



## 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:

### Sales and Use Taxes

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### SALES AND USE TAXES

**Boat docking and storage services.** *Brennan Marine, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, September 7, 2011). The issue in this case is whether the taxpayer's barge fleeting service on the Mississippi River is subject to Wisconsin sales and use taxes as "docking or providing storage space for boats" under sec. 77.52(2)(a)9., Wis. Stats.

The taxpayer is a Wisconsin corporation, with its principal place of business in La Crosse, Wisconsin. Initially founded in 1984 as a marine service company, it has grown to provide a wide variety of marine transportation and management services throughout the Upper Mississippi River region. The taxpayer's transportation services include fleeting, switching, short haul towing, and barge cleaning, along with topside and dry-dock repairs.

Some fleeting industry terms and tools of the trade are as follows:

A "barge" is a long, large, usually flat-bottomed, unpowered vessel that is towed or pushed by other craft. It is typically used for transporting freight.

A "tow" is a group of interconnected barges that are transported by a tugboat or tow boat. A "line tow" is made up of a group of barges that are transported by line-haul towboats over long distances and between major ports. Line-haul towboats are typically larger tugboats equipped with living quarters for the crew designed to operate in line-haul operations.

"Line-haul operations" are operations involved in the transportation of freight between ports, usually dedicated to a river section, such as the Lower Mississippi.

A "dock" is a structure that is connected to the shore and serves as the location where a barge is loaded and unloaded with cargo. Docking fees are generally charged by dock operators to customers on a per hour or per ton basis for the use of the dock to load or unload a barge.

A "fleet," "fleeting area," or "fleeting site" is an off-shore staging area where barges are staged until appropriate transportation can be arranged. There is no access to the fleeting site from the shore other than by boat. Rather than allowing the barges to drift in the waterway, the barge is secured in the fleeting area. Typically, the barge is staged at the fleeting area because either (1) the dock where the barge is loaded or unloaded is being utilized, or (2) the tow responsible for transporting the barge is not immediately available.

"Fleeting" or "fleeting services" consists of the temporary staging or marshalling of barges in the fleeting area and the disassembly and assembly of tows. A fleeting charge for fleeting services is charged by the owner or operator of a fleeting area on a per day basis.

The taxpayer's fleeting services begins when the taxpayer rearranges barges in the tow to allow access to the barges designated for the specific port and certain docks in the area and removes the barges from the tow. The taxpayer then transports all barges removed from the tow to a fleet site using a harbor tug or switch boat. Because a particular dock may not be immediately available for loading or unloading, the barge or barges will be temporarily fleeted or staged by the taxpayer at the fleeting area until the dock is ready for the particular barge.

When the dock is available, the taxpayer tows a selected barge or barges from the fleeting site to docks for loading and unloading. Barges that have been unloaded at a dock are then towed by the taxpayer to another dock where they are cleaned, if necessary, or back to the fleeting area.

The taxpayer's next step for the empty barge is to load it with cargo in the port, at which time the taxpayer tows the barge to the dock for loading. Alternatively, the empty barge departs empty when the taxpayer places the barge in a passing line-haul tow to transport the barge to the next fleeting and loading port. Once the tow arrives, the taxpayer is responsible for switching the barges from the fleeting area to an outward-bound tow.

Barges that have been loaded at a dock are subsequently towed by the taxpayer to the fleeting area for future tow assembly. Once the tow arrives, the taxpayer is responsible for reassembling the tow.

In less frequent instances, barges that have been repaired by the taxpayer in its dry-dock are staged at a fleeting area until a tow arrives to pick up the barge. The taxpayer tows the barge from the dry-dock area to the fleeting area, and once the tow arrives, the taxpayer is responsible for towing the barge from the fleeting area to the tow, and reassembling the tow itself.

The barge fleeting services at issue encompass all of the services provided by the taxpayer, as described above. In all instances, the taxpayer's fleeting services are provided in connection with barges in excess of a 50-ton burden which are primarily engaged in transporting freight or cargo in interstate or foreign commerce. The taxpayer does not provide fleeting services with regard to watercraft that are designed and constructed for the transportation of persons on water.

Barges that are staged at a fleeting area are available for immediate use and transportation. Barges are typically staged at any one fleet for an average period of twelve days. The taxpayer does not, and has not, used its fleeting areas to store barges that are out of service for extended periods of time. The taxpayer does not own a dock, and the taxpayer does not charge its customers a docking fee.

