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

Assessments - correctness; Appeals - frivolous. *John Gutsch vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 2001). The issues in this case are:

A. Whether the department properly assessed the taxpayer for 1997 and 1998 income taxes under sec. 71.74(3), Wis. Stats.

B. Whether the taxpayer's position in this matter is frivolous and groundless, thereby subjecting him to an additional assessment under sec. 73.01(4)(am), Wis. Stats.

In March and April 2000, the department wrote to the taxpayer, requesting him to file Wisconsin income tax returns for tax years 1997 and 1998. The taxpayer did not file the requested returns, and in May 2000, the department sent him an estimated assessment for 1997 and 1998, pursuant to sec. 71.74(3), Wis. Stats.

The taxpayer filed a petition for redetermination with the department in June 2000. In it the taxpayer asserted that the assessment was unlawful, that he was a Minnesota resident, that he was a nonresident alien, that he was a "Citizen of Wisconsin and domiciled in Dunn County, Wisconsin," and that he was a "Sovereign Citizen of the Wisconsin Republic." The department denied the petition for redetermination, and the taxpayer timely filed an appeal with the Commission. The department has filed a motion for summary judgment.

The taxpayer claims protection from paying income taxes by citing various provisions of the U. S. Constitution, and by citing quotations from cases from the federal courts and the courts of various states.

The Commission concluded as follows:

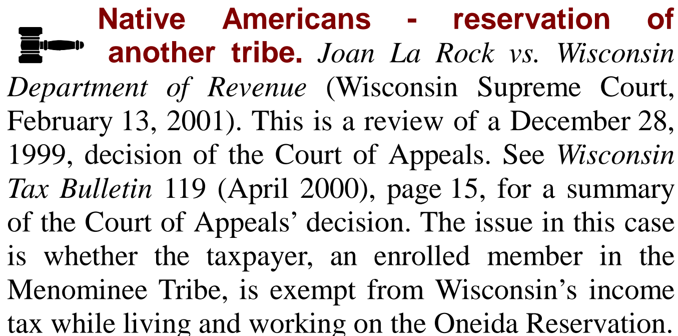
A. The department properly assessed the taxpayer for 1997 and 1998 income taxes under the provisions of sec. 71.74(3), Wis. Stats.

B. The taxpayer's position in this matter, consisting exclusively of semantic gymnastics which attempt to rationalize why the state income tax laws do not apply to him, is frivolous and groundless, thereby

subjecting him to an additional assessment under sec. 73.01(4)(am), Wis. Stats. The taxpayer's arguments and ones like them have been given no credence when argued by others in prior cases before the Commission and the courts, and his arguments do not prevail now.

The Commission granted the department's motion for summary judgment and dismissed the petition for review. In addition, in accordance with conclusion B, the Commission imposed an additional assessment of $500 against the taxpayer.

The taxpayer has appealed this decision to the Circuit Court.



Native Americans - reservation of another tribe. *Joan La Rock vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, February 13, 2001). This is a review of a December 28, 1999, decision of the Court of Appeals. See *Wisconsin Tax Bulletin* 119 (April 2000), page 15, for a summary of the Court of Appeals' decision. The issue in this case is whether the taxpayer, an enrolled member in the Menominee Tribe, is exempt from Wisconsin's income tax while living and working on the Oneida Reservation.

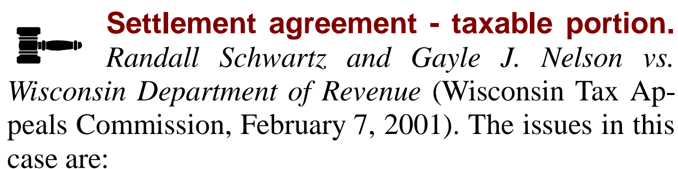
The taxpayer is an enrolled member of the Menominee Tribe. She married an enrolled member of the Oneida Tribe and they had four children, all enrolled members of the Oneida Tribe. She divorced in 1993 but resided and worked on the Oneida Reservation in 1994 and 1995. The taxpayer deducted her federal adjusted gross income from the state income tax in 1994 and 1995, based on her American Indian status.

