

The text of Tax 11.68(1) and (4)(b)2 is as follows:

Tax 11.68(1) DEFINITION. In this section, “real property construction activities” means activities that occur at a site where tangible personal property that is applied or adapted to the use or purpose to which real property is devoted is affixed to that real property, if the intent of the person who affixes that property is to make a permanent accession to the real property. “Real property construction activities” do not include affixing to real property tangible per-

sonal property that remains tangible personal property after it is affixed.

(4)(b)2. Taxable services which a construction contractor will resell may be purchased without tax for resale.

Tax 11.70 Advertising agencies. Subsection (3)(m) is created, to reflect the amendments of sec. 77.51(18) and (22)(a) and creation of sec. 77.54(43), Wis. Stats., by 1997 Wisconsin Act 27. The text of Tax 11.70 (3)(m) is as follows:

Tax 11.70(3)(m) Raw materials processed, fabricated or manufactured into, attached to or incorporated into printed materials that are transported and used solely outside Wisconsin.

Example: Company A, located in Wisconsin, publishes catalogs it gives away to potential customers. Company A purchases paper from a company who delivers it to a Wisconsin printer that prints the catalogs for Company A. The catalogs are transported and used solely outside Wisconsin.

The paper purchased by Company A for the catalogs is exempt from Wisconsin sales or use tax. □



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:

The taxpayer filed a 1996 “Wisconsin Income Tax” Form 1. She entered zeros on each line of the Form 1 except the lines for income tax withheld, total credits against income tax due, and amount of refund. On those three lines she entered “3,857.03.”

Two wage statements attached to the return showed income totaling \$65,342 and state income tax withheld totaling \$3,857.03. The federal Form 1040 copy attached to the Form 1 also had all zeros except for the withholding, total payments, amount overpaid, and refund lines.

The taxpayer’s basic argument before the Commission was that neither the Wisconsin statutes nor federal laws are worded properly to require her to pay a tax on her income. She argued that because Article VIII, Section 1 of the Wisconsin Constitution authorizes the imposition of taxes on “incomes” and sec. 71.02(1), Wis. Stats., imposes a tax on “net incomes of individuals,” no Wisconsin statute

Individual Income Taxes

Assessments - estimated
Susan Boon (p. 12)

Marital property income - notification
Marital property income - tax liability
Jeffrey E. Davis (p. 13)

Nonresident alien - taxable income
Tian Zhang (p. 13)

Corporation Franchise and Income Taxes

Business loss carryforward - reorganization
Caterpillar Inc. (p. 14)

Dividend received deduction
First Wisconsin National Bank of Milwaukee (p. 15)


Sales and Use Taxes

Boats, vessels and barges - nonresident purchases
Charles K. Harder (p. 15)

Officer liability
Joseph A. Balistreri (p. 16)

Services subject to the tax - producing, fabricating, and processing
Hammersly Stone Company, Inc. (p. 16)

INDIVIDUAL INCOME TAXES

 **Assessments – estimated.**
Susan Boon vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 8,

1999). The issue in this case is whether Wisconsin statutes properly impose a tax on “incomes” as authorized by Article VIII, Section 1 of Wisconsin’s Constitution.

properly imposes a tax on “incomes.”

The Commission concluded that Wisconsin’s statutes and the federal laws which the state statutes adopt clearly impose Wisconsin’s income tax on the taxpayer’s wages which are reflected on her two 1996 Forms W-2. In addition, the department properly issued an estimated assessment under sec. 71.74(3), Wis. Stats., because the taxpayer did not file a complete and proper Wisconsin income tax return for 1996.

The Commission further assessed the taxpayer an additional \$500, pursuant to sec. 73.01(4)(am), Wis. Stats., on the basis that her position is frivolous and groundless.

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

■ Marital property income – notification; Marital property income – tax liability. *Jeffrey E. Davis vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 30, 1999). The issues in this case are:

- A. Whether the taxpayer failed to notify his then-spouse about the amount and nature of marital property income he did not report to the department, so that the department may not apply the income-splitting provisions of ch. 766, Wis. Stats., in assessing him on the income for 1992 and 1993.
- B. What is the taxpayer’s liability to the department for 1992 and 1993 Wisconsin income taxes under the terms of his divorce from his former wife?

