



## 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

Business expenses – employe business expense	
Bad Debts	
<i>Philip and Patricia Sunich</i> .....	26
Declaratory judgment – partial veto	
<i>Glenn Schmidt</i> .....	27
Refunds claims for – statute of limitations	
<i>Kurt H. Van Engel</i> .....	27

### Individual and Fiduciary Income Taxes

Distributable net income	
<i>Edmund R. Gilson, et al.</i> .....	28

### Corporation Franchise and Income Taxes

Apportionment, payroll factor	
Interest income, United States obligations	
<i>Milwaukee Safeguard Insurance Co. and Milwaukee Guardian Insurance, Inc.</i> .....	29
Deductions, taxes – single business taxes	
<i>Delco Electronics Corporation</i> .....	30
Filing requirements, who must file – health maintenance organizations	
<i>Group Health Cooperative of Eau Claire, et al.</i> 30	
Loss deductions (prior law)	
Interest on assessments and refunds	
<i>Madison Gas and Electric Company</i> .....	30

### Sales and Use Taxes

Containers	
<i>Luetzow Industries</i> .....	31
Motor vehicles and trailers - nonresident purchases	
<i>Johnson Welding &amp; Manufacturing Co., Inc. a/k/a Johnson Truck Bodies</i> .....	31
Officer liability	
<i>Fidelis Omegbu</i> .....	32

### Sales and Use Taxes, and Withholding of Taxes

Officer liability	
<i>Danny R. Senf</i> .....	32

### Withholding of Taxes

Officer liability	
<i>Val Anderson, Jr.</i> .....	33

### Drug Taxes

Drug tax, appeals – timeliness	
Drug tax, claim for refund	
<i>David L. Gilbert</i> .....	33

## INDIVIDUAL INCOME TAXES

**Business expenses – employe business expense; Bad debts.** *Philip and Patricia Sunich vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 14, 1999). The issues in this case are:

- A. Whether the taxpayers substantiated, as required by sec. 274 of the Internal Revenue Code (IRC), the unreimbursed employe vehicle expense deductions claimed on their 1991 to 1994 Wisconsin income tax returns.
- B. Whether the taxpayers substantiated a worthless debt under IRC sec. 166, deductible as a short-term capital loss on their 1993 and 1994 Wisconsin income tax returns.


During the period under review, 1991 to 1994, Philip and Patricia Sunich were both employed. On their income tax returns they claimed itemized deductions for employe business expenses from federal Form 2106. Among the claimed expenses were vehicle expenses based on a claimed percent of vehicle business use. The department allowed some of the claimed expenses but disallowed other expenses as unsubstantiated.

The department also disallowed the taxpayers' claimed capital losses of \$3,000 for 1993 and \$3,000 for 1994, with respect to a default judgment obtained against Frederick Bon in 1993. This consisted of a defaulted promissory note as well as an additional amount for Mr. Bon's failure to share the cost of utilities and food when he resided with the taxpayers.

The Commission concluded as follows:

- A. The taxpayers did not substantiate, as required by IRC sec. 274, the vehicle expense deductions disallowed by the department. They also did not substantiate the percentages they claimed for business use of their vehicle.
- B. The taxpayers did not substantiate the nonbusiness bad debt for Mr. Bon's failure to share the costs of utilities and food. They did substantiate the nonbusiness bad debt that became worthless in 1993. The allowed bad debt is deductible as a short-term capital loss of \$500 in 1993, with \$500 deductible as a carryover in 1994. Wisconsin's annual net loss limitation is \$500.

The taxpayer has appealed this decision to the Circuit Court. The department has not appealed the decision. [☞](#)


 **Declaratory judgment – partial veto.** *Glenn Schmidt vs. Cate S. Zeuske, Secretary of Revenue* (Circuit Court for Dane County, September 9, 1999). The matter before the Circuit Court is the plaintiff's motion for summary judgment. The plaintiff maintains that he is entitled to judgment as a matter of law on his declaratory judgment action. He requests that the Court grant declaratory relief finding Governor Tommy Thompson's partial vetoes creating secs. 9256 and 285c of 1997 Wisconsin Act 237 to be invalid.