The department disallowed her deduction because she was not living and working on Menominee tribal lands. The taxpayer appealed the department's finding to the Wisconsin Tax Appeals Commission on the ground she is an "Indian" living in "Indian country." The Commission affirmed the department, as did the Circuit Court and the Court of Appeals.

The Commission found "no Act of Congress, no treaty, no state statute or state agreement with any tribe that impairs Wisconsin's right to impose an income tax on enrolled members of a federally-recognized Indian tribe who live and work on the reservation of another tribe in Wisconsin." The Circuit Court held that "since [La Rock] is not a member of the Oneida Nations, she enjoys no protected status that would allow her to claim immunity from the duty she owes as a citizen of the State of Wisconsin to pay income taxes." The Court of Appeals reviewed the treaties and federal statutes and asserted that those laws did not preempt state income tax jurisdiction in this instance.

The Wisconsin Supreme Court concluded that principles of tribal sovereignty do not bar the State from taxing the taxpayer's income earned on the Oneida Reservation, because she is an enrolled member of the Menominee Tribe rather than the Oneida Tribe.

The taxpayer has not appealed this decision.



Settlement agreement - taxable portion. *Randall Schwartz and Gayle J. Nelson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, February 7, 2001). The issues in this case are:

A. Whether any portion of payments from a settlement agreement entered into in 1991 is exempt from income tax, pursuant to sec. 104(a)(2) of the Internal Revenue Code ("IRC").

B. What portion of the payments from the settlement agreement is attributable to a covenant not to compete and, therefore, is subject to the income tax.

From 1985 until 1990, Randall Schwartz ("the taxpayer") was one of three shareholders of Global Fastener & Supply, Inc. ("Global"). In 1990 he came to believe that the other two shareholders were causing Global to act improperly, and so he decided it was necessary to sever his ties with Global.

As a result of the conduct of the other two shareholders, the taxpayer suffered anxiety and panic attacks, and he continued to exhibit a panic disorder condition for several years thereafter. His condition prevented him from working for Global during the period from August 1990 to January 1991.

In January 1991, the taxpayer, the other two shareholders, and Global entered into a settlement and purchase

agreement ("Settlement"). Under terms of the Settlement, Global paid $100,000 in cash to the taxpayer at closing and executed a promissory note for $250,000. The Settlement provided that the parties would allocate, for tax purposes, $175,000 of the $350,000 ("the $175,000 payment") in consideration of the release by the taxpayer of any possible claim for personal injury, and for a covenant not to compete.

The $175,000 payment included the $100,000 paid at closing, plus monthly payments of $8,000, consisting of $6,139 in principal and $1,861 in interest. The covenant not to compete limited the taxpayer's activity with regard to Global's past and current customers and within Global's sales territory until March 1, 1991.

The parties to the Settlement also executed a mutual release agreement ("Release"). The Release provided in part that the $175,000 payment was to be paid in exchange for the taxpayer's non-competition agreement and in lieu of all possible claims for personal injury. The other two shareholders also executed a directors' resolution that authorized and directed the proper officers to enter a mutual release agreement with the taxpayer, pursuant to which he would be paid $175,000 for releasing Global "from any liability pursuant to any allegations or threatened allegations by Mr. Schwartz and in exchange for a covenant not to compete."

Both the Settlement and the Release specified that the portion allocable to the release of any possible claim for personal injury shall be excludable from the taxpayer's income for tax purposes, all in accordance with IRC section 104(a)(2) and other relevant Code sections and Treasury regulations. None of the documents specified how the $175,000 payment was to be allocated between the covenant not to compete and the release of any personal injury claim, and no such allocation was made on Global's books.

On their 1991 income tax return, the taxpayers (who are husband and wife) attributed $10,000 of the $175,000 payment to the covenant not to compete and included it as taxable income. They did not report the remainder of the $175,000 based on their assertion that it was not taxable because it was received in exchange for the release of personal injury claims. In April 1994, the department issued an income tax assessment to the taxpayers, on which it attributed the entire $175,000 to the covenant not to compete. The taxpayers filed a petition for redetermination with the department, the department denied it, and the taxpayers filed a timely petition for review with the Commission.

The department argued that the personal injury claims subject to the Release are not those contemplated by IRC sec. 104(a)(2). It also argued that the taxpayer failed to show that any portion of the $175,000 can be attributed to the personal injury claim release.

