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

Native Americans – reservation of another tribe. *Joan La Rock vs. Wisconsin Department of Revenue and Wisconsin Tax Appeals Commission* (Court of Appeals, District III, December 28, 1999). This is an appeal from a February 11, 1999, judgment of the Circuit Court for Brown County, which affirmed a May 11, 1998, decision of the Wisconsin Tax Appeals Commission ("Commission"). The issue is whether the taxpayer, a Menominee Indian living on and deriving income from sources on the Oneida Indian reservation, is exempt from Wisconsin income tax. The Commission and the Circuit Court held that she is not exempt.

The taxpayer, a member of the Menominee Indian tribe of Wisconsin, resides in Wisconsin, on land that is part of the Oneida reservation. She is employed by the Oneida tribe on the on the Oneida reservation. She married an Oneida Indian, with whom she had four children, two of whom still reside with her. She is divorced from her Oneida husband. Her children are enrolled members of the Oneida tribe, but she is not.

In 1994, the taxpayer filed a Wisconsin tax return on which she claimed a deduction for her income, based on her Native American status. The department disallowed the deduction on the basis that she was not living and working on her own tribe's reservation. She appealed to the Commission, which affirmed the department, and she appealed that decision to the Circuit Court, which affirmed the Commission.

The taxpayer contended that she is exempt from Wisconsin income tax on the basis of her status as an Indian living in and deriving income from sources in Indian country. She contended that Wisconsin's exercise of tax jurisdiction is preempted by: (1) treaties and federal statutes; (2) prohibition against taxing reservation Indians residing on and deriving income from the reservation as a result of the U.S. Supreme Court's decision in *McClanahan v. Arizona* (1973); and (3) the federal and tribal interests implicated.

The Court of Appeals concluded that the treaties and federal laws on which the taxpayer relied neither expressly preempt nor authorize Wisconsin to impose an income tax on the taxpayer. The Court further concluded that that *McClanahan* exempts only Indians who reside on and derive income from their own tribe's land. Finally, the Court concluded that federal and tribal interests are not implicated in such a manner as to require preemption. In summary, the Court of Appeals concluded that no act of Congress, treaty, state statute, or agreement with any tribe impairs Wisconsin's right to

impose an income tax on enrolled members of a federally recognized Indian tribe that live and work on a reservation of another tribe. The taxpayer has appealed this decision to the Wisconsin Supreme Court.

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Refunds, claims for – statute of limitations. *Wisconsin Department of Revenue vs. Kurt H. Van Engel* (Circuit Court for Milwaukee County, February 20, 2000). This matter was remanded to the Circuit Court by the Court of Appeals on December 29, 1999, after the Wisconsin Supreme Court denied the taxpayer's petition for review of the September 29, 1999, Court of Appeals Decision. See *Wisconsin Tax Bulletin* 118 (January 2000), page 27, for a summary of the Court of Appeals decision.

On remand, the Circuit Court reversed the April 24, 1997, Wisconsin Tax Appeals Commission decision, for the reasons stated in the Court of Appeals decision. The Circuit Court then remanded the case to the Commission. The case is pending at the Commission.

Tax Appeals Commission – jurisdiction – late claim for refund; Tax Appeals Commission – appeal procedure – premature appeal. *Cyril and Carole Kohlbeck vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, November 1, 1999). The issue in this case is whether the Wisconsin Tax Appeals Commission ("Commission") has jurisdiction over the matters in the taxpayers' appeal. The department moved for dismissal on the basis that (1) the taxpayers failed to file a claim for refund for 1993 within the four-year statutory time provided by sec. 71.75(2), Wis. Stats., and (2) the taxpayers filed with the Commission a request for a reduction in their tax liability for 1994 through 1997, before the department has acted on a claim for refund for those years.

In April 1997, the taxpayers were issued an assessment covering tax years 1993, 1994, and 1995. The 1993 adjustment involved disallowance of a bad debt loss and conversion of net operating losses to capital losses. The taxpayers appealed the assessment, the department reduced the amount due, and the taxpayers paid it in November 1997.

In November 1998, the taxpayers submitted a claim for refund for 1993, pertaining to the tax treatment of an Individual Retirement Account. The department denied the claim for refund because it was filed later than the statutory period of four years from the unextended due date of the 1993 return, as provided in sec. 71.75(2), Wis. Stats.

The taxpayers wrote to the department, requesting "forms and conditions" needed to appeal the denial. The department considered the request a "petition for redetermination" under sec. 71.88(1)(a), Wis. Stats. The department denied the petition for redetermination in July 1999.

