Tax Law

by Maureen A. McGinnity, Carl D. Fortner, Daniel M. Hess, Timothy L. Voigtman, and Zhu (Julie) Lee

Maureen A. McGinnity is a tax litigator with Foley & Lardner LLP, Milwaukee, and chairs the firm's national tax, valuation, and fiduciary litigation group. Her practice includes local, state, and federal tax litigation. She graduated from the University of Wisconsin Law School cum laude and was an editor of the *Wisconsin Law Review*. She is a past chair of the State Bar Board of Governors and past president of the Milwaukee Young Lawyers Association and the Association for Women Lawyers.

Carl D. Fortner is a corporate tax attorney with Foley & Lardner LLP, Milwaukee. He received his undergraduate degree in accounting, with distinction, and his master's degree in taxation from the University of Wisconsin–Madison and his law degree, cum laude, from the University of Wisconsin Law School. Mr. Fortner is also a certified public accountant and has frequently lectured on corporate and income tax topics.

Daniel M. Hess is a partner in the Estates and Trusts Practice Group of Foley & Lardner LLP. His practice focuses on estate planning, business succession planning, and estate and trust administration. He received his undergraduate degree in economics from Colorado College. He received his law degree from the University of Wisconsin Law School, where he was managing editor of the *Wisconsin Law Review*. He received his master of laws degree in taxation from the University of Florida College of Law Graduate Tax Program, where he was graduate editor of the *Florida Tax Review*.

Timothy L. Voigtman is a tax attorney with Foley & Lardner LLP, Milwaukee. He received his undergraduate degree in accounting from the University of Wisconsin–Madison and his law degree, cum laude, from the University of Wisconsin Law School. Mr. Voigtman is also a certified public accountant.

Zhu (Julie) Lee practices tax law with Foley & Lardner LLP, Milwaukee. She received her undergraduate degree in urban and regional planning from Beijing University, People's Republic of China; her master's degree in energy and environmental policy from the University of Delaware; and her law degree, cum laude, from Northwestern University School of Law, where she was an articles editor of the *Northwestern Journal of International Law and Business*.

This chapter covers in varying detail the principal 2007 court decisions and legislative changes affecting Wisconsin taxpayers and tax attorneys. Although most 2007 income tax, franchise tax, sales and use tax, and property tax developments are discussed, this chapter is not all-inclusive.

CASE LAW

Individual and Fiduciary Income Tax

No significant individual or fiduciary income tax cases were decided in 2007.

Corporate Franchise and Income Tax

Income and Deductions. In *Minocqua Country Club, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-055 (Tax App. Comm'n Nov. 7, 2007), the tax appeals commission ruled that deposits made by country club members and shareholders in connection with an expansion of the club's golf course and a substantial renovation of its clubhouse constituted taxable gross income to the country club instead of nontaxable contributions to capital. The taxpayer has appealed this decision.

Procedure. In *Novartis Pharmaceuticals Corp. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-975 (Tax App. Comm'n Jan. 26, 2007), the commission dismissed the taxpayer's petition for review because the taxpayer failed to file it within 60 days of receipt of the Department of Revenue's (DOR) notice of action. Wis. Stat. § 73.01(5)(a).

Sales and Use Tax

Procedure: Netting of Assessment and Refund Claims. In *Badger State Ethanol, L.L.C. v. Department of Revenue*, No. 06-S-199, 2007 WL

2875486, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-036 (Tax App. Comm'n Sept. 26, 2007), the commission held that the taxpayer could not unilaterally net a sales tax assessment from one year against a sales tax refund from a different year. The taxpayer filed a voluntary compliance agreement for unpaid sales tax related to calendar years 2002 to 2004 and agreed to pay an assessment of $516,000, plus interest at 18%. Before paying the assessment, the taxpayer filed a refund claim for calendar year 2005 for $246,000, plus interest at 9%. The taxpayer then offset the amount due on the assessment by the amount of the refund claim, including any resulting interest. The DOR denied the refund claim. The commission reasoned that the offsetting of interest lies within the DOR's discretion pursuant to section 77.59(5) of the Wisconsin Statutes[1] and is therefore outside the commission's jurisdiction. Additionally, the commission reasoned that the unrelated factual basis between the assessment and the refund precluded application of the equitable recoupment doctrine, which allows a party to assert an otherwise barred claim as