The Commission concluded as follows:

A. Payments to the taxpayer in exchange for the personal injury claim release are exempt pursuant to IRC sec. 104(a)(2). The language of the Settlement and related documents contemplated damages for personal injuries or sickness within the meaning of that section.

B. Only the portion of the $175,000 payment received by the taxpayer prior to the March 1, 1991, expiration of the covenant not to compete is attributable to the covenant not to compete and, therefore, subject to the income tax. The taxable amount is $112,278, consisting of the $100,000 payment at closing plus two monthly principal payments of $6,139 each. It is reasonable to assume that amounts paid after March 1, 1991, were not attributable to the covenant not to compete.

The taxpayers have appealed this decision to the Circuit Court.

Tax Appeals Commission - proper procedures. *Billy E. Stephenson and Terry A. Stephenson vs. Wisconsin Department of Revenue* (Circuit Court for Milwaukee County, January 2, 2001). This is a review of an April 20, 2000, decision of the Wisconsin Tax Appeals Commission. See *Wisconsin Tax Bulletin* 122 (October 2000), page 23, for a summary of the Commission's decision. The issue on appeal is whether the taxpayers received a fair and impartial hearing by the Commission, and more specifically whether the Commission's decision correctly applied applicable law and was supported by substantial evidence in the record.

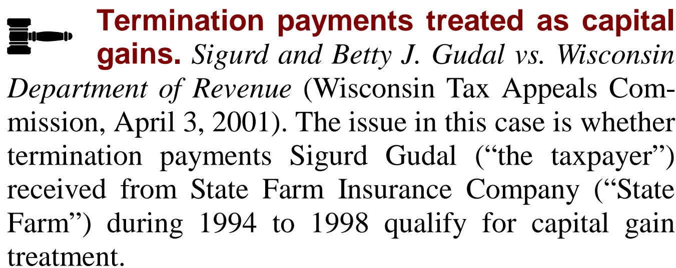
The department made numerous adjustments to the taxpayers' joint Wisconsin income tax returns for the years 1991 through 1994. Adjustments included the disallowance of a business loss for 1991, an ordinary loss on Form 4797 for 1992, employee business expenses and a rental loss for 1993, and employee business expenses,

capital losses on Schedule D, and ordinary losses relating to the sale of a camper for 1994. The reasons for the adjustments included improper or unsubstantiated deductions, failure to prove that a business ever existed, and discrepancies relating to ownership of the camper.

On appeal, the taxpayers asserted that the hearing before the Commission violated due process. The taxpayers further contended that the department failed to notify them as to what documents were being requested.

The Circuit Court concluded that the hearing before the Commission did not violate due process because its decision was the result of adherence to prescribed procedure and the correct interpretation of applicable law. The burden to show that the assessments were in error is on the taxpayers, and the Commission's finding that they failed to do so is supported by substantial evidence in the record. The taxpayers were adequately informed of which deductions were being challenged and what type of documentation was necessary to successfully challenge the assessments, either in the assessment notices or in a letter from the department's Office of Appeals.

The taxpayers have not appealed this decision



Termination payments treated as capital gains. *Sigurd and Betty J. Gudal vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 3, 2001). The issue in this case is whether termination payments Sigurd Gudal ("the taxpayer") received from State Farm Insurance Company ("State Farm") during 1994 to 1998 qualify for capital gain treatment.

The taxpayers filed Wisconsin income tax returns for the years 1994 through 1997, listing income received from State Farm as termination payments. They did not claim capital gain treatment for the payments.

In November 1998, the taxpayers filed amended returns for 1994 through 1997, claiming refunds based on their belief that compensation received from State Farm during those years qualified for capital gain treatment. The taxpayers filed their 1998 Wisconsin income tax return reporting the compensation from State Farm as a long-term capital gain.

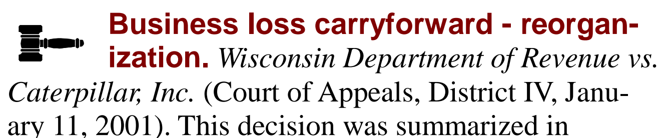
In July 1999, the department denied the taxpayers' refund claims for 1994 through 1997. Also in July 1999, the department issued an assessment against the taxpayers for 1998, on which it denied capital gain treatment on the compensation received from State Farm. The taxpayers filed petitions for redetermination with the department regarding both actions. The department denied both petitions, and the taxpayers then filed timely petitions for review with the Commission.