The taxpayers filed a petition for review with the Commission in August 1999, and in addition they requested that the Commission order a reduction of their income taxes for 1994 through 1997. They have filed a claim for refund with the department covering tax years 1994 through 1997, and action on that claim is pending in the department's Resolution Unit.

The Commission concluded that it had no jurisdiction over the 1993 claim for refund because it was filed later than four years after the unextended due date of the 1993 tax return. The time limit is provided in sec. 71.75(2), Wis. Stats. The taxpayers may not file a claim under sec. 71.75(5), Wis. Stats., which permits a refund claim for four years after a tax assessment, because they appealed the assessment.

The Commission also concluded that it does not have the authority to consider the request to reduce the taxpayers' income taxes for 1994 through 1997. The taxpayers must file their claim for refund with the department (which they have done). If they are aggrieved by the department's action on the claim for refund, they may file with the department a petition for redetermination, and it is only the department's action on that petition that may be appealed to the Commission.

The taxpayers have not appealed this decision.

INDIVIDUAL AND FIDUCIARY INCOME TAXES

Claims for refund – basis. *Judy Hagner and STRJDS Trust, Judy Hagner, Trustee vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 4, 2000). The issue in this case is whether 1998 income tax returns filed by Judy Hagner ("Hagner") and STRJDS Trust ("the Trust") are correct as filed. The department, Hagner, and the Trust have all filed motions for summary judgment.

Individual income tax

Hagner filed a 1998 Wisconsin individual income tax return on which she claimed estimated tax payments and a refund in the amount of $5,691,736, with no tax liability. The department denied the request for refund, stating that its records did not show any record of estimated tax payments or credits from Hagner's 1997 tax return.

Hagner filed a petition for redetermination, stating that her 1998 return was correct "based on Victims Civil Tort Claims Against Government." The department denied the petition for redetermination "because there is no basis for paying the claimed refund."

Hagner filed a timely petition for review with the Commission with no filing fee, declaring herself indigent. In her unsworn document she called herself an "innocent victim," states that she filed bankruptcy in 1993 and that all of her debts were cancelled, alleges that the "government" is at fault for violating the bankruptcy laws and her constitutional rights, and asserts that her claim is valid.

Fiduciary Income Tax

The Trust filed a 1998 fiduciary income tax return, reporting credits against tax due and a refund in the amount of $5,691,736, with no tax liability. Attached to the trust return was a Schedule WD, *Capital Gains and Losses,* indicating a long-term capital loss of $5,691,736 for a "Bankruptcy Estate" acquired in "1994 thru 1997 No liability," and listing the date sold as "Transferred 1998." The department denied the request for refund, stating that the "Trust has made no tax payments to the Wisconsin Department of Revenue in current year or prior years. The trust has not made and is not eligible to make any claims for credits."

The Trust filed a petition for redetermination, stating that the 1998 return was a valid claim for refund based on "Valid Claims From Civil Tort Claim Transferred Payment By Courts to STRJDS Trust Trustee – Case Already Filed In Courts – Courts Awarded Valid Claim For Refund to Victim." The Trust also stated that the refund claim "Is Out Of Court Money Settlement On Civil Tort Claim Against Government." The department denied the petition for redetermination.

The Trust filed a timely petition for review with the Commission with no filing fee, declaring itself indigent. The Trust stated it would not appear at any hearing, requested a telephone conference "For Victim," and asserted that the refund claim is valid based on documents submitted with the tax return.

Conclusion

The Commission concluded that Hagner and the Trust provided no basis for their claims for refund. They provided no evidence that their returns are correct, and their filings are confusing, illogical, and incoherent. They provided no facts to support their alleged claims for refund of almost $6 million each, and no sworn affidavit supports their motion for summary judgment as required by statute.

The Commission granted the department's motion for summary judgment and denied Hagner's and the Trust's motions for summary judgment.

Hagner and the Trust have appealed this decision to the Circuit Court .

CORPORATION FRANCHISE AND INCOME TAXES

Accounting – change in method. *Babcock & Wilcox Company (The) vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, December 16, 1999). The issue in this case is whether the taxpayer properly changed its method of accounting when it filed amended tax returns for taxable years ending in 1981, 1982, and 1983, thereby assigning to the taxpayer's predecessor a portion of $600 million in deferred income of the predecessor. The taxpayer appealed a June 16, 1999, decision of the Wisconsin Tax Appeals Commission ("Commission"). See Wisconsin Tax Bulletin 115 (October 1999), page 23, for a summary of that decision.

