



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.

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INDIVIDUAL INCOME TAXES

Alimony. *Eric W. Miller and Teri L. Miller vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 1, 2000). The issues in this case is whether payments made by Eric W. Miller (“Eric”) to Teri L. Miller (“Teri”) during 1996 and 1997 were alimony (“separate maintenance”) or child support payments, and what portion of any payments deemed separate maintenance are deductible from Eric’s income and taxable to Teri.

The taxpayers were married in 1991, and they have two minor children. Teri filed for divorce, and an Order was entered in 1995 and amended in 1996. The divorce did not become final until 1998.

The 1995 Order provided that Eric was to pay 36% of his gross income to Teri, as “support.” The 1996 Order directed Eric to pay Teri “family support” of 25% of his

gross income, plus \$150 per month. In accordance with the 1995 and 1996 Orders, Eric paid Teri \$11,330 in 1996 and \$10,087 in 1997.


Eric filed 1996 and 1997 Wisconsin income tax returns, and on both returns he deducted as alimony or separate maintenance the payments he had made to Teri. Teri filed 1996 and 1997 Wisconsin income tax returns, and the amounts she received from Eric were not reported on either return. In January 1999 the department issued assessments in the alternative against both taxpayers for 1996 and 1997. The department disallowed the deductions claimed by Eric and added the amounts to Teri’s taxable income.

The parties have stipulated that in the event the amounts Eric paid to Teri constitute alimony, only the portion that when added to Teri’s share of marital income, exceeds one-half of the total marital income, may be deducted. This stipulation is based on the Commission’s decision in *Knoblauch vs. Dep’t. of Revenue*, Wis. Tax Rep. (CCH) 400-192 (WTAC 1996).

The Commission concluded that a portion of the payments made by Eric W. Miller to Teri L. Miller – \$2,108 in 1996 and \$1,800 in 1997 – was separate maintenance under sec. 71 of the Internal Revenue Code. However, none of the payments are deductible by Eric or taxable to Teri because, when added to Teri’s share of the marital income, the resulting sum is less than one-half of their total marital income for each year. The Commission thus affirmed the assessment against Eric W. Miller and reversed the assessment against Teri L. Miller.

Neither Eric W. Miller nor the department has appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission, with respect to the portion of the decision relating to Eric W. Miller. That portion of the decision is provided for informational purposes only and may not be used as a precedent. [☞](#)

 **Appeals – jurisdiction.** *Judy Hagner vs. State of Wisconsin Appeals Commissioners – Miusolf, and Department of Revenue* (Circuit Court for Milwaukee County, July 26, 2000). This is a review of a Wisconsin Tax Appeals Commission decision dated February 4, 2000. See *Wisconsin Tax Bulletin* 119 (April 2000), page 17, for a summary of the Commission’s decision. The issue in this case is whether the Circuit Court has subject matter jurisdiction over the case.

The taxpayer brought several claims before the Commission. First, she claimed that the STRJDS Trust, of which she was the trustee, is entitled to a tax refund of \$5,691,736 for 1998. Second, she claimed that she personally is entitled to a tax refund of \$5,691,736, as well as a \$6,000,000 judgment against the department and a department attorney, because their delay in handling the taxpayer’s case violated her civil rights. Third, she claimed that she is entitled to a \$15,000 judgment against the department and the attorney as a penalty for their delay in handling her case.

The Commission granted summary judgment in the first two dockets because there was no basis in the record


demonstrating that the taxpayer or the Trust paid nearly \$6,000,000 in taxes.

The department’s motion to dismiss the third docket was granted on the basis that the Commission lacked jurisdiction to hear the case, because the department had not yet issued a final determination. The taxpayer filed a petition for review with the Circuit Court and served a copy of the petition to the Commission on February 18, 2000.

The department argues that the Circuit Court lacks subject matter jurisdiction over this case because the taxpayer failed to serve the department with a copy of her petition for review. The taxpayer has submitted four affidavits of service, but none of them were directed to the department.

The Circuit Court concluded that it does not have subject matter jurisdiction over this matter. The Circuit Court dismissed the petition for review.

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

 **Estimated assessments.** *George F. Reif vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 1, 2000). The issue in this case is whether the taxpayer’s petition for review of the department’s estimated assessments against him state a claim against which relief can be granted.