The two challenged sections of 1997 Wisconsin Act 237 provide for a one-time expansion of Wisconsin's school property tax credit for the 1998 tax year. On June 2, 1998, Governor Tommy Thompson approved parts of 1997 Assembly Bill 768, which became 1997 Wisconsin Act 237.

In October 1998, the plaintiff filed a complaint seeking a declaratory judgment that the Governor's partial veto of the challenged sections is invalid, and that those sections have become law without the approval of the Governor, in the form in which they were passed and enacted by the Legislature. The plaintiff submits that the partial veto is invalid because it did not result in a complete and workable law, and because the result constitutes an unlawful delegation of legislative power to the defendant.

The Circuit Court denied the plaintiff's motion for summary judgment on his declaratory judgment action. The Court found that the Governor's partial vetoes creating secs. 9256 and 285c of 1997 Wisconsin Act 237 are valid and constitutional. The Court thus granted summary judgment to the defendant and dismissed the plaintiff's declaratory judgment action.

The plaintiff has not appealed this decision. [🔗](#)

 **Refunds, claims for – statute of limitations.** *Wisconsin Department of Revenue vs. Kurt H. Van Engel* (Court of Appeals, District I, September 28, 1999). The department appeals from a judgment of the Circuit Court of Milwaukee County, dated February 17, 1998. For a summary of that decision, see *Wisconsin Tax Bulletin* 110 (July 1998), page 16.

The issue is whether the taxpayer was entitled to offset untimely claims for refund for tax years 1988 and 1989 against timely tax assessments for 1990 to 1992. The Circuit Court upheld the Commission's decision that the equitable recoupment doctrine applies in this case. The department argued that the Commission should not have applied the doctrine of equitable recoupment because the untimely refund claim and the timely assessment occurred within different transactions and in separate tax years. Alternatively, the department argued that the Commission improperly applied the doctrine because the taxpayer did not have "clean hands."

In May 1988, the taxpayer received notification that he was the target of a federal investigation. His attorney advised him to stop filing federal and state income tax returns while the investigation was ongoing, and he later advised him to stop filing returns while the federal

criminal charges were pending. Consequently the taxpayer did not file state tax returns for 1988 to 1992 but did make estimated tax payments.


In March 1995, after the taxpayer was acquitted of several tax-related charges and he pled guilty to a federal misdemeanor, he filed state income tax returns for all the missing years. He applied the refunds due him for 1988 and 1989 to the other years and calculated that he was due a net refund of over \$62,000.

The department refused to apply the 1988 and 1989 refunds to the other years' tax liability, citing sec. 71.75(2), Wis. Stats. (1993-94), the four-year statute of limitations. Further, in recognizing the bar created by sec. 71.77, Stats., the department made no additional assessments for 1988 or 1989. The department did assess the taxpayer \$21,020.46 for the years 1990 to 1992.

The Court of Appeals reversed the Commission's (and thus the Circuit Court's) decision and remanded the matter back to the Commission for an order consistent with this decision.

The taxpayer appealed this decision to the Wisconsin Supreme Court. On December 20, 1999, the Wisconsin Supreme Court denied the petition for review. [🔗](#)

## INDIVIDUAL AND FIDUCIARY INCOME TAXES

 **Distributable net income.** *Edmund R. Gilson; Margaret M. Gilson Estate, Dale T. Daniell and Judith E. Blazer; and Carl H. Stiehl and Cynthia F. Moeller-Stiehl vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 24, 1999, and August 27, 1999). This case involves assessments issued by the department in the alternative against 1) Edmund R. Gilson (“the taxpayer”) and 2) all of the other petitioners (“the moving petitioners”). The primary issue is whether distributions from the Margaret M. Gilson Estate to the taxpayer carried with them “distributable net income” (“DNI”), making them fully taxable to him.