The taxpayer is a successor by merger to a corporation of the same name. In 1977, McDermott, Incorporated ("McDermott") began to acquire the stock of a New Jersey corporation then called Babcock & Wilcox ("Old B&W"). After acquiring all of Old B&W's stock, McDermott created a wholly owned subsidiary, into which Old B&W was merged effective March 31, 1978. The new subsidiary was renamed "The Babcock & Wilcox Company" ("the taxpayer"), and at that time Old B&W ceased to exist. As a result of the merger, the taxpayer acquired all of the assets and liabilities of Old B&W and began carrying on its business under the laws of Delaware rather than New Jersey.

The nature of the manufacturing business of Old B&W and the taxpayer required them to enter into long-term contracts covering several years. This required both corporations to use special rules and procedures to account for the income generated by these contracts. The methods used were "percentage of completion" accounting for financial reporting purposes, and "completed contract" accounting for tax reporting purposes.

The use of completed contract accounting for tax purposes by Old B&W meant that, at any given time, there was a substantial amount of income generated that was not contemporaneously recognized for income tax purposes. The reporting of the income was deferred until the completion of the entire contract. At the time of the merger in 1978 there was approximately $600 million of deferred income earned but not reported. All of the deferred income was reported by the taxpayer in the years following the merger, consistent with the completed contract method of accounting used by Old B&W.

Old B&W's unused tax credits and business loss carryovers were also claimed by the taxpayer but were later disallowed by the department. The taxpayer then attempted to amend its tax returns for tax years ending in 1981 to 1983, omitting the deferred income. The Commission denied the claim for refund, finding that the taxpayer had impermissibly changed its accounting method to percentage of completion. The Commission held that the taxpayer's interpretation of sec. Tax 2.15 of the Wisconsin Administrative Code was incorrect, and that the department may but is not required to prescribe a different method of accounting if the method employed does not clearly reflect the income.

The Circuit Court concluded that the Commission's interpretation of the Wisconsin Tax Code in coming to its decision was reasonable, and that the taxpayer's change in accounting method was improper.

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

SALES AND USE TAXES

Amusement devices – leased or used by vendor? *Amusement Devices, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, December 15, 1999). The issues in this case are:

A. Whether the taxpayer's purchases of amusement devices were subject to the Wisconsin sales or use tax.

B. Whether the department properly imposed the negligence penalty for the taxpayer's filing of an incorrect return due to neglect.

The taxpayer is a Wisconsin corporation engaged in the business of placing various coin-operated amusement devices in business establishments such as hotels, motels, taverns, bowling alleys, restaurants, convenience stores, and schools. The taxpayer paid sales tax on the majority of amusement devices and their related parts and accessories purchased from Wisconsin vendors, but did not pay sales or use tax on those purchased from out-of-state vendors.

The taxpayer negotiated oral or written agreements with the owners of the establishments where its devices were placed. Each agreement specified which amusement devices were to be initially placed in the establishment by the taxpayer and what percentage of gross receipts from the devices was to be paid to the location owner "(f) or and in consideration of the use of the space in Location Owner's premises." The taxpayer agreed to maintain the devices in good working condition and to provide the parts and supplies needed to play them. Under each agreement, title to the devices remained in the taxpayer's name at all times.

The taxpayer had exclusive keyed access to the devices' coin boxes. Receipts were routinely removed from the devices by the taxpayer, usually in the presence of an employe of the establishment. The receipts were then counted, sales taxes were calculated and subtracted, and the amount due to the location owner was calculated and

paid, sometimes later by check. The taxpayer subsequently remitted the sales tax to the department.

The establishments exercised very limited control over the taxpayer's amusement devices, including where they were placed and when their patrons had access. The taxpayer ultimately controlled the type and number of devices and charges for playing them, except that the taxpayer would remove objectionable devices at the establishment's request.

The Commission concluded:

A. The taxpayer's purchases of amusement devices were subject to the sales and use tax. The taxpayer sold its device-dispensed amusement services at retail to those who paid to play. The taxpayer's purchases of the amusement devices were taxable because they were used or consumed in the taxpayer's business of furnishing and selling amusement services.

B. The taxpayer failed to show its failure to file a correct return was "due to good cause and not to neglect." The department properly imposed the negligence penalty.