During 1994 through 1998 the taxpayer was not actively employed by State Farm. At some point prior to 1994, the taxpayer entered into an agency agreement with State Farm, which provided that upon termination he could receive termination payments for 60 months, based on commissions, compensation, and other entitlements as of the date of termination. The agreement also provided for extended termination payments for certain agents who met age and length of service requirements. The agreement did not provide that eligibility for or the amount of termination or extended termination payments were based upon, or in exchange for, the sale of goodwill or any other asset.

The Commission concluded that the payments the taxpayer received from State Farm from 1994 to 1998 were not entitled to capital gain treatment. There is no evidence that there was a sale of assets, as is required for capital gain treatment. Nothing in the agency agreement indicates that State Farm is compensating the taxpayer for his contributions to the company's assets and goodwill, as asserted by the taxpayers.

The taxpayers have appealed this decision to the Circuit Court.

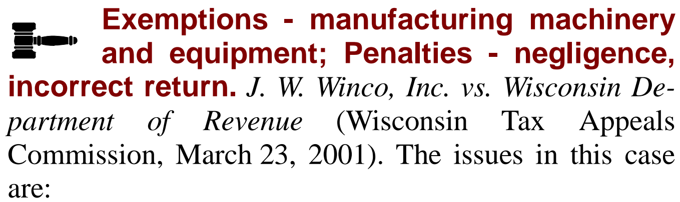
CORPORATION FRANCHISE AND INCOME TAXES



Business loss carryforward - reorganization. *Wisconsin Department of Revenue vs. Caterpillar, Inc.* (Court of Appeals, District IV, January 11, 2001). This decision was summarized in *Wisconsin Tax Bulletin* 124 (April 2001), page 21. That summary indicated that the department had appealed the decision to the Wisconsin Supreme Court.

On April 5, 2001, the Wisconsin Supreme Court denied the department's petition for review. The case is closed.

SALES AND USE TAXES



Exemptions - manufacturing machinery and equipment; Penalties - negligence, incorrect return. *J. W. Winco, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 2001). The issues in this case are:

A. Whether the taxpayer's purchases of Industriever 12000T Vertical Lift Systems (Industrievers) used to stock raw material parts after delivery from suppliers are exempt from Wisconsin sales or use tax as equipment used exclusively in manufacturing under sec. 77.54(6)(a), Wis. Stats.

B. Whether the taxpayer was negligent under sec. 77.60(3), Wis. Stats., in failing to report use tax on purchases of books, stools and chairs, badges, certificates, anniversary seals, a carton opener, a knife, freight charges, and additional Industrievers.

During the year 1997, the taxpayer was a Wisconsin corporation with its principal place of business in New Berlin, Wisconsin.

The taxpayer was in the business of manufacturing business tools and tooling components for sale to other manufacturers and distributors, and the importing, exporting, and wholesale distributing of metric and inch standard clamping and operating elements.

On May 30, 1997, the taxpayer purchased 10 Industrievers on which the taxpayer stocks raw material parts after delivery from suppliers. Some work in progress is also put on the Industrievers after the taxpayer performs some manufacturing work on them. No finished goods are placed on the Industrievers.

Each Industriever contains 42 pans. When stocking parts on an Industriever, the taxpayer's employee enters into the Industriever's computer keyboard the location on the Industriever where the part is to be placed. The computer tells the extractor (vertical lift/conveyor) to retrieve the pan in that location and deliver it to the employee, who then places the part in the pan and pushes the "return pan" button on the keyboard to return the pan to its location on the Industriever. The Industrievers' same moving parts were used to stock raw materials on the Industrievers as were used to retrieve raw materials from the Industrievers.

The taxpayer keeps on a computer separate from the Industrievers information regarding the part identification number, quantity, location, and description of the various items of raw material and work in progress that have been placed on the Industrievers. To manufacture a finished product, the taxpayer's computer generates a kit order, which is an instruction sheet that sets forth the various components of raw material and/or work in progress items and the procedures required to assemble those components into a finished product. The kit order also includes the Industrievers' location code for each of the required components. After obtaining the kit order, the employee inputs the location code from the kit order for each of the required components on the Industrievers' control panel. The Industrievers then deliver the pans which contain each of the components to the employee, who then takes the various components from the Industrievers and either carries them to a work station or places them on a wheeled cart and pushes it to a work station.

