



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


 **Appeals - jurisdiction.** *Judy Hagner vs. State of Wisconsin Appeals Commissioners – Musolf, and Department of Revenue* (Court of Appeals, District I, April 19, 2001). This is an appeal from an order of the Circuit Court for Milwaukee County dated July 26, 2000. See *Wisconsin Tax Bulletin* 123 (January 2001), page 23, for a summary of the Circuit Court decision. The issue in this case is whether the Circuit Court has subject matter jurisdiction over the case.

The taxpayer requested the Circuit Court to vacate three decisions of the Wisconsin Tax Appeals Commission and claimed she was owed a tax refund of approximately \$5 million. The Circuit Court dismissed the case because it lacked subject matter jurisdiction, since the taxpayer failed to serve the department with a copy of her petition for review. The taxpayer submitted four affidavits of service to the Circuit Court, but none of them were directed to the department, as required.

The taxpayer contends that even if the Circuit Court lacks subject matter jurisdiction over her appeals to the Commission, the Circuit Court had jurisdiction as an original action because her claim was also based in “civil tort personal injury.”

The Court of Appeals concluded that the Circuit Court properly held that it does not have subject matter jurisdiction over this matter. The Court of Appeals further concluded that a civil tort claim against the Commission is barred by the doctrine of sovereign immunity, because the taxpayer did not comply with the “notice of claim” statute.

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

 **Appeals - jurisdiction.** *Robert J. Quinnell vs. Wisconsin Department of Revenue and Wisconsin Tax Appeals Commission.* (Circuit Court for Wood County, June 12, 2001). This is an appeal from a decision of the Wisconsin Tax Appeals Commission dated February 20, 2001. See *Wisconsin Tax Bulletin* 124 (April 2001), page 19, for a summary of the Commission’s decision.


The Commission's ruling and order was issued and mailed to the taxpayer on February 20, 2001. The 30-day period for filing a petition for review of the Commission's decision lapsed on March 22, 2001. The taxpayer's petition for review was filed with the Circuit Court on March 23, 2001, and the Commission filed a Motion to Dismiss the petition, on the grounds that it was not timely filed.

The Circuit Court concluded that even though the petition for review was only one day late, the Circuit Court

has no authority to hear it, regardless of any merit it may have. The deadline may not be extended or ignored by the court.

Without the authority or jurisdiction to act, The Circuit Court dismissed the petition for review.

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

 **Appeals - jurisdiction.** *Billy E. Stephenson and Terry A. Stephenson vs. Wisconsin Department of Revenue* (Court of Appeals, District I, August 6, 2001). This is an appeal from a February 9, 2001, order of the Circuit Court for Milwaukee County, denying the taxpayers' motion for reconsideration of its decision dated January 2, 2001. See *Wisconsin Tax Bulletin* 125 (July 2001), page 15, for a summary of the Circuit Court's January 2 decision.


The summary of the January 2 Circuit Court decision stated that the taxpayers had not appealed the decision. However, on May 10, 2001, the taxpayers did appeal the Circuit Court's February 9, 2001, denial of their January 21, 2001, motion for reconsideration of the January 2 decision.

The Court of Appeals issued an order on July 10, 2001, in which it concluded that the May 10, 2001, notice was not timely filed as to the Circuit Court's January 2, 2001, decision, and therefore it has no jurisdiction in the

matter. While the appeal was timely as to the February 9, 2001, order denying the motion for reconsideration, the scope of issues reviewable on appeal from that order is limited to new issues that were not previously raised. The July 10 order directed the parties to file memoranda addressing whether any new issues were raised in the January 21 motion for reconsideration. The resulting memoranda did not identify any new issues that might be subject to the Court of Appeals' jurisdiction.

The Court of Appeals concluded that in light of the memoranda submitted by the parties, new issues subject to its jurisdiction were not presented by the taxpayers. Accordingly, the Court of Appeals lacks the jurisdiction to review the Circuit Court's order denying the motion for reconsideration. The Court of Appeals therefore dismissed the appeal.