The taxpayer has appealed this decision to the Circuit Court.

Boats, vessels and barges – nonresident purchases. *Raymond and Patricia Wehrs vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 6, 2000). The Circuit Court vacated the previous decision of the Commission and remanded the case for further evidentiary proceedings on January 22, 1998. See Wisconsin Tax Bulletin 111 (October, 1998), page 18, for a summary of the Circuit Court decision. The issues in this case are:

A. Whether the taxpayers qualify for exemption from use tax under sec. 77.53(17m), Wis. Stats., on the purchase of a boat.

B. Whether the boat at issue is exempt from use tax under sec. Tax 11.85(2)(d), Wis. Adm. Code.

At the times relevant to this matter, the taxpayers were domiciled in the state of Illinois. On July 2, 1992, the taxpayers purchased a boat. On the day of the sale, the taxpayers were in Illinois, while the boat and its seller were in Florida. The taxpayers were represented at the closing in Florida by Mr. Bernie Walker. Mr. Wehrs gave his permission for Mr. Walker to enter into the agreement for the purchase of the boat. A bill of sale was executed on the day of the sale in the state of Florida. The boat was not titled or registered in Florida, nor was a Florida sales tax paid on the sale of the boat.

On July 7, 1992, Mr. Wehrs rented a slip in Racine, Wisconsin for the remainder of 1992 and reserved a slip for 1993. Within days after purchasing the boat, Mr. Wehrs began piloting the boat to Lake Michigan. The boat entered the Wisconsin waters of Lake Michigan for the first time on August 8, 1992, and remained there for the next two or three days. The boat then left Wisconsin waters, and returned to the Wisconsin waters of Lake Michigan on about August 19, 1992, and remained there for the next few days. In early September 1992, Mr. Wehrs took the boat to the waters off northern Michigan and Canada, and returned to Racine on about September 15, 1992. The boat remained in the Wisconsin waters of Lake Michigan for two or three days for repairs and maintenance.

On September 17, 1992, Mr. Wehrs filed an application for title and registration for the boat, listing Wisconsin as the state of principal use and Racine County as the county where the boat was kept. On the application, Mr. Wehrs claimed an exemption from use tax under sec. 77.53(17m), Wis. Stats., and the taxpayers did not pay any use tax.

From about September 18 through October 1, 1992, Mr. Wehrs piloted the boat throughout southern Lake Michigan, occasionally entering Wisconsin waters. After about October 1, 1992, Mr. Wehrs piloted the boat to the Caribbean for the winter. During the summer of 1993, the taxpayers used the boat throughout Lake Michigan. On approximately 20 days, the boat was used in Wisconsin waters. Although Mr. Wehrs made a deposit for a Racine boat slip for 1993, there is no record of the actual rental of the slip.

When Mr. Wehrs applied for insurance for the boat, Racine, Wisconsin was listed as the location of the boat. The boat was registered with the United States Coast Guard. At some point after 1992, the boat was registered in Illinois; however, no sales tax was paid to the state of Illinois in conjunction with the taxpayers' purchase of the boat.

The Commission concluded:

A. The boat was not purchased in the state of Illinois and the taxpayers do not qualify for the exemption from use tax under sec. 77.53(17m), Wis. Stats.

B. The boat is exempt from use tax under sec. Tax 11.85(2)(d), Wis. Adm. Code, because the taxpayers only made temporary use of the boat in Wisconsin during the years 1992 and 1993, and any storage of the boat was incidental to the temporary use.

The department has not appealed this decision.

Exemptions – waste reduction or recycling machinery and equipment. *Browning–Ferris Industries of Wisconsin, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 13, 2000). The issues in this case are:

A. Whether the taxpayer's purchases of compactors, bins, and containers used by its customers to reduce the size of or to collect disposed items, and motor vehicles and related items used to transport recyclables to processing facilities are subject to Wisconsin use tax.

B. Whether the taxpayer's sales and rentals of compactors to customers of its hauling service are subject to Wisconsin sales tax.

C. Whether tangible personal property the taxpayer received by intercompany transfer from separately organized affiliated entities is subject to Wisconsin use tax.

D. Whether the refund of state motor fuel tax by the department to the taxpayer is subject to Wisconsin use tax.

During the period from October 1, 1989 through September 30, 1993, the taxpayer, a wholly-owned subsidiary of Browning-Ferris Industries (BFI), was a Wisconsin corporation with its headquarters and principal place of business in Muskego, Wisconsin. The taxpayer had operations at four business sites: Green Bay, Germantown and two in Madison.