The taxpayer does not have statistical information or data indicating the percentage of use for holding raw materials versus stocking or retrieval from the Industrievers for manufacturing. The Industrievers helped the taxpayer reduce its storage space by 93%. The Industrievers did not produce any physical change in the raw materials placed on them, and they were not part of a synchronized system of manufacturing tangible personal property.

During the years 1994 through 1997, the taxpayer had no system for reporting use tax and reported no use tax on its annual sales and use tax returns. The taxpayer indicated on its franchise and income tax returns that it did not purchase any tangible personal property or taxable services for storage, use, or consumption in Wisconsin without paying sales or use tax.

The Department of Revenue mailed sales and use tax returns, instructions, and various publications with sales and use tax information to the taxpayer at its mailing addresses at several different locations.

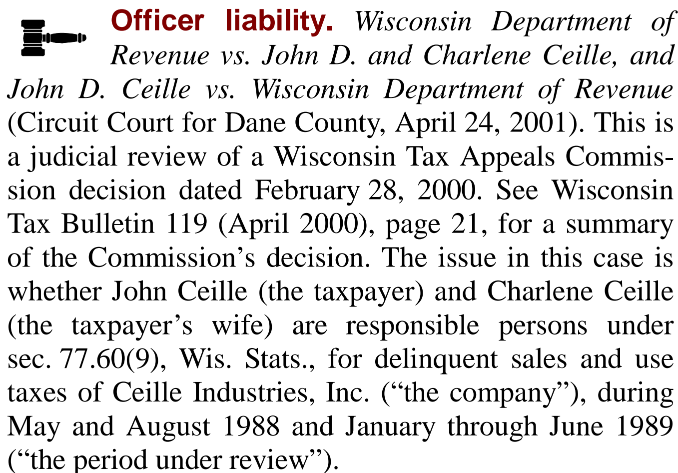
The Commission concluded:

A. The Industrievers were not used exclusively in manufacturing as required by sec. 77.54(6)(a), Wis. Stats., and are not exempt from Wisconsin sales and use tax. The Commission recognized in its opinion that manufacturing does not include storage under the provisions of sec. Tax 11.39, Wis. Adm. Code, and that "exclusively" as defined in sec. Tax 11.40, Wis. Adm. Code, means "to the exclusion of all other uses…except…an infrequent and sporadic use other than in manufacturing tangible personal prop-

erty." The Industrievers were used more than incidentally for storage. Even when raw materials were being retrieved from one pan of an Industriever to be used in manufacturing, the Industrievers' other pans were still being used to store raw materials. At any one time only one of 42 pans, or 2.4% of the Industrievers' capacity, would possibly be considered used in manufacturing, leaving 97.6% used for storage. This does not constitute exclusive use in manufacturing as required under sec. 77.54(6)(a), Wis. Stats.

B. The taxpayer was negligent under sec. 77.60(3), Wis. Stats., in failing to report use tax on purchases of books, stools and chairs, badges, certificates, anniversary seals, a carton opener, a knife, freight charges, and additional Industrievers. It was neglect for the taxpayer's owners and officers to fail to inform themselves concerning the sales and use tax law applicable to such transactions, and it was neglect for them to fail to report and pay use tax on those transactions subject to tax.

The taxpayer has not appealed this decision.



Officer liability. *Wisconsin Department of Revenue vs. John D. and Charlene Ceille, and John D. Ceille vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 24, 2001). This is a judicial review of a Wisconsin Tax Appeals Commission decision dated February 28, 2000. See Wisconsin Tax Bulletin 119 (April 2000), page 21, for a summary of the Commission's decision. 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.

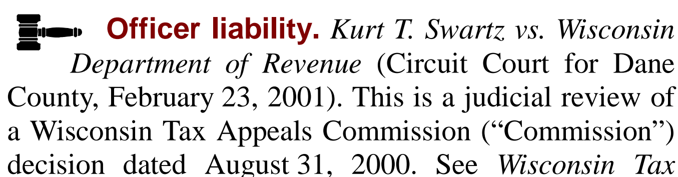
The Circuit Court concluded as follows:

A. The taxpayer is a responsible person who is liable for the company's unpaid sales and use taxes for the month of May 1988.