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

 **Assessments - correctness; Appeals - frivolous.** *Jerome Redcay vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 3, 2001). The issues in this case are:

- A. Whether the department properly assessed the taxpayer for 1998 Wisconsin income taxes to include in income wages he received during the year, and whether the department properly denied the taxpayer's petition for redetermination.
- B. Whether the taxpayer's arguments in this case are frivolous and groundless, thereby subjecting him to an additional assessment under sec. 73.01(4)(am), Wis. Stats.

In May 1999, the department sent the taxpayer an assessment covering tax year 1998. The assessment was

based on the department's receipt of one or more wage statements showing wages paid to the taxpayer in 1998, which were not reported on his 1998 income tax return. The taxpayer was domiciled in Wisconsin during all of 1998.

The taxpayer filed a petition for redetermination with the department in July 1999. The department denied the petition for redetermination, and the taxpayer timely filed an appeal with the Commission.

The taxpayer's arguments in this case are, generally, that neither federal nor Wisconsin tax laws apply to his earnings. He specifically argued that the department lacks statutory authority to impose income tax on his earnings because they are excluded by Amendment V of the U. S. Constitution, federal and Wisconsin statutes, and the Wisconsin administrative code. He cited por-

tions of federal and Wisconsin cases and also argued that his earnings are excluded because they are convertible to federal reserve notes, which are exempt from tax under 18 U. S. C. sec 8.

The Commission concluded as follows:

- A. The department properly assessed the taxpayer for 1998 Wisconsin income taxes to include in income wages he received during the year. In addition, the department properly denied the taxpayer's petition for redetermination.
- B. The taxpayer's arguments in this case are frivolous and groundless, thereby subjecting him to an additional assessment under sec. 73.01(4)(am), Wis. Stats. The arguments consist of semantic gymnastics, which attempt to rationalize why Wisconsin's

income tax laws do not apply to his income. The taxpayer's arguments and ones like them have been given no credence in prior cases before the Commission and the courts, and his arguments do not prevail now.

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.

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. [☞](#)

☞ Distributable net income. *Edmund R. Gilson vs. Wisconsin Department of Revenue* (Court of Appeals, District III, May 15, 2001). This is an appeal from a judgment of the Circuit Court for Outagamie County, dated April 4, 2000. The Circuit Court affirmed decisions of the Wisconsin Tax Appeals Commission dated June 24, 1999, and August 27, 1999. See *Wisconsin Tax Bulletin* 118 (January 2000), page 28, for a summary of the Commission's decisions. (The Circuit Court decision was not summarized in the *Wisconsin Tax Bulletin*.)

The Commission held (and the Circuit Court affirmed) that distributions the taxpayer received from the estate of his late wife, Margaret Gilson ("Margaret"), carried with them "distributable net income" ("DNI"), subject to Wisconsin income tax. The taxpayer contends that under the "separate share rule" set forth in sec. 663(c) of the Internal Revenue Code ("IRC"), he should be required to pay taxes only on 25% of the DNI because that is the percentage of the distributions from Margaret's trust that he would have received if the trust had been funded. The Commission held that the separate share rule did not apply because, under the terms of a settlement agreement, the distributions passed from the estate directly to the taxpayer, without going through the trust.

The taxpayer argues that: (1) the Commission erroneously interpreted Margaret's will when it concluded that the personal representatives were allowed to bypass the trust; (2) the prerequisites for giving that authority to the personal representatives were not met; (3) the separate share rule should apply because the payment from the


estate discharged a legal obligation of the trust; and (4) payment under the will was not proper if it did not discharge the trust's obligation.

Margaret's will named her two daughters and Valley Trust Company as personal representatives of her estate. After disposing of some specific items, the will provided that the residue would go to a trust that was simultaneously created, with the same daughters and trust company named as trustees.

Following Margaret's death, a dispute arose between her daughters and her husband regarding the dollar values to be inserted into the formula created by the trust documents to determine the taxpayer's share. The parties eventually entered into a settlement agreement that, as amended, required the estate to distribute to the taxpayer specific property and cash. It did not contain any provision characterizing the tax attributes of the payments. The estate's tax returns showed that its distribution to the taxpayer carried out the DNI, but the taxpayer's tax returns did not conform with the estate's position.