Margaret M. Gilson died in March 1991. Prior to her death, she executed a last will and testament (“the will”), and in a separate instrument created the Margaret M. Gilson Revocable Trust (“the trust”).

In general, the will provided that Mrs. Gilson’s residence and all tangible personal property except jewelry were to be distributed in equal shares to her two daughters (two of the moving petitioners). Her jewelry and the residue of her estate were to be given to the trust. The taxpayer, Mrs. Gilson’s husband, could elect to take a Florida condominium and a Door County property that may have been part of the residue of the estate in accordance with certain terms of the trust document.

Following Mrs. Gilson’s death, the taxpayer and the estate could not agree on the dollar values to be inserted into the trust document’s formula to determine the value of his share. The value was determined in a settlement agreement entered into in September 1991 and amended in November 1991.

The settlement agreement provided that some of the assets would be distributed directly to the taxpayer from the estate, and not to the trust. With regard to the cash in the agreement, either the trust or the estate could pay these amounts to the taxpayer. The estate, not the trust, made the cash payments. Neither the settlement agreement nor its amendment contained any provision characterizing the tax attributes of any of the payments or distributions to the taxpayer.

The estate’s fiduciary income tax returns for fiscal years ending January 31, 1992 and 1993 showed that the estate’s distribution to the taxpayer carried out DNI, with respect to amounts reflected in the provisions in the settlement agreement. The taxpayer’s income tax returns for the years at issue did not reflect the estate’s position relating to DNI.

In May 1996 the department issued assessments in the alternative against the taxpayer and each of the moving petitioners. Each of the petitioners filed timely petitions for review with the Commission.

The Commission concluded that distributions to taxpayer Edmund R. Gilson under the settlement agreement carried with them distributable net income, because these payments were not bequests of a specific sum of money or of specific property within the meaning of sec. 663(a)(1) of the Internal Revenue Code (“IRC”). The “separate share rule” does not apply. Finally, the distributions were deductible to the estate because they were properly paid under IRC sec. 661(a).

Under the separate share rule, the taxpayer would be liable for no more than 25% of the trust DNI earned while he held a residuary interest in the trust. The separate share rule does not apply because the distributions were not made by the trust and were not made in satisfaction of a legal obligation of the trust under IRC sec. 662.

Taxpayer Edmund R. Gilson has appealed this decision to the Circuit Court. The department has not appealed the portion of the decision relating to the moving petitioners.

Following the June 24, 1999, decision and order, the taxpayer and the department filed a stipulation that resolved the remaining issues. Those issues were whether the taxpayer was to receive credit for deposits he paid and whether he owed the department any additional tax or interest. The stipulation provided that the taxpayer has deposited the tax and interest assessed against him. If his appeal to the Circuit Court is successful, he will be entitled to a refund of the amounts deposited, and if he does not prevail no further tax or interest will be owing. The August 27, 1999, ruling and order affirmed the department’s action on the taxpayer’s petition for redetermination, as modified by the stipulation. [↗](#)

## CORPORATION FRANCHISE AND INCOME TAXES

### Apportionment, payroll factor; Interest income, United States obligations.

*Milwaukee Safeguard Insurance Co. and Milwaukee Guardian Insurance, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 12, 1999). The issues in this case are:

- A. What the proper method is to apportion the taxpayers' income under secs. 71.43 and 71.45, Wis. Stats., for 1990 to 1993.
- B. Whether the taxpayers' interest income from U. S. Government securities was properly includible in their Wisconsin apportionable incomes for the years at issue.

In April 1996 the department issued assessments of additional Wisconsin franchise tax and interest for the years ending December 31, 1990, to December 31, 1993 ("the years at issue"), against each of the taxpayers. In June 1966 the taxpayers each filed a petition for redetermination with the department and timely deposited with the department the amount of franchise tax assessed, plus interest to that date.