In July 1999 the department issued two estimated assessments against the taxpayer because he failed to file income tax returns for 1993 to 1997. The taxpayer filed timely petitions for redetermination, and the department denied them. The taxpayer then filed petitions for review with the Commission.

In the petitions for review, the taxpayer indicated that he did not give his consent “to be governed by any tyranny nor any depotism,” and that “I simply do not owe any tax to any government that refuses to recognize me as its free and equal citizen.” In response the Commission requested a clear and concise statement of the facts in the

case and the taxpayer’s specific objections to the department’s action. The taxpayer did not respond to the notice.

In April 2000 the department filed a motion to dismiss the petitions for review on any one of six bases, including failure of the taxpayer to state a claim upon which relief can be granted. In his reply brief the taxpayer requested that the department’s assessments be reversed for various reasons, including constitutionality of Wisconsin’s tax laws, and illegal “attainder.”

The Commission concluded that the taxpayer failed to state a claim against which relief can be granted. The Commission also imposed an additional \$100 assessment against the taxpayer because he offered nothing but groundless and frivolous arguments to disprove the accuracy of the department’s assessments.

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

SALES AND USE TAXES



Amusement devices – leased or used by vendor? *Amusement Devices, Inc. vs.*

Wisconsin Department of Revenue (Circuit Court for Dane County, September 14, 2000). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated December 15, 1999. See *Wisconsin Tax Bulletin* 119 (April 2000), page 18, for a summary of the Commission's decision. 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 devices provide amusement to the establishments' patrons, and the patrons are considered the taxpayer's customers.

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. Although the taxpayer gave exemption certificates claiming resale to suppliers when it purchased items it intended to resell, it did not use exemption certificates claiming resale when purchasing the amusement devices from the out-of-state vendors.

The taxpayer negotiated oral or written agreements with the owners of the establishments where its devices were placed. The agreements designated the taxpayer as the "operator" of the devices and each establishment owner as "location owner." 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 employee 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.

Giving due weight to the Tax Appeals Commission's interpretation, the Circuit Court affirmed the Commission's decision and concluded as follows:

- 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 did not transfer any tangible personal property to the establishments' patrons and did not lease the amusement devices to the establishments. 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 did not meet its burden to show its failure to file a correct return was "due to good cause and not due to neglect." The taxpayer "knew or should have known that sales or use taxes were payable on all disputed purchases..." The department properly imposed the negligence penalty.

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

Exemptions – waste reduction or recycling machinery and equipment.

Browning-Ferris Industries of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Circuit Court for Dane County, September 28, 2000). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated January 13, 2000. See *Wisconsin Tax Bulletin* 119 (April 2000), page 20, for a summary of the Commission's decision. The Commission affirmed the department's assessment of use tax in issues A., B., and D. below. The department adopted a position of nonacquiescence with regard to the Commission's conclusion that the intercompany transfers are not subject to Wisconsin use tax in issue C. below. The issues before the Commission were as follows:

- 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 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.

The only issue the taxpayer asked the Circuit Court to review is the Commission's decision that the equipment and motor vehicles in issue A. above are subject to Wisconsin use tax.

Giving due weight to the Commission's interpretation, and based on the decisions in *Revenue Dept. v. Parks-Pioneer*, 170 Wis. 2d 44, and *Ruef's Sanitary Service, Inc. v. Wisconsin Department of Revenue*, WTAC, June 13, 1994 (CCH WI Rptr 400-064), the Circuit Court affirmed the Commission's decision that the 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 not used directly in the recycling process, are not related to an activity that reduces the amount of solid waste generated, and are not related to an activity that composites solid waste or reuses solid waste.

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

Officer liability. *Barbara Bice vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 2, 2000). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of Sheboygan Mattress Superstore, Inc., also known as Specialty Sleep Products Company ("the corporation"), under sec. 77.60(9), Wis. Stats., for the periods of February through July 1996 and September through December 1996.

The taxpayer incorporated the corporation, having drafted and filed its Articles of Incorporation with the Wisconsin Secretary of State in November 1995. On July 23, 1996, the taxpayer signed Articles of Amendment as president of the corporation and filed them with the Wisconsin Department of Financial Institutions, to change the name of the business to Specialty Sleep Products Company.