The taxpayer was primarily engaged in the business of collecting trash, garbage, and recyclables from its Wisconsin residential and commercial customers, and transporting these discarded materials to landfills, recycling centers, or material recycling facilities.

The taxpayer leased or sold compactors to some of its hauling customers, and also provided bins, dumpsters, and containers to its customers without additional charge. The taxpayer's customers deposited their recyclable items in the bins, dumpsters, and containers and their nonrecyclable waste items in dumpsters for the taxpayer to pick up.

The compactors were stationary hand-fed, shoot-fed compactors that were placed on the customer's premises. A customer was not required to use or rent the taxpayer's compactors to obtain the taxpayer's hauling services. Most, if not all, of the taxpayer's compactor lease agreements allowed the customer to purchase the compactor at the termination of the lease.

The taxpayer paid no sales or use tax when purchasing the compactors, bins, or containers, or the motor vehicles and equipment, attachments, and repairs used to transport recyclables to processing facilities.

The taxpayer sometimes contracted for its hauling services separately from its compactor rentals and sales, and sometimes both were included on the same contract. The taxpayer's hauling contracts did not refer to the taxpayer's sales or rentals of compactors, and the compactor sales or rental contracts did not refer to the taxpayer's hauling services. In its internal accounting system, the taxpayer accounted separately for the revenue attributable to its waste hauling services from the revenue attributable to its sales or rentals of compactors. The taxpayer used resale exemption certificates to purchase the compactors it leased to its customers. The taxpayer did not collect or pay to the department any sales or use tax on its compactor lease or sales receipts.

BFI and/or its subsidiaries (BFI affiliates) transferred to the taxpayer items of tangible personal property such as trucks, tractors, tractor trailers, and containers, none of which are exempt as tangible personal property used in either common or contract carriage, or waste reduction or recycling activities. These "intercompany transfers" included all rights to, and ownership of, the transferred assets. The motor vehicles transferred were re-titled in the taxpayer's name with the Wisconsin Department of Transportation. Capital assets transferred were depreciated on the taxpayer's income/franchise tax returns. The

taxpayer paid no sales or use tax on the intercompany transfers.

BFI and the BFI affiliates that transferred assets to the taxpayer were separate, legal, corporate entities from the taxpayer and were not divisions or units of the taxpayer. The taxpayer's bookkeeping entry for the receipt of the intercompany transfers was to debit the specific asset account and credit an intercompany account. The bookkeeping entry for BFI affiliates/transferors was to credit the specific asset account and to debit the intercompany account. No money was exchanged between the BFI affiliates and the taxpayer for the intercompany transfers the taxpayer received from them. The taxpayer received no invoice or other bill in connection with the receipt of intercompany assets.

The state motor fuel tax refunds at issue involve motor fuel on which the taxpayer paid the motor fuel tax, which was later refunded because the taxpayer did not use the fuel for operation upon the public highways. The taxpayer has paid no sales or use tax on its purchase of motor fuel related to the motor fuel tax refunds at issue.

The Commission concluded:

A. The taxpayer's purchases of compactors, bins, and containers used by its customers to reduce the size of or to collect disposed items, and motor vehicles and related items used to transport recyclables to processing facilities are subject to Wisconsin use tax. These items are not exempt as machinery and equipment used "exclusively and directly for waste reduction or recycling activities" under sec. 77.54(26m), Wis. Stats. The items are used prior to the recycling process and do not reduce the amount of waste generated into the waste stream.

B. The taxpayer's sales and rentals of compactors to customers of its hauling service are not incidental to the hauling service under secs. 77.51(5) and 77.52(2m), Wis. Stats., and are subject to Wisconsin sales tax.

C. The taxpayer's receipt of tangible personal property by intercompany transfer from separately organized affiliated entities is not subject to Wisconsin use tax. There was no transfer for remuneration or consideration and no exchange of money, and the transfers resulted in the taxpayer's receiving no invoice or other bill.

D. The refund of state motor fuel tax by the department to the taxpayer is subject to Wisconsin use tax. Although sec. 77.51(15)(a)4, Wis. Stats., was amended effective December 1, 1997 to exclude from the sales price subject to the use tax any amount of motor fuel tax refunded, the amendment does not apply to purchases of motor fuel during the period from October 1, 1989 through September 30, 1993.