In May 1997 the department issued notices of action granting in part and denying in part the taxpayers' petitions for redetermination. The taxpayers each filed a petition for review with the Commission in July 1997, and they filed amended petitions for review in January 1998.

Each taxpayer is a property and casualty insurance company domiciled in Wisconsin. Each is a domestic insurer, not engaged in the sale of life insurance, which, during the years at issue, collected premiums written where the subjects of insurance were resident, located or to be performed outside Wisconsin, within the meaning of sec. 71.45(3)(intro.), Wis. Stats.

Throughout the years at issue, 100% of the taxpayers' stock was owned by Milwaukee Insurance Group, Inc. ("MIG"), a publicly traded holding company domiciled in Wisconsin. During the period under review, Milwaukee Mutual Insurance Company ("Mutual"), a shareholder of MIG, owned 65.0% of the stock until June 10, 1993, and 48.5% thereafter. The remaining shares were held by the public in general. Mutual's percentage of ownership dropped below 50% on June 11, 1993, due to a second public stock offering of MIG stock.

After June 10, 1993, the taxpayers and Mutual were at no time part of the same controlled group as defined in sec. 267(f)(1) of the Internal Revenue Code ("IRC"). After that date Mutual owned less than 50% of MIG, and MIG owned 100% of the stock of each taxpayer, as well as each of three other companies.

The taxpayers had no employees and paid no payroll during the years at issue. All services performed for the taxpayers during those years were performed by employees of Mutual, for which the taxpayers paid Mutual a fee. Between 15.406% and 17.102% of each taxpayer's services performed by Mutual's employees for which the taxpayers paid a management fee were performed outside Wisconsin.


For purpose of sec 71.45(3)(b), Wis. Stats., the taxpayers' payroll paid outside Wisconsin and total payroll paid everywhere are both zero for 1993. The taxpayers and the department disagree as to the numerator and denominator of the payroll percentage for 1990 to 1992.

The taxpayers, Mutual, and another insurance company were members of a pooling agreement during the years at issue. In the department's audit and during its review of the petitions for redetermination, it accepted the taxpayers' use of the pooling agreement for determining the payroll apportionment factor as reported on their returns.

The parties have stipulated that these matters present certain issues, including the apportionment issue and the U. S. Government interest issue. They have also agreed to certain outcomes, depending on how the Commission resolves these issues.

The Commission concluded as follows:

- A. The payroll percentage under sec. 71.45(3)(b), Wis. Stats., is excluded from the average of percentages under sec. 71.45(3), Wis. Stats, with respect to an insurer who has no payroll.
- B. Interest on U. S. Government obligations was properly included in the taxpayers' respective apportionable incomes.

The taxpayers have not appealed this decision. The department has not appealed the decision but has adopted a position of nonacquiescence regarding the decision and order. The effect of this action is that the Commission's conclusions of law, the rationale and construction of statutes in this case are not binding upon or required to be followed by the department in other cases. 

**Deductions, taxes – single business taxes.** *Delco Electronics Corporation vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, May 13, 1999). This decision was summarized in *Wisconsin Tax Bulletin* 115 (October 1999), page 24. That summary indicated that the taxpayer had appealed the decision to the Wisconsin Supreme Court.

On September 28, 1999, the Wisconsin Supreme Court denied the taxpayer's petition for review. [☞](#)

**Filing requirements, who must file – health maintenance organizations.** *Group Health Cooperative of Eau Claire, Group Health Cooperative of South Central Wisconsin, and Family Health Plan Cooperative vs. Wisconsin Department of Revenue, et al.* (Court of Appeals, District I, August 10, 1999).

This case involves a constitutional challenge to portions of the 1995 Budget Bill, 1995 Wisconsin Act 27, that removed tax exemptions for benevolent organization-run health maintenance organizations. The taxpayers argue that the challenged portions violate (1) article IV, section 18 of the Wisconsin Constitution, Article IV, section 31 of the Wisconsin Constitution, and (3) the equal protection provisions of both the Wisconsin and the United States Constitutions. Also at issue is the assessment of property taxes, which will not be addressed in this summary.