The Department of Revenue argued that the taxpayer's barge fleeting services are subject to sales tax as "docking" under sec. 77.52(2)(a)9., Wis. Stats. Alternatively, the department argued that the taxpayer's activity constitutes providing storage space for boats.

The taxpayer filed a Petition for Redetermination, arguing that its fleeting charges are not taxable under sec. 77.52(2)(a)9., Wis. Stats., because fleeting services are neither "docking" nor providing "storage space" for boats, and that the barges being fleeted do not fall within the definition of a "boat."

The Wisconsin Tax Appeals Commission reversed the Department of Revenue's sales tax assessment against the taxpayer. While the Commission concluded that a "barge" is a "boat," for purposes of sec. 77.52(2)(a)9., Wis. Stats., the Commission also concluded that barge fleeting services are not subject to sales and use taxes under sec. 77.52(2)(a)9., Wis. Stats.

The Department of Revenue has not appealed this decision.

**Officer liability.** [\*Terrill J. Marxer vs. Wisconsin Department of Revenue\*](#) (Wisconsin Tax Appeals Commission, July 15, 2011).

The issues in this case are (1) whether the taxpayer is a responsible person who is liable for the unpaid sales taxes of Marc's Brothers, Inc. under sec. 77.60(9), Wis. Stats., for the period of September 1, 2002 through March 31, 2004, and (2) if the Department of Revenue's estimated assessment is correct.

Marc's Brothers, Inc. was formed as a Nevada corporation for purposes of operating a used car dealership and did business under the name Precision Auto Center. At the beginning of the operation of Marc's Brothers, Inc., Marc Baldwin, Jack Elsinger, and the taxpayer were each 33.3% owners of the corporation. The taxpayer was also identified as a 33.3% owner of Marc's Brothers, Inc. on the Entity/Owner Statement document filed with the Department of Transportation (DOT) and was listed on DOT records as a salesperson for Marc's Brothers, Inc., as well as the holder of a Buyer Identification Card for the company. A Buyer Identification Card is necessary for the purchase of automobiles at auction, which the taxpayer did.

The taxpayer was listed as "Manager" on the bank signature card for Marc's Brothers, Inc. and was the only authorized signatory on the company's checking account. The vast majority of the checks signed on behalf of Marc's Brothers, Inc. were signed by the taxpayer.

The company applied for a Wisconsin seller's permit, authorizing it to collect and remit sales taxes. Sales taxes were collected from customers on cars sold, and these taxes were deposited into the company's bank accounts.

Some cars were sold by Marc's Brothers, Inc. for between \$200 and \$1,000 each. Jack Elsinger bought a car from the company for \$15,700, and paid sales tax to the company on that purchase. None of the owners were able to state the dollar amount of the sales of cars by Marc's Brothers, Inc., and the taxpayer did not submit any records of the actual amount of sales by the company in evidence to the Commission.

Marc's Brothers, Inc. was required to file monthly sales tax returns. The company filed sales tax returns for the period April through August 2002, but did not file sales tax returns for the period September 2002 through March 2004. The department made estimated sales tax adjustments against Marc's Brothers, Inc. for each month of the period September 2002 through March 2004, in the amount of \$1,875.00 tax, plus applicable penalties, interest, and fees.

The taxpayer testified that the bank statements came to his home and that he had access to these statements. There was no indication in the company's check register or on stubs that any checks were being written to the Wisconsin Department of Revenue for sales taxes, and the taxpayer was aware that sales tax was due when a car is sold. The taxpayer had access to the checkbook of the company, but never signed any company checks to pay sales tax. Numerous checks payable to various third parties were signed by the taxpayer during the period at issue, and the amount shown as deposits into the company's bank account exceeded the total estimated sales taxes, indicating that the company was able to pay the sales taxes that were due. At one point, Jack Elsinger signed over his 1/3 interest in the company to the taxpayer, making the taxpayer a 2/3 owner of the company, but the business ended in 2004.

The Commission concluded that the taxpayer is personally liable for the unpaid sales taxes of Marc's Brothers, Inc. from September 1, 2002 through March 31, 2004. The Commission stated that the Department of Revenue met its burden of proof in presenting evidence that the taxpayer as manager, and eventually majority owner of Marc's Brothers, Inc., had the **authority** to sign checks on behalf of the company. As manager and part owner, and the only one authorized to sign checks, the taxpayer clearly had the **duty** to pay the taxes. The Commission also stated that the evidence was clear that the taxpayer wrote checks to other creditors while sales taxes were due, thereby satisfying that the taxpayer **intentionally breached his duty**.