The taxpayer has appealed this decision to the Circuit Court. The department has not appealed the decision but has adopted a position of nonacquiescense in regard to conclusion C, and in regard to the Commission's opinion that the taxpayer's intercompany transfers are not sales or purchases from a retailer within the meaning of secs. 77.51(14) and 77.53(1) and (2), Wis. Stats.; that the taxpayer's entering the net book value of the transferred assets on its books is not remuneration or consideration for the subject intercompany transfers; and that the items of tangible personal property which the taxpayer received by intercompany transfer are not subject to Wisconsin use tax. The effect of this action is that, although the Decision and Order is binding on the parties for the instant case, the Commission's conclusions of law, the rationale, and construction of statutes related to the issue of the intercompany transfers are not binding upon or required to be followed by the department in other cases.

Officer liability. *John D. Ceille and Charlene Ceille vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 28, 2000). The issue in this case is whether John Ceille ("the taxpayer") and Charlene Ceille ("the taxpayer's wife") are responsible persons under sec. 77.60(9), Wis. Stats., for delinquent sales and use taxes of Ceille Industries, Inc. ("the company"), during May and August 1988 and January through June 1989 ("the period under review").

Beginning in August of 1986, the taxpayer became sole shareholder, president, and treasurer of the company. The taxpayer's authority included signing all checks drawn on the company's checking account. Also in August of 1986, the taxpayer initiated a loan agreement with the company's bank. The taxpayer alone negotiated and executed the loan documents on behalf of the company. The taxpayer, on behalf of the company, negotiated an additional loan with the bank in the spring of 1988.

Prior to August of 1988, the taxpayer's wife had no active involvement in the company. During a portion of the period under review, the taxpayer's wife was a member

of the company's board of directors and the company's vice-president and secretary.

In July of 1988, the taxpayer became incapacitated. In August of 1988, the taxpayer was no longer involved in the business affairs of the company, and, in accordance with the terms of a loan agreement between the taxpayer and the company's bank, the taxpayer's wife agreed to allow the company's bank to approve all checks written on the company's account. The taxpayer's wife was given authority to write checks, but the bank had final approval of all payments. The bank authorized some tax payments by the company, but sales tax returns for August of 1988 and the first six months of 1989 were filed without payment of the tax due. The taxpayer's wife attempted to pay a number of tax liabilities with checks that were not approved and were not honored by the bank.

The Commission concluded that the taxpayer was a responsible person under sec. 77.60(9), Wis. Stats., and was personally liable for the company's unpaid sales taxes.

The taxpayer, as the company's president and treasurer, had the **authority** to pay the company's taxes, had a **duty** to pay the sales taxes because he was aware that they were due, and he **intentionally violated this duty** by paying other vendors. Because he negotiated the loan agreements that allowed the bank to exercise control of the checking account, the taxpayer could not claim immunity from liability based on the control that he voluntarily conveyed to the bank.

The Commission concluded that the taxpayer's wife was not personally liable for the company's taxes because she had no active involvement in the company and did not have **authority** to direct the payment of taxes. The taxpayer's wife, while having authority to sign checks, did not have authority to cause the company to pay taxes, the control of which had been conveyed by the taxpayer to the bank.

Both the department and the taxpayer have appealed this decision to the Circuit Court.

Services subject to the tax – towing. *City of Milwaukee vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 28, 2000). The issue in this case is whether the $135 fee charged by the City of Milwaukee for removal of an illegally parked or abandoned vehicle is subject to the sales tax on towing services under sec. 77.52(2)(a)10, Wis. Stats.

During the period 1993 through 1996, the City of Milwaukee hired contractors to implement its enforcement towing program by removing illegally parked and abandoned vehicles from city streets. The amount billed by the contractors to the City for these towing services averaged about $35 per tow and was exempt from the sales tax under sec. 77.54(9a)(b), Wis. Stats. Milwaukee City ordinance 101-25 provided in part that: "The charges for removal and storage under this section shall be $135 per vehicle… [T]he vehicle may be released from storage upon payment of all charges…" The $135 fee was in addition to any illegal parking citation the vehicle owner may have received, and was refunded if the citation was dismissed by a court or was otherwise excused.

The Commission concluded the $135 fee was not subject to the sales tax because the only towing services involved were provided to the City by its contractors, and the disputed receipts were not from towing services sold, performed or furnished by the City at retail to consumers as required by sec. 77.52(2)(a)10, Wis. Stats. The Commission found the $135 charge was more like a nontaxable fine than a sale.

The department has appealed this decision to the Circuit Court.