In 1995, the Wisconsin Legislature passed certain revisions affecting the tax liability of entities that offer health maintenance organizations. Sections 71.26(1)(a) and 71.45(1), Wis. Stats., remove corporate income tax exemptions for income of “cooperative sickness care associations organized under s. 185.981, or a service insurance corporation organized under ch. 613, that is derived from a health maintenance organization.”

The Court of Appeals concluded that the challenged provisions of 1995 Wisconsin Act 27 do not violate any of the constitutional provisions cited.

The taxpayers have not appealed this decision. [☞](#)

**Loss deductions (prior law); Interest on assessments and refunds.** *Madison Gas and Electric Company vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, August 12, 1999). This is an appeal from a June 17, 1998, judgment of the Circuit Court for Dane County. See *Wisconsin Tax Bulletin* 111 (October 1998), page 15, for a summary of that decision. The issue is whether losses relating to a transmission line collapse in 1975 were properly deducted by the taxpayer in 1975, 1976, and 1977. An issue not reached by the Court of Appeals is whether, if the department's position is correct, underpayments for 1975 to 1977 should have been offset against an overpayment for 1978 when calculating interest (9% interest is paid on overpayments and 12% interest is charged on additional tax assessments).

In January 1975, the taxpayer's 63-mile transmission line between Madison and the south Fond du Lac substation collapsed and was totally destroyed. The taxpayer, which had no insurance to cover the loss, sued the consulting engineers who designed the line and supporting structures, the builder, and a railroad whose employe had cut a conductor after part of the line had fallen, causing the rest of the line to collapse.


Because of the collapse of the line, the taxpayer deducted losses on its 1975, 1976, and 1977 income tax returns. In 1978, the defendants in the taxpayer's lawsuit agreed to and paid a settlement amount, and the taxpayer declared that amount on its 1978 income tax return.

Subsequent to receiving notice of the recovery, the department issued an assessment for additional taxes due, in which it allowed only 15% of the losses to be deducted each year in 1975 to 1977 and permitted the major portion of the losses to be deducted in 1978. The department charged 12% interest on the additional taxes for 1975 to 1977 and allowed interest at 9% on the refund for 1978. The Tax Appeals Commission affirmed the department's action, and the Circuit Court reversed the Commission.

The Court of Appeals concluded that under sec. 71.04(7), Wis. Stats. (1975-76), the taxpayer properly deducted losses in 1975, 1976, and 1977 that occurred from the 1975 transmission line collapse. Since it reached that conclusion it did not address the question of netting overpayments of taxes against underpayments of taxes, and the resulting interest computations.

The department appealed this decision to the Wisconsin Supreme Court. On October 26, 1999, the Wisconsin Supreme Court denied the petition for review. [☞](#)


## SALES AND USE TAXES

 **Containers.** *Luetzow Industries vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 12 and September 8, 1999). The issues in this case are:

- A. Whether the taxpayer's sales of garment bags to dry cleaners are exempt under sec. 77.54(6)(b), Wis. Stats.
- B. Whether the taxpayer accepted exemption certificates in good faith from its customers for sales of garment bags.

On July 25, 1988, the department assessed the taxpayer for additional sales tax for the years 1984 to 1987. The basis of the assessment was that the gross receipts received by the taxpayer from the sales of plastic garment bags were subject to Wisconsin sales tax. The Court of Appeals determined that the taxpayer's gross receipts from its sale of the garment bags to dry cleaners are not exempt from the state sales tax (Court of Appeals, District I, October 31, 1995). For a summary of the Court of Appeals decision, see *Wisconsin Tax Bulletin* 96 (April 1996), page 18. The Supreme Court denied the taxpayer's petition for review.