Regarding the second issue of whether the Department of Revenue's assessment was correct, the taxpayer did not meet his burden of proving the assessment to be incorrect. Neither at trial, nor in any of the documents filed before the trial, did the taxpayer offer any evidence as to what the correct amounts of the company's sales were. Therefore, the Commission was forced, under the law, to accept the department's estimated assessment as correct.

The taxpayer has appealed this decision to the Circuit Court.

**Officer liability.** [\*Elijah M. Rashaed vs. Wisconsin Department of Revenue\*](#) (Wisconsin Tax Appeals Commission, July 13, 2011). The main issue in this case is whether the taxpayer is personally liable for the sales and use tax liability of M & S, Inc.

M & S, Inc. filed an application for a Wisconsin seller's permit on or about January 29, 1996, listing its principal business as retail clothing. According to the Department of Revenue's computer records, M & S, Inc. had a lengthy history of filing its monthly sales and use tax returns late, as well as a lengthy history of not remitting or timely remitting the sales and use taxes due per its return. When the returns for the periods at issue were filed, they appear to have been signed by the taxpayer, using variations of his name, or by Laura Scruggs, using variations of her name. **Note:** The taxpayer filed a petition with the Milwaukee Circuit Court on August 8, 2001, requesting that his name be legally changed from Dennis Bell to Elijah Mohammad Rashaed. Variations of his name have been used on documents (e.g., checks, accounts) throughout.

In August 2001, the Department of Revenue made a determination to revoke M & S, Inc.'s Wisconsin seller's permit as of December 31, 2000, for failure to timely file its sales and use tax returns and for failure to timely remit the sales taxes due. The department also billed M & S, Inc. by issuing notices of amount due for the unpaid sales taxes, including interest, fees, and penalties. Various collection activities were pursued by the department.

On March 21, 2005, the Department of Revenue issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of Amount Due of an assessment of personal liability for the unpaid estimated sales and use taxes\* of M & S, Inc. for the months of August 2000, October 2000, November 2000, and December 2000. The taxpayer's attorney appealed this assessment on behalf of the taxpayer stating in the taxpayer's Amended State-

ment of Facts and Objections that “Through July 31, 2000, Mr. Rashada controlled the corporation known as M&S Incorporated ...” Also per the Amended Statement of Facts and Objections, it was stated that “On or about July 31, 2000, Mr. Rashada relinquished control of M&S Incorporated ...”

\*Also on March 21, 2005, the department issued to Mohammed Rashada, n/k/a Elijah M. Rashaed, a Notice of Amount Due of an assessment of personal liability for the unpaid withholding taxes of M & S, Inc., for the periods 1999 WT-7, the annual reconciliation withholding tax report, January 2000 through September 2000, and 2000 WT-7, the annual reconciliation withholding tax report. The taxpayer subsequently paid the delinquent assessment of personal liability for these withholding taxes.

On January 19, 2007, the Department of Revenue received M & S, Inc.’s sales and use tax returns for August 2000, October 2000, and November 2000, which were signed by the taxpayer. The department reduced the estimated tax assessment against M & S, Inc. to the return amounts. It was further stipulated that the reduction also applied to the personal liability of the taxpayer for tax, penalty, and interest.

In September 2008, the department gathered evidence to personally assess the taxpayer for the unpaid sales and use taxes of M & S, Inc. for various periods from February 28, 1998 to May 31, 2000. The Department of Revenue mailed a letter to the taxpayer, dated February 3, 2009, informing the taxpayer that interviews were being conducted to establish personal liability for the delinquent account of M & S, Inc. On March 6, 2009, the Department of Revenue assessed the taxpayer for the unpaid sales and use tax, including interest and penalties, of M & S, Inc. for various periods from February 28, 1998 to May 31, 2000. The taxpayer appealed this assessment.

The Wisconsin Tax Appeals Commission was asked to review the following issues:

1. Whether the taxpayer is personally responsible under sec. 77.60(9), Wis. Stats., for the assessment made by the Department of Revenue on March 6, 2009.
2. Whether the amount of the assessment is correct.