B. The taxpayer is not a responsible person liable for the company's unpaid sales and use taxes for August 1988 and January through June of 1989.

C. The taxpayer's wife is not a responsible person liable for the company's unpaid sales and use taxes.

Neither the department nor the taxpayer has appealed this decision.



Officer liability. *Kurt T. Swartz vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, February 23, 2001). This is a judicial review of a Wisconsin Tax Appeals Commission ("Commission") decision dated August 31, 2000. See *Wisconsin Tax Bulletin* 123 (January 2001), page 26, for a summary of the Commission's decision. 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 taxpayer also disputes whether the Commission had personal jurisdiction over him because he is a resident of Minnesota, and whether an affidavit submitted by a Department of Revenue ("department") attorney was admissible by the Commission.

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 he became aware of a sales tax delinquency in mid-1994. The taxpayer did not file the return for the month of April 1994 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 Circuit Court found that by filing his petition with the Commission, the taxpayer requested the assistance of the Commission and thus submitted himself to the jurisdiction of the Commission.

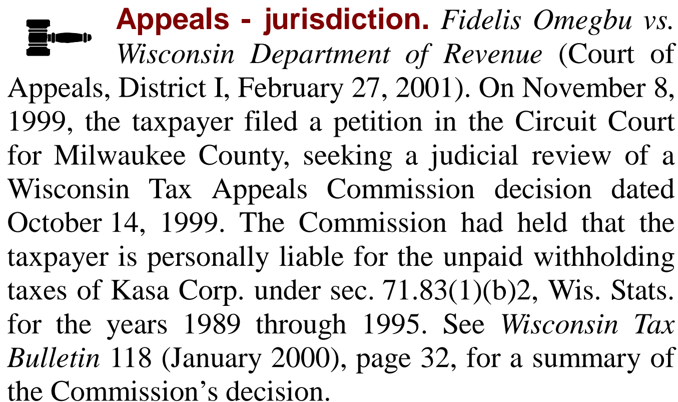
The taxpayer disputes the admission of the affidavit signed by the department's attorney because he alleges the attorney did not have the necessary personal knowledge of the documents attached to the affidavit. However, the Circuit Court found there was a reasonable basis for the Commission's decision to admit the affidavit because the routine identification of documents can be submitted via an attorney's affidavit if the documents qualify as records prepared during the regularly conducted activity of a qualified witness, and the witness is personally acquainted with the business records relative to the assessment at issue. The taxpayer failed to demonstrate the attorney was not personally acquainted with the documents attached to the affidavit.

Giving great deference to the Commission's decision, the Circuit Court affirmed the Commission and 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 based on the affidavit submitted by the department's attorney, he knew the taxes were unpaid and had the authority to see that corporate funds were used to pay them. The affidavit and its attached exhibits show the taxpayer **intentionally breached his duty** when he used corporate funds to pay other creditors with knowledge of taxes being due.

The taxpayer has not appealed this decision.

WITHHOLDING OF TAXES



Appeals - jurisdiction. *Fidelis Omegbu vs. Wisconsin Department of Revenue* (Court of Appeals, District I, February 27, 2001). On November 8, 1999, the taxpayer filed a petition in the Circuit Court for Milwaukee County, seeking a judicial review of a Wisconsin Tax Appeals Commission decision dated October 14, 1999. The Commission had held that the taxpayer is personally liable for the unpaid withholding taxes of Kasa Corp. under sec. 71.83(1)(b)2, Wis. Stats. for the years 1989 through 1995. See *Wisconsin Tax Bulletin* 118 (January 2000), page 32, for a summary of the Commission's decision.