From January 1, 1990 to December 31, 1993 (the period at issue in this case), the taxpayer continued to sell garment bags to dry cleaning establishments located in Wisconsin but did not remit to the department sales taxes on the gross receipts of such sales. For many, if not all, of the taxpayer's sales of garment bags, the taxpayer obtained exemption certificates from the dry cleaning establishments. The rationale behind the exemption certificates was that the sales at issue were exempt under sec. 77.54(6)(b), Wis. Stats.

 **Motor vehicles and trailers - nonresident purchases.** *Wisconsin Department of Revenue vs. Johnson Welding & Manufacturing Co., Inc., a/k/a Johnson Truck Bodies* (Circuit Court for Dane County, August 11, 1999). The Wisconsin Tax Appeals Commission issued a decision on December 30, 1998, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 113 (April 1999), page 22, for a summary of the Commission's decision. The issue in this case is whether the Commission was correct in its decision that the taxpayer's sales of 25 truck bodies qualifies for the sales tax exemption in sec. 77.54(5)(a), Wis. Stats.

The taxpayer's customer, Schwan's Sales Enterprises, Inc. ("Schwan's"), requested a refund from the taxpayer for

On March 6, 1995, the department assessed the taxpayer for additional sales tax for the years 1990 through 1993. The primary basis for the assessment was that the taxpayer sold plastic garment bags for which sales taxes were not paid and valid exemption certificates were not maintained.

In its February 12, 1999, Ruling and Order Awarding Summary Judgment in Part, the Commission concluded as follows:

- A. The taxpayer's sales of garment bags were not exempt from the sales tax under sec. 77.54(6)(b), Wis. Stats., because the items on which the garment bags were used were not merchandise as that term is used in the exemption (*Luetzow Industries*, 197 Wis. 2d at 924).
- B. The taxpayer did not submit any valid supporting papers to show that the exemption certificates were accepted in good faith.

In a Partial Stipulation and Order dated September 8, 1999, the taxpayer and the department stipulated among other things, that the partial stipulation of that date resolves all of the remaining issues not addressed in the Commission's February 12, 1999 action, that the parties only entered into the partial stipulation to resolve those issues, and that the parties are not conceding any of those issues. The partial stipulation resulted in a refund of \$7,374.79 to the taxpayer (the taxpayer had deposited \$45,553.61 to pay the March 6, 1995, assessment of tax, interest, and penalty).

Since the parties entered into the partial stipulation of September 8, 1999, neither the taxpayer nor the department has appealed the February 12, 1999, decision. [↗](#)

sales tax paid on 25 non-Wisconsin truck bodies. The taxpayer then filed a claim for refund with the department for sales tax collected and remitted to the department. The basis of the refund request was that the truck bodies are exempt under sec. 77.54(5)(a), Wis. Stats., because they were sales made to a person who is not a resident of Wisconsin and who will not use the trucks for which the truck bodies were made otherwise than in their removal from Wisconsin.

The truck bodies were delivered to Schwan's plant located in Rice Lake, Wisconsin, and installed on trucks assigned to Schwan's depots located in other states. Schwan's is a corporation organized and incorporated under the laws of Minnesota. Its corporate headquarters are, and at all times


during its existence have been, in Minnesota. Schwan's does business in all 50 states, including permanent places of business at 19 locations throughout Wisconsin.

The Commission held that the taxpayer's sales to Schwan's qualified for the sales tax exemption in sec. 77.54(5)(a), Wis. Stats., adopting the definition of corporate residency used in the income tax statutory scheme.

The Circuit Court reversed the decision of the Commission, concluding that it was more reasonable to determine

residency for purposes of sales tax exemptions based on the nature and extent of a corporation's business activities in Wisconsin. The nature and extent of Schwan's business activities in Wisconsin are such that Schwan's is a resident within the meaning of sec. 77.54(5)(a), Wis. Stats. Therefore, the taxpayer's sales of 25 truck bodies to Schwan's are not exempt from sales taxation under sec. 77.54(5)(a), Wis. Stats.