The Court of Appeals concluded that the Commission reasonably held that Margaret Gilson's will allowed the personal representatives to bypass the trust and distribute the estate directly to the recipients. The will unequivocally allows them to distribute property or bequests set out in the trust "directly to the recipient or beneficiary without transferring such assets to the Revocable Trust...."

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

 **Retirement funds exempt.** *Alan and Carol Hansis vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 14, 2001). The issue in this case is whether retirement benefits paid to the taxpayers during 1995 through 1998 are exempt from the Wisconsin income tax.

Taxpayer Alan Hansis (“Mr. Hansis”) became a member of the Milwaukee Teachers Retirement System (“MTRS”) in 1961. In 1966 he withdrew his entire monetary contributions to the MTRS. The withdrawal application, signed by Mr. Hansis, stated that payments by the MTRS “shall constitute a full and complete discharge and release of all right, interest or claim on my part to state deposit accumulations which accrued while a member of said FUND.”

Mr. Hansis became a member of the State Teachers Retirement System (“STRS”) in 1966, and in 1995 he purchased 6 years of forfeited MTRS service. The Department of Employee Trust Funds (“DETF”) added the 6 years to his total creditable service in 1998, pursuant to the Wisconsin Court of Appeals decision in *Benson v. Gates*, 188 Wis. 2d 389 (Ct. App. 1994).

Taxpayer Carol Hansis (“Mrs. Hansis”) first became a member of MTRS in 1960. In 1965 she withdrew her entire monetary contributions to the MTRS. The withdrawal application, signed by Mrs. Hansis, stated that payments by the MTRS “shall constitute a full and complete discharge and release of all right, interest or claim on my part to state deposit accumulations which accrued while a member of said FUND.”

Mrs. Hansis joined the Wisconsin Retirement System (“WRS”) in 1972. DETF added 2 years of forfeited

MTRS service to her total creditable service in 1998, pursuant to the Benson decision.


On their 1998 Wisconsin income tax return, the taxpayers subtracted from their federal adjusted gross income the retirement benefits they received from the WRS in 1998. The department issued a refund based on their 1998 return.

In July 1999, the taxpayers filed amended Wisconsin income tax returns for 1995, 1996, and 1997, subtracting retirement benefits paid by the WRS to Mr. Hansis. The department issued refunds based on the amended returns for 1995 and 1996, but not 1997.

In January 2000, the department issued an assessment reversing the refunds issued for 1995, 1996, and 1998, and denying a refund for 1997. The taxpayers filed a timely petition for redetermination that the department denied. They each filed a timely petition for review with the Commission.

The Commission concluded that the retirement benefits paid to the taxpayers are not exempt from the Wisconsin income tax, because they were not paid on the accounts of persons who were members of an eligible retirement system as of December 31, 1963. Since each taxpayer withdrew all of the assets that remained in each of their accounts subsequent to December 31, 1963, there was nothing remaining in the accounts as of that date to which they had any right. The taxpayers’ repurchase of forfeited credit does not mean their retirement benefits were paid on the account of a member as of December 31, 1963.

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

 **Retirement funds exempt - federal retirement benefits.** *Raymond L. and Helen L. Bartkowiak vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 19, 2001). The issue in this case is whether the taxpayers are entitled to refunds for taxes they paid on military benefits received by Raymond L. Bartkowiak (“the taxpayer”) in 1983 and 1984.

The taxpayers filed Wisconsin income tax returns for 1983 and 1984, on which they reported as income federal military retirement benefits (“military benefits”) the taxpayer received in those years. In October 1993, the taxpayers claimed refunds for the taxes they paid on the military benefits for those years.

In February 1994, the department and counsel for a number of federal retirees entered into a Settlement Stipulation that provided a method for resolving claims by certain federal retirees for refunds of income taxes previously reported on their federal pensions. Pursuant to the Settlement Stipulation, the taxpayers received a Questionnaire and Release, which they both signed. It provided, in part, that the taxpayers release the State of Wisconsin from any other legal claims relating to the past taxation of federal pension income by the State of Wisconsin. As a result, the taxpayers received installment payments constituting refunds of taxes and interest for 1985 through 1988.