The corporation's sales tax returns were filed for each month except December 1996. Six of these returns were signed by the taxpayer as president. With five of the monthly returns, no money was paid. The taxpayer was

the only person authorized to sign checks on a corporate checking account opened in August 1996.


In August 1996 the taxpayer was informed by a revenue agent of the department that the corporation was delinquent in paying its sales tax, and that sales tax returns for May through July 1996 had not been filed. The revenue agent provided the taxpayer with returns to file for the period May through July 1996, after which she signed them as corporate president and filed them on December 18, 1996. The taxpayer signed and filed the August 1996 sales tax return on September 27, 1996, and paid the tax shown on that return with a check written on the corporation's account. During the months of October, November, and December 1996, tens of thousands of dollars were in the corporate account and used to pay creditors other than the department for the sales tax owed.

The Commission concluded the taxpayer is personally liable under sec. 77.60(9), Wis. Stats., for unpaid sales tax of the corporation for February through July 1996 and September through December 1996.

The taxpayer signed sales and use tax returns of the corporation for May and July through November 1996 as president of the corporation. By holding herself out as president, the taxpayer had the authority to pay the corporation's taxes or to direct their payment. The taxpayer was the only person with check signing authority on the corporation's checking account. As a person with authority, and having been advised by a revenue agent of

the department that the corporation was delinquent in its sales tax payments, the taxpayer had a duty to see that corporate funds were used to pay the sales tax liability. The taxpayer intentionally breached her duty when, during the months of October, November, and December 1996, while knowing that sales tax was due, she issued checks to the corporation's creditors.

The taxpayer has not appealed this decision. [↗](#)

 **Officer liability.** *Kurt T. Swartz vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 31, 2000). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of the La Crosse HI Corporation ("the corporation"), under sec. 77.60(9), Wis. Stats., for the periods April through August 1994, May through August and October and November 1995, and February 1996 ("the period under review").

The corporation operated the Holiday Inn Resort and Conference Center in La Crosse, Wisconsin. The taxpayer, a Minnesota resident, was employed as the controller of the corporation from August 1990 to May 1997. As controller, the taxpayer supervised the clerks and auditors who maintained the corporation's books and records. The taxpayer signed monthly sales tax returns filed with the department and prepared local financial records for the corporation on a day-to-day basis. The taxpayer signed all of the corporation's sales tax returns filed during the period under review, and became aware of a sales tax delinquency in April 1994, when he did not file the return for that month until September 30, 1994. Further, the taxpayer signed the June, July, August, and October 1994 sales tax returns showing substantial amounts of tax due but filed them with no remittance.

In addition to signing the sales tax returns, the taxpayer held himself out as having authority over the corporation's Wisconsin state tax matters when he:

1. Signed the corporation's application for an employer identification number on February 21, 1991;
2. Executed a sales tax assessment settlement agreement with the department on June 30, 1991;
3. Signed a letter as controller of the corporation in response to a notice of delinquent tax warrant filed

against the corporation by the department in March 1991; and

4. Prepared and signed the proper forms on behalf of the corporation, when the Department informed the corporation in January and February 1996 that the sales tax returns filed for November and December 1995 were incomplete.

The taxpayer had authority to cosign checks on the corporate checking account from February 1991 until at least May 1996. The bank statements for the corporate checking account for the months of January, August, and November 1995 and February 1996 show substantial deposits. The taxpayer cosigned checks from the corporate checking account to pay other creditors, while substantial amounts were owed to the department.

The Commission concluded the taxpayer is personally liable under sec. 77.60(9), Wis. Stats., for the unpaid sales tax of the corporation for the periods April through August 1994, May through August and October and November 1995, and February 1996.

The taxpayer held himself out as having authority over the corporation's Wisconsin state tax matters by signing the corporation's sales tax returns, signing the application for an employer identification number, signing a settlement closing agreement to resolve a prior sales tax matter on the corporation's behalf, and signing a form to complete the corporation's incomplete sales tax returns. The taxpayer had a duty to pay the taxes due because he knew the taxes were unpaid and had the authority to see that corporate funds were used to pay them. The taxpayer intentionally breached his duty when he used corporate funds to pay other creditors with knowledge of taxes being due.

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