The taxpayer has appealed this decision to the Court of Appeals. [↗](#)

 **Officer liability.** *Fidelis Omegbu vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, October 14, 1999). The issue in this case is whether the taxpayer is personally liable for the unpaid sales and use taxes of Kasa Corp. ("the corporation") under sec. 71.83(1)(b)2, Wis. Stats., for 1989 through 1995.


The taxpayer organized the corporation in 1984 as a building contractor. Since its inception, 100% of the corporation's stock was owned by the taxpayer, who was its president and treasurer. As corporate president, chief executive officer, and treasurer, the taxpayer estimated bids, negotiated contracts, and managed contracting projects for the corporation. The taxpayer was also in charge of the corporation's financial operations, including the signing of corporate checks. An application for Employer Identification (Withholding Tax) Permit was signed by the taxpayer on January 31, 1985. The taxpayer also signed franchise/income tax returns for the corporation and an installment agreement on behalf of the corporation for delinquent taxes.

The Commission concluded that the taxpayer is personally liable for the unpaid withholding taxes of the corporation under sec. 71.83(1)(b)2, Wis. Stats., for the years 1989 through 1995.

As president and treasurer of the corporation, the taxpayer was in charge of the corporation's daily operations. As CEO, he had the **authority** to pay or direct payment of the company's withholding taxes. The taxpayer had a **duty** to direct payment of the company's tax obligations once he became aware of the corporation's tax delinquencies. By signing and submitting the application for Employer Identification Permit, the taxpayer acknowledged that he knew that the corporation would be required to withhold, account for, and pay income taxes withheld from employees' wages to the department. When the taxpayer was aware of the delinquent tax obligations and failed to comply with the agreement, he **intentionally breached his duty** to pay the taxes.

The taxpayer has appealed this decision to the Circuit Court. [↗](#)

## SALES AND USE TAXES, AND WITHHOLDING OF TAXES

 **Officer liability.** *Danny R. Senf vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 27, 1999). The issues in this case are:

- A. Whether the taxpayer is personally liable for the unpaid withholding taxes of Advanced Temperature Technicians, Inc. ("the company") under sec. 71.83(1)(b)2, Wis. Stats.
- B. Whether the taxpayer is personally liable for the unpaid sales and use taxes of the company under sec. 77.60(9), Wis. Stats.

The taxpayer was president of the company for the period under review. The taxpayer was a member of the company's board of directors and owned at least 50% of the company's stock. The company's daily business operations were divided between the taxpayer and one other individual, Mr. Patrick. The taxpayer had check-signing authority on both of the company business checking accounts and signed 192 checks during the period under review. The taxpayer was also personally aware that the company was delinquent on its sales and withholding tax obligations. The taxpayer contends that he believed that Mr. Patrick would take care of the delinquent taxes.

The Commission concluded as follows:


- A. The taxpayer is personally liable for the unpaid withholding taxes of the company under sec. 71.83(1)(b)2, Wis. Stats.
- B. The taxpayer is personally liable for the unpaid sales and use taxes of the company under sec. 77.60(9), Wis. Stats.

The taxpayer had the **authority** to direct payment of the company's taxes. He was president of the company,

served on its board of directors, owned 50% of stock, and had check-writing authority. The taxpayer had a **duty** to direct payment of the company's tax obligations once he became aware of the company's sales and withholding tax delinquencies. Once the taxpayer was aware of the delinquent tax obligations of the company, he **breached his duty** to pay these taxes when he delegated the payment of taxes to a subordinate and did not personally ensure that such taxes were paid.

The taxpayer has appealed this decision to the Circuit Court. [↗](#)

## WITHHOLDING OF TAXES

 **Officer liability.** *Val Anderson, Jr. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 20, 1999, and November 12, 1999). The issue in this case is whether the taxpayer is personally liable for unpaid withholding taxes under sec. 71.83(1)(b)2, Wis. Stats., for August to December 1996, January 16 to June 15, 1997, and August 1 to 15, 1997.

The taxpayer was the president of Brothers Plumbing Company, Inc. ("the corporation"), for the first two periods in question. His resignation was accepted by the Board of Directors on June 19, 1997, and the taxpayer ceased all activity with the corporation thereafter.