The Settlement Stipulation provided that in order to be considered by the department, refund claims must be filed in a timely fashion as provided by chapter 71 of the Statutes. It specifically provided that refund claims for 1984 must be filed by April 17, 1989, and that each party expressly releases any and all claims related to the taxation of federal pension income for tax years prior to 1984.


In May and August 1994, the department denied the taxpayers' claims for refund for 1984 and 1983, respectively. The taxpayers filed petitions for redetermination with the department, which the department denied. They then filed petitions for review with the Commission.

The Commission concluded that the taxpayers were not entitled to refunds for taxes paid on the taxpayer's military benefits, because their claims for refund were not timely filed pursuant to sec. 71.75(2), Wis. Stats. In addition, in exchange for payment of refunds for 1985 and thereafter, the taxpayers agreed that the statute of limitations set forth in chapter 71 applied to their claims, and they agreed to forgo any refunds for years prior to 1984.

The taxpayers have not appealed this decision.

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. [☞](#)

CORPORATION FRANCHISE AND INCOME TAXES

 **Appeals - jurisdiction.** *Kurtis and Donna Borre, and Interstate Management Services, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, April 3, 2001). The issue in this case is whether the Wisconsin Tax Appeals Commission ("the Commission") has jurisdiction to rule on the taxpayers' petitions for review, neither of which were filed within the time prescribed in sec. 73.01(5)(a), Wis. Stats.

Taxpayers Kurtis and Donna Borre ("the Borres") were assessed income tax by the department in October 1998. They filed a petition for redetermination, which the department granted in part and denied in part, in a Notice of Action dated August 11, 2000, and received by the Borres on August 14, 2000. The Borres filed a petition for review with the Commission, postmarked October 18, 2000. The statutory 60-day period for filing a timely petition for review expired October 13, 2000.

Taxpayer Interstate Management Services, Inc. ("Interstate") was assessed income/franchise tax by the department, also in October 1998. Interstate filed a petition for redetermination, which the department granted

in part and denied in part, in a Notice of Action dated August 11, 2000, and received by Interstate on August 15, 2000. Interstate filed a petition for review with the Commission, postmarked October 18, 2000. The statutory 60-day period for filing a timely petition for review expired October 16, 2000.

The department moved to dismiss both petitions for review, on grounds that they were not filed within the 60-day period prescribed in sec. 73.01(5)(a), Wis. Stats. The Borres claimed that Kurtis Borre comes within the definition of "disability" in the Americans with Disabilities Act ("ADA") and thus invoked the provisions of the ADA to seek redress from the department's notice to them of their appeal rights.

The Commission concluded that because the Borres' and Interstate's petitions for review were not filed within the time prescribed in sec. 73.01(5)(a), Wis. Stats., the Commission lacks subject matter jurisdiction. The Commission therefore granted the department's motion to dismiss. The Commission rejected Kurtis Borre's argument that his claim of disability was relevant to its jurisdiction in these matters.

Neither the Borres nor Interstate have appealed this decision. [☞](#)

SALES AND USE TAXES

Exemptions - waste reduction or recycling machinery and equipment.

Browning-Ferris Industries of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Court of Appeals, District IV, June 28, 2001). On September 28, 2000, the Circuit Court for Dane County affirmed the Wisconsin Tax Appeals Commission decision dated January 13, 2000. See *Wisconsin Tax Bulletin* 123 (January 2001), page 25 and *Wisconsin Tax Bulletin* 119 (April 2000), page 20, for summaries of the Circuit Court and Commission decisions. The issue in this case is 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.

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 used to transport recyclables to processing facilities, including equipment, attachments, and repairs for the motor vehicles.

The Commission held that 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.

The Circuit Court affirmed the Commission's decision, that 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 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 Court of Appeals concluded that the Commission's interpretation of "directly used for" as meaning "performs an integral function in" waste reduction is a reasonable one, and the disputed items did not perform an integral function in waste reduction activities. The Court of Appeals also concluded that the Commission's interpretation of "reducing the amount of solid waste generated" to exclude reducing the volume of solid waste already generated is reasonable. Giving due weight to the Commission's interpretations, and finding that the taxpayer has not offered a more reasonable interpretation, the Court of Appeals affirmed the Circuit Court's decision that 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.