The taxpayer and Deborah Zydowicz (“Deborah”) were married and resided together during 1992 and 1993, the period under review.

All of their income for that period was marital property income.

The taxpayer and Deborah did not timely file Wisconsin income tax returns for 1992 and 1993. The taxpayer filed his 1992 and 1993 returns in November 1995, using “married filing separate return” filing status. Deborah filed her 1992 and 1993 returns in November 1996.

During both years the taxpayer’s principal business was furniture refinishing/woodwork repair, a sole proprietorship in his name. Deborah assisted him in maintaining the business books and records, except for December 1993. Deborah did not work outside the home in 1992; in 1993 she earned adjusted gross income of \$2,534.

The taxpayer and Deborah separated in January 1994. She remained in the marital residence, where most of the business records were kept, until April 1994, when she moved out and the taxpayer returned. Deborah took some of the parties’ financial records with her, which were returned to the taxpayer in May 1995. The parties were divorced in November 1994.

The taxpayer’s divorce judgment provided that each party shall be solely responsible for his or her own individual tax liabilities.

The Commission concluded as follows:

- A. Notification was not required for 1992, because the parties were married as of April 15, 1993, the due date of the 1992 tax return, and both parties were aware of the income. The department may assess the taxpayer for taxes on only one-half of the marital property income for 1992.

Notification was required for 1993, because Deborah did not have complete information as to income for 1993 as of April 15, 1994, the due date of the 1993 tax return. The taxpayer failed to notify Deborah about the amount and nature of marital property income for 1993 before the filing deadline. The department therefore properly assessed him for all of the 1993 Schedule C income.

- B. Even though the taxpayer’s divorce decree provides that he is liable for one-half of his and Deborah’s total tax liabilities for 1992 and 1993, the department is bound by sec. 71.10(6m), Wis. Stats., not the divorce decree. The taxpayer’s liability is therefore as provided in conclusion A.

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

■ Nonresident alien – taxable income. *Tian Zhang vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 8, 1999). The issue in this case is whether the taxpayer is entitled to exemption from Wisconsin income tax for 1992 and 1993, under the U.S./China Treaty.

The taxpayer applied for and received an F-1 Visa and entered the United States in July 1990. The Form I-20 shows that she entered the United States for the sole purpose of pursuing her educational studies in computer sciences.

During the years at issue, 1992 and 1993, the taxpayer was a resident of the People’s Republic of China. As part of her doctorate program, she was required to take courses and to student teach. She was granted a

change of visa status from F-1 to an H-1B Visa for the period September 8, 1992 to June 7, 1993. This change was needed before she could teach at the University of Wisconsin-Oshkosh. She was a temporary lecturer there for the fall semester of 1992 through the spring semester of 1993.

The taxpayer filed nonresident income tax returns, Forms 1NPR, for 1992 and 1993. On those returns she deducted her wage income of \$20,078 and \$25,989, respectively. On both returns she stated that she believed the income was not subject to tax under Article 19 of the Agreement between the United States government and the government of the People's Republic of China ("the Treaty").

The department determined that the taxpayer did not qualify for exemption under Article 19 of the Treaty and in September 1996 issued a Notice of Amount Due.

The Commission concluded that the income received by the taxpayer in 1992 and 1993 for teaching may not be excluded from income.

The taxpayer has not appealed this decision.

CORPORATION FRANCHISE AND INCOME TAXES

Business loss carryforward – reorganization. *Caterpillar Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 25, 1999). The issues in this case are:

A. Whether the Wisconsin net business losses for tax years 1982 through 1984 sustained by Caterpillar Tractor Co. prior to its merger into the taxpayer on May 8, 1986, may be carried forward to offset Wisconsin net

business income for tax year 1986, pursuant to sec. 71.06(1), Wis. Stats.(1985-86).

B. Whether those same losses may be carried forward to offset Wisconsin net business income for tax years 1987 through 1990, pursuant to sec. 71.26(3)(n) and (4), Wis. Stats. (1987-88).