Prior to his resignation the taxpayer was in charge of business operations and had check-signing authority on the corporation's business checking account. In April 1996, an employe of the corporation informed the taxpayer that the corporation had delinquent withholding taxes outstanding. On behalf of the corporation, the taxpayer signed and filed with the department 13 WT-6 withholding tax deposit reports.

The Commission concluded that the taxpayer was personally liable, under sec. 71.83(1)(b)2, Wis. Stats., for the unpaid withholding taxes of the corporation for the first two periods under review, because he had the corporate authority as president to pay those taxes and did not do so, he had a duty to pay them and did not do so, and he intentionally breached that duty. However, due to his resignation on June 19, 1997, the last day for which he is responsible for the withholding taxes of the corporation is June 19, 1997.

As president, the taxpayer was one of several people in charge of the corporation's daily operations. This included having the **authority** to pay, or direct payment of, the withholding taxes at issue. A corporate officer with authority to pay or to direct payment of withholding taxes, who knows the taxes are unpaid, becomes personally obligated to see that they are paid. When a corporate president knows the corporation has adequate company funds, this officer has a **duty** to see that the taxes are paid. The corporate funds were used to pay other corporate creditors with knowledge that withholding taxes were owed; therefore, the taxpayer **intentionally breached his duty** to pay the withholding taxes.

Neither the taxpayer nor the department has appealed this decision. [↗](#)

## DRUG TAXES

 **Drug tax, appeals – timeliness; Drug tax, claim for refund.** *David L. Gilbert vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 27, 1999). The issues in this case are:

- A. Whether the Commission has subject matter jurisdiction, even though the taxpayer's petition for

redetermination was filed more than 60 days the department's denial of his claim for refund.

- B. Whether the Commission lacks subject matter jurisdiction because the taxpayer filed his claim for refund more than two years after the department's assessment for controlled substance tax.

In June 1993 the department issued a controlled substance tax assessment against the taxpayer, which



included interest plus a penalty of 100% of the tax. The taxpayer paid the assessment and did not appeal it.

In November 1997, the taxpayer filed a claim for refund with the department, asserting that the department illegally collected amounts pursuant to the assessment, since the controlled substance tax was unconstitutional. The assertion was based on a January 24, 1997, Wisconsin Supreme Court decision, *State v. Hall*, 207 Wis 2d 54,90 (1997), which held that the controlled substance tax violates the constitutionally guaranteed privilege against self-incrimination.

On November 26, 1997, the department sent a letter to the taxpayer denying his claim for refund. The department did not include any notice of the taxpayer's right to appeal or object to the denial. The taxpayer filed a petition for redetermination on February 25, 1998. The department denied the petition and included appeal information with its denial letter.

The Commission concluded as follows:

A. The taxpayer's filing of the petition for redetermination with the department more than 60 days after receipt of the department's denial of his claim for refund does not deprive the Commission of subject

matter jurisdiction. Section 227.48(2), Wis. Stats., requires each decision of an agency to be accompanied by a notice of appeal rights, and provides that the time for filing a petition for redetermination does not begin to run until the agency has served the notice of appeal rights. Because the denial did not contain a notice of appeal rights, the 60-day appeal period never began to run.

B. The Commission lacks subject matter jurisdiction over the petition for review, because the taxpayer filed his claim for refund more than two years following the assessment.

The taxpayer has appealed this decision to the Circuit Court. The department has not appealed the decision but has adopted a position of nonacquiescence regarding the portion of the decision which indicates that the provisions of sec. 227.48(2), Wis. Stats., are applicable to the denial of the refund claim or the consideration of a petition for redetermination. It is the position of the department that the provisions of that statute apply only to agency decisions that follow an administrative hearing. The effect of this action is that the Commission's conclusions of law, the rationale and construction of statutes in this case are not binding upon or required to be followed by the department in other cases. [↗](#)