The taxpayer appealed this decision to the Wisconsin Supreme Court. On September 19, 2001, the Supreme Court denied the petition for review. [☞](#)

Leases and rentals - real vs. personal property.

All City Communication Company, Inc. and Waukesha Tower Associates vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 6, 2001). The issues in this case are:

- A. Whether the gross receipts Waukesha Tower Associates ("Waukesha Tower") received for the use of a tower and equipment building are subject to sales tax as payments for the lease of tangible personal property.

- B. Whether the rental fees paid by All City Communication Company, Inc. (“All City”) to owners of towers and rooftop equipment on which All City placed its communication equipment are subject to sales tax as payments for the rental of tangible personal property.

During the years 1986 through 1995, Waukesha Tower built and owned a communication tower and an adjacent equipment building on leased land. Waukesha Tower obtained all of the necessary approvals from local, state, and federal government agencies to erect the tower. The lease agreement between the land owner and Waukesha Tower provided that “Improvements and personal property” on the land were the property of Waukesha Tower, which could remove them at the end of the 10-year lease. The lease agreement also contained a provision allowing Waukesha Tower to purchase the leased land if the owner received an offer to purchase from another person, and a provision granting Waukesha Tower an option to purchase the land during the last year of the lease.


Portions of the tower, which was specifically designed for the leased land, were constructed off the premises and brought to the property for assembly there. Concrete anchor points were poured at the leased property to support the tower, approximately 30 guy wires, and the two adjacent equipment buildings. The two buildings adjacent to the tower housed electronic equipment to provide electric power for building lighting, to power the electronic equipment, to maintain climate control in the buildings, and to power transmission equipment on the tower. The buildings also housed telephone lines. The tower could be taken down either by toppling it in place or by dismantling it piece by piece. The tower could either be reassembled at another site, sold as scrap metal, or sold as a used tower.

During the years 1992 through 1995, All City was engaged in the paging business and paid rental fees to owners of towers, including Waukesha Tower, for the placement of its reception and transmission equipment. The rental fees also allowed All City to place other equipment in related, adjacent equipment buildings. All City then used the installed equipment for its own paging business, and also rented the use of its equipment to its customers so they could transmit their signals. All City rented space from Waukesha Tower, for five years, at approximately the 480 foot level of their tower and space in an adjacent equipment building for All City to install, operate, and maintain its 2-way radio equipment.

The Commission concluded as follows:

- A. The gross receipts Waukesha Tower received for the use of the tower and equipment building are subject to sales tax as payments for the lease of tangible personal property. When the tower and related equipment building were installed, Waukesha Tower did not own the land on which they were installed. Therefore, the tower and building remained tangible personal property, not a real estate improvement.
- B. The rental fees paid by All City to Waukesha Tower and to other owners of towers and rooftop equipment on which All City placed its communication equipment are subject to sales tax as payments for the rental of tangible personal property. The rental agreements allow All City to install, operate, and maintain its communications equipment on towers located on leased land for a fixed period for a monthly fee. The agreements are for the lease of locations on towers and related buildings that are tangible personal property, and not merely for access to the equipment.

The taxpayers have appealed this decision to the Circuit Court. [☞](#)

 **Officer liability.** *Eugene C. Rondon vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 5, 2001). The issue in this case is whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of National Vehicle Management, Inc. (“the corporation”), under sec. 77.60(9), Wis. Stats., for the periods of February, May through August, November, and December 1995 and January through July 1996, and for a dealer plate project assessment for January 1992 to December 1995.

The taxpayer was president and sole shareholder of the corporation, was in charge of the corporation’s day-to-day operations, and was authorized to sign checks on the corporation’s checking account.

In May and December 1995 and January 1996, the taxpayer signed and issued checks to pay creditors other than the department, even though he knew there were unpaid sales taxes due to the department.

The taxpayer signed all of the corporation's monthly Wisconsin sales and use tax returns for the period under review, reporting taxes due to the department. The taxpayer, on behalf of the corporation, also signed an agreement with the department on October 12, 1995, acknowledging sales and use tax delinquencies through August 1995.