3. Whether the assessment is timely as the assessment is over 10 years old.

In addition, the Department of Revenue requested costs under sec. 73.01(4)(am), Wis. Stats., on the ground that the taxpayer’s Petition for Review was frivolous in that it contained no facts showing that the taxpayer was not personally responsible under sec. 77.60(9), Wis. Stats., for the unpaid sales taxes of M & S, Inc.

#### Personal Liability

For a person to be personally liable for a sales tax assessment, the Department of Revenue must establish that the taxpayer (1) had the **authority** to make, or direct, payment of the taxes; (2) had the **duty** to make, or direct, payment of the taxes; and (3) **willfully breached that duty**.

Although the taxpayer alleged that he did not meet the definition of a responsible officer under sec. 77.60(9), Wis. Stats., the Commission found that he conceded the issue of personal liability in the footnote to his brief. In that footnote, the taxpayer stipulated that he was personally liable for the sales taxes of M & S, Inc., for August, October, and November of 2000.

#### Correctness

Assessments made by the Department of Revenue are presumed to be correct and the taxpayer must show by clear and convincing evidence that they are incorrect.

Since the taxpayer did not brief this issue or argue it, or provide any evidence to overcome the presumption, the Commission determined that the presumption would stand and the assessment was correct.

#### Timeliness

The assessment was made in March 2009, but refers to sales-related liabilities beginning on February 1, 1998, and ending on May 31, 2000. The taxpayer argued that the department is barred from making the assessment because it allegedly violated a self-imposed four-year policy of limitation, thus the department should be equitably estopped from enforcing its assessment.

The Commission determined that equitable estoppel does not apply to this case, since the government’s conduct was to lawfully investigate the personal liability of the taxpayer for sales tax. The department’s conduct of investigating and issuing an assessment in 2009 was within the law and did not result in any injustice to the taxpayer.

The Commission concluded that there was no genuine issue as to any material fact and granted the Department of Revenue's motion for summary judgment. The Commission also chose not to assess the taxpayer for costs under sec. 73.01(4)(am), Wis. Stats., since the issue of timeliness of the assessment was arguable enough to defeat the claim that the entire appeal was frivolous.

The taxpayer has appealed this decision to the Circuit Court.

**Real property construction activities versus tangible personal property.** *Chula Vista, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, August 5, 2011). The issue in this case is whether the steel support beams (and related design and installation services) for a water slide are taxable tangible personal property or nontaxable real property improvements for purposes of Wisconsin sales and use taxes.

The taxpayer is a Wisconsin tax option S-corporation, with its principal place of business in Wisconsin Dells, Wisconsin. The taxpayer has been operating a hotel resort in Wisconsin Dells for 59 years. In 1993, the taxpayer purchased and installed its first water slide as a resort amenity. Since 1993, the taxpayer and/or its LLC have purchased and installed over 20 additional water slides, some indoor and some outdoor.

Each water slide has included as its components fiberglass flumes, the steel support structure that holds up the fiberglass flumes, and a start tower or some type of stairs. A flume is an inclined channel for conveying water and, in this instance, passengers. Prior to the water park and water slides at issue in this case, the taxpayer had a smaller indoor water park containing three water slides that the taxpayer built in the late 1990's and later demolished in 2008, without destroying the building in which they were housed.

In 2005, the LLC paid Whitewater West Industries, Ltd. for the engineering design services, installation, and water slide equipment at issue, which included nine fiberglass water slides, steel slide supports for those water slides, and one Aquaplay. Engineering design services and installation services were also included in the sale. The concrete foundation works, including footings, piers, columns, supply and setting of anchor bolts, were specifically excluded from the purchase of the water slides. The LLC paid Wisconsin sales or use tax on its purchase of the fiberglass water slides and conveyors (flumes) and the Aquaplay. The LLC did not pay Wisconsin sales or use tax on its purchase of the engineering

design services associated with the water slides, the structural steel supports, or the installation services for the water slides, including the steel supports and towers.

The question before the Commission is whether the steel support beams became part of the real estate when installed or remain tangible personal property after installation. If the steel beams became part of the real property, the LLC's purchase of the installed beams is not subject to Wisconsin sales and use taxes. However, if the steel support beams remain tangible personal property after installation, the LLC's purchase of them is subject to sales and use taxes.

The Commission ruled that the sale of the steel support beams (and related installation service) is a nontaxable sale of a real property improvement. Therefore, the taxpayer's Motion for Summary Judgment was granted, and the Department of Revenue's action on the Petition for Redetermination was reversed.

The Department of Revenue has not appealed this decision.