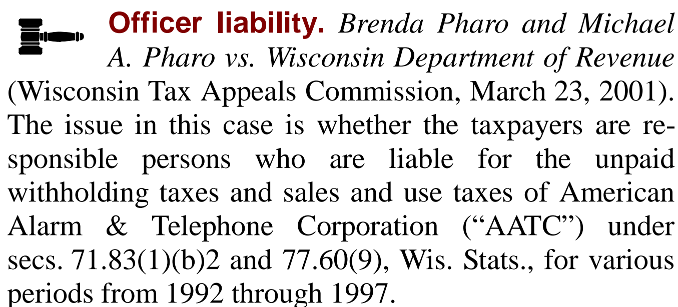
On December 1, 1999, the department moved the Circuit Court to dismiss the taxpayer's petition because the taxpayer failed to properly serve the petition on the department or the Commission. The Circuit Court agreed with the department and dismissed the taxpayer's petition. The taxpayer appealed to the Court of Appeals. (The Circuit Court's decision was not summarized in the *Wisconsin Tax Bulletin*.)

The taxpayer served copies by regular mail on the department and the Commission, of the November 8, 1999, petition with the Circuit Court. The Circuit Court held that it was without subject matter jurisdiction because the taxpayer failed to serve the petition on the department and the Commission in person or by certified mail as required by sec. 227.53(1)(a)1, Wis. Stats.

The Court of Appeals concluded that the Circuit Court correctly held that it lacked subject matter jurisdiction over the taxpayer's petition for review. The Court of Appeals thus granted summary judgment to the department.

The taxpayer has not appealed this decision.

SALES AND USE TAXES, AND WITHHOLDING OF TAXES



Officer liability. *Brenda Pharo and Michael A. Pharo vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 2001). The issue in this case is whether the taxpayers are responsible persons who are liable for the unpaid withholding taxes and sales and use taxes of American Alarm & Telephone Corporation ("AATC") under secs. 71.83(1)(b)2 and 77.60(9), Wis. Stats., for various periods from 1992 through 1997.

During the years 1992 through February 1997, AATC was in the business of selling and servicing telephone systems, and installing and monitoring alarm systems.

From incorporation in January 1992 until early 1995, Brenda Pharo was president and treasurer of AATC. Mrs. Pharo handled some of the accounting and payroll duties for AATC, signing the application for AATC's seller's permit, and signing and filing some of AATC's monthly sales and use tax returns and the AATC 1992 year-end withholding tax return.

Mrs. Pharo was the only signatory on AATC's bank account from November 26, 1991, until December 9, 1994. During this period, Mrs. Pharo signed all checks drawn on this account, usually after determining that funds were available in this account. During the period Mrs. Pharo was president of AATC, AATC was delinquent in its Wisconsin withholding and sales and use taxes. Although AATC owed withholding and sales and use taxes, Mrs. Pharo authorized the use of corporate funds to pay AATC's other creditors.

Michael Pharo, while being president and treasurer of AATC from early 1995 through the end of February 1997, was in fact in charge of virtually all activities of AATC from 1992 through February 1997, including all day-to-day activities of AATC. Mr. Pharo routinely:

- Received and handled inquiries received by the receptionist;
- Assigned duties and responsibilities to AATC employees;
- Assigned service calls for AATC technicians;
- Held himself out as owner of AATC and its "controller," even before becoming AATC's president;
- Signed and filed withholding and sales and use tax returns on behalf of AATC;
- Represented AATC in all dealings with the Department of Revenue; and
- Was compensated for his efforts on behalf of AATC.

Mr. Pharo was a signatory on AATC's checking account beginning December 8, 1994. Prior to and during the period Mr. Pharo was its president, AATC was delinquent in its Wisconsin withholding and sales and use taxes. Mr. Pharo had actual knowledge that AATC was delinquent in its withholding and sales and use taxes as early as 1993. Although AATC owed withholding and sales and use taxes, Mr. Pharo authorized the use of corporate funds to pay AATC's other creditors.

The Commission concluded the taxpayers were persons responsible for the withholding tax and sales and use tax liabilities of the corporation under secs. 71.83(1)(b)2 and 77.60(9), Wis. Stats.

The taxpayers were the corporation's president and treasurer, or played a significant role in the corporation's business affairs. They either possessed the **authority** to write checks on the corporation's checking account or were in a position to direct payment of AATC's tax liabilities. As the corporation's president and treasurer, or responsible person, the taxpayers had a **duty** to pay the taxes of the corporation and knew they were not being paid. The taxpayers **intentionally breached their duty** to pay the taxes when they directed payments to other creditors while the taxes went unpaid.

The taxpayers have appealed this decision to the Circuit Court.

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