The Commission concluded the taxpayer is personally liable under sec. 77.60(9), Wis. Stats., for unpaid sales tax of the corporation for the periods of February, May through August, November, and December 1995 and January through July 1996, and for a dealer plate project assessment for January 1992 to December 1995. The Commission awarded summary judgement to the department as there was no genuine issue as to any material fact and the department is entitled to summary judgement as a matter of law.

The taxpayer was president and sole shareholder of the corporation, was in charge of the corporation's day-to-day operations, was authorized to sign checks on the

corporation's checking account, and had **authority** to pay the corporation's sales taxes. The taxpayer signed all sales and use tax returns for the corporation and knew what taxes were owed to the department. As a person with authority, and having been advised by 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 his duty** when he issued checks to the corporation's creditors, knowing that sales tax was due to the department.

The taxpayer's claim that the assessment is an "excessive fine" is not supported because the assessment simply recovers the amount of revenue lost to the state as a result of his conduct. Further, the taxpayer's claim that the department violated his constitutional rights to due process and equal protection is unsupported and makes no legal sense.

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

DRUG TAXES



Drug tax, claim for refund - timeliness.

David L. Gilbert vs. Wisconsin Department of Revenue (Court of Appeals, District II, June 6, 2001). This is an appeal from an order of the Circuit Court for Waukesha County, dated June 21, 2000. See *Wisconsin Tax Bulletin* 122 (October 2000), page 29, for a summary of the Circuit Court's decision. The Circuit Court reversed a decision of the Wisconsin Tax Appeals Commission ("Commission") to dismiss the taxpayer's petition for review and the Commission's denial of a rehearing. The department argues that The Commission's dismissal and denial were proper because the taxpayer's petition for review was not filed within two years of a tax assessment, as required under sec. 71.75(5), Wis. Stats. (1995-96).

In June 1993, the department issued a notice of amount due to the taxpayer for taxes, interest, and penalties, under the then-existing Wisconsin tax on controlled substances. The taxpayer paid the tax. In January 1997, the Wisconsin Supreme Court held in *State v. Hall*, 207 Wis. 2d 54, 557 N.W.2d 778 (1997), that the controlled substances tax violated the constitutionally guaranteed privilege against self-incrimination.

In November 1997, the taxpayer requested a refund, citing the unconstitutionality of the controlled sub-

stances law under *Hall*. The department denied the taxpayer's request because it was not filed within two years of the assessment as required under sec. 71.75(5), Wis. Stats. The taxpayer requested a redetermination, the department denied it, and the taxpayer timely filed a petition for review with the Commission.

The department sought an order dismissing the taxpayer's petition and the Commission granted the motion, on the grounds that the taxpayer's request for a refund was untimely under sec. 71.75(5), Wis. Stats., because he did not file it within two years after notice of the assessment under the controlled substances law. The taxpayer filed a petition requesting the Commission to grant a rehearing on its decision, the Commission denied the petition, and the taxpayer filed a petition for judicial review with the Circuit Court.

The Circuit Court reversed the Commission's ruling and order. Relying on municipal property tax cases, the Circuit Court held that the department's assessment was void *ab initio* (void from the beginning), and that the time limits cited were therefore inapplicable to the taxpayer's refund claim. The department appealed from the Circuit Court's order.

The Court of Appeals concluded that the Commission properly dismissed the taxpayer's claim and the Circuit Court improperly reversed the Commission's ruling.

The Legislature provided the taxpayer with an administrative remedy for recovery of allegedly illegal or excessive state taxes, and the taxpayer was required to file a refund request within two years under sec. 71.75(5), Wis. Stats., in order for it to be considered. The Court of Appeals disagreed with the Circuit Court's decision that the assessment was void *ab initio*. Citing *Hogan v. Musolf*, 163 Wis. 2d 1, 471 N.W.2d 216 (1991), the Court of Appeals stated that the department and the Commission "would become ineffectual if they lost their authority to review a case every time a consti-

tutional claim was asserted." Administrative remedies must be timely pursued in connection with all claims, including claims that a state taxing statute is unconstitutional. The Legislature made compliance with this provision mandatory because under sec. 71.75(1), Wis. Stats., it is the only method for the filing and review of claims for refund.

The taxpayer appealed this decision to the Wisconsin Supreme Court. On September 19, 2001, the Supreme Court denied the petition for review. [☞](#)