The taxpayer, a Delaware corporation, is engaged in the business of designing, manufacturing, and marketing, in Wisconsin and elsewhere, earthmoving, construction, and materials-handling machinery and related parts and equipment, as well as engines for that machinery and other applications.

Caterpillar Tractor Co. was incorporated in California in the 1920s. In 1986 the company changed its name to remove the reference to a single product and better reflect the scope of the company's business operations. It incorporated a new entity, Caterpillar Inc. ("the taxpayer") in Delaware as a wholly owned subsidiary of the existing entity, which immediately merged into the taxpayer effective May 8, 1986.

The change in the state of incorporation was made to obtain the benefits of Delaware corporate law, specifically with respect to anti-takeover provisions. The reorganization had no effect on the substance of the trade or business transacted by the taxpayer. There was no change in ownership, and all shares of common stock were converted to shares of the taxpayer's common stock. Certificates representing shares of Caterpillar Tractor Co. stock were deemed for all purposes to represent shares of the taxpayer's stock.

The officers and directors remained the same for both corporations, and the bylaws continued in effect for

the taxpayer. No distribution of any property was made by reason of the reorganization. The taxpayer succeeded to all rights, privileges, powers, and property of Caterpillar Tractor Co., and the taxpayer assumed all its assets and liabilities. The taxpayer continued to compare its operations and financial performance to Caterpillar Tractor Co.'s historical performance and maintained its federal identification number.

For federal income tax purposes, the reorganization constituted a nontaxable reorganization under Internal Revenue Code (IRC) sec. 368(a)(1)(F), and the taxpayer succeeded to and took into account the tax attributes of Caterpillar Tractor Co., pursuant to IRC sec. 381.

Caterpillar Tractor Co. sustained Wisconsin net business losses in 1982, 1983, and 1984. It carried forward and used part of the loss in 1985 and carried forward the balance to 1986.

The taxpayer used part of the losses carried forward from 1982 to 1984 on each of its 1986 through 1990 Wisconsin corporate franchise tax returns. The department disallowed the business losses carried forward for the portion of 1986 after the reorganization, and for all of 1987 through 1990.

The Commission concluded as follows:

A. The taxpayer is not entitled to deduct losses incurred by Caterpillar Co. with respect to that portion of 1986 following the May 8, 1986, corporate reorganization, because the taxpayer is not the corporation that incurred the losses. This was a requirement under Wisconsin law for 1986, the year before the federalization of Wisconsin's

corporate and franchise tax took effect.

- B. The taxpayer may deduct losses incurred by Caterpillar Tractor Co. with respect to 1987 through 1990, because the federalization of IRC sec. 381 is not limited to corporate reorganizations occurring after January 1, 1987, as contended by the department.

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

Dividend received deduction. *First Wisconsin National Bank of Milwaukee vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 12, 1999). The issue in this case is whether the department properly disallowed the taxpayer's deduction of dividends received from the Federal Reserve Bank.

In May 1992 the taxpayer filed a claim for refund relating to distributions it contends should be excluded from Wisconsin taxable income pursuant to the decision in *NCR Corporation v. Wisconsin Department of Revenue*, CCH # 203-301 (WTAC February 10, 1992). In June 1992 the department notified the taxpayer of adjustments to its taxable income for tax years 1983 to 1986. The department, as part of that notice, denied the claims for refund for those years, as well as the claim that increases the taxpayer's net operating loss for 1987. The period under review is therefore tax years 1983 to 1987.

The taxpayer filed a petition for redetermination in August 1992 for all tax years under review. In response, the department allowed a deduction for dividends received from the ownership of stock in companies other than governmental entities. The department disallowed deductions for distributions from the

Federal Reserve Bank ("FRB"), the Federal National Mortgage Association ("Fannie Mae"), and the Student Loan Marketing Association ("Sallie Mae"). The department subsequently withdrew its disallowance of deductions for distributions received from Fannie Maes and Sallie Maes. Thus, the only issue remaining is the disallowance of deductions for distributions received from the FRB.

The taxpayer timely filed a petition for review with the Commission. The taxpayer challenged the department's action under the dividend deduction statute as barred by the constitutional doctrine of intergovernmental tax immunity. The taxpayer also contended that the denial of a deduction for dividends received from the FRB amounts to a state taxation of a federal obligation, which is prohibited under 31 U.S.C. sec. 3124(a).

The Commission concluded that the department properly denied the taxpayer's deductions for Federal Reserve Bank dividends received, because the FRB does not meet all the valid requirements of the dividend received statute, sec. 71.04(4), Wis. Stats. (1985-86) and sec. 71.26(3)(j), Wis. Stats. (1987-88). These statutes were not entirely invalidated by the decision in *NCR v. Department of Revenue*, but are severable pursuant to sec. 990.001(11), Wis. Stats. The department's action is not barred by the doctrine of intergovernmental tax immunity or by 31 U.S.C. sec. 3124(a).

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

SALES AND USE TAXES

Boats, vessels and barges - nonresident purchases.

Charles K. Harder vs. Wisconsin Department of Revenue (Circuit

Court for Dane County, March 18, 1999). The Wisconsin Tax Appeals Commission issued a decision on August 19, 1998, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 112 (January 1999), page 23, for a summary of the Commission's decision. The issue in this case is whether the Commission correctly held that the purchase of a sailboat occurred in Minnesota, within the meaning of sec. 77.51(14r), Wis. Stats.

The taxpayer, a Minnesota resident, purchased a sailboat. The taxpayer and the sellers met in Minnesota to close on the sale. At closing, the taxpayer and the sellers executed a Bill of Sale that transferred the sellers' "right, title, and interest" in the sailboat to the taxpayer. The taxpayer took physical possession of the sailboat several weeks later in Wisconsin. The sailboat continued to be berthed and used in Wisconsin. The taxpayer's purchase of the sailboat was an exempt occasional sale under the laws of Minnesota.

The Commission determined that the taxpayer's purchase of the sailboat was exempt under sec. 77.53(17m), Wis. Stats., which provides a use tax exemption for "... a boat purchased in a state contiguous to this state by a person domiciled in that state if the boat is berthed in this state's boundary waters adjacent to the state of the domicile of the purchaser and if the transaction was an exempt occasional sale under the laws of the state in which the purchase was made."

The Circuit Court reversed the Commission's decision and concluded that the purchase of the sailboat did not occur in Minnesota. Section 77.51(14r), Wis. Stats., provides that "A sale or purchase involving transfer of ownership of property shall be deemed to have been completed at the time and place

when and where possession is transferred by the seller . . . to the purchaser . . .” The Circuit Court determined that sec. 77.51(14r), Wis. Stats., refers to when and where physical possession is transferred by the seller.

The taxpayer has not appealed this decision. □

Officer liability. *Joseph A. Balestrieri vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, December 3, 1998). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated June 2, 1998. See *Wisconsin Tax Bulletin* 111 (October 1998), page 19, for a summary of the Commission’s decision. The issue in this case is whether the Commission correctly held that the taxpayer is a responsible person under sec. 77.60(9), Wis. Stats., and thus liable for the unpaid sales taxes of Riverside Theatre (“the corporation”).

The Circuit Court affirmed the Commission’s decision and concluded that the taxpayer had the **authority** to pay the sales taxes, he had the **duty** to pay the sales taxes, and he **intentionally breached his duty** in his failure to pay these taxes.

The taxpayer was president of the corporation with signature **authority** on its three checking accounts. He signed checks for the corporation and entered into an agreement with the department acknowledging the sales tax delinquency and agreeing to pay it; therefore, the taxpayer had the **authority** to pay the taxes. As the president, director, and operational manager of the corporation, the taxpayer had a **duty** to pay the sales tax. The taxpayer **intentionally breached that duty** by making the decision to use corporate funds to pay other creditors with the knowledge of sales tax being due.

The taxpayer has not appealed this decision. □

Services subject to the tax – producing, fabricating, and processing. *Hammersley Stone Company, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, December 21, 1998). The Wisconsin Tax Appeals Commission issued a decision on August 17, 1998, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 112 (January 1999), page 27, for a summary of the Commission’s decision.

The department filed a motion to dismiss the petition for judicial review, on the grounds that service was not properly made.

The Circuit Court granted the department’s motion to dismiss.

The taxpayer has not appealed this decision. □