which are consumed or destroyed in the process of quality control testing of product samples drawn from a manufacturing line, where the purchaser of the materials is not itself a manufacturer but consumes the materials purchased in performing its testing service for a manufacturer.

B. The taxpayer has demonstrated by clear evidence that it is entitled to the consumed materials exemption under sec. 77.54(2), Wis. Stats., because virtually all of its quality control tests are performed on samples for manufacturing customers drawn from the manufacturing process line, which testing has been determined previously by the department to be "in the manufacture" of tangible personal property when performed by the manufacturer. To the extent that levels of non-manufacturing testing have been quantified as to frequency of performance or percentage of gross revenues, however, materials consumed to perform such testing are not exempt.

The department did not appeal the decision but has adopted a position of nonacquiescence relating to equipment and other items not incorporated, consumed, or destroyed in performing testing services on work-in-process samples for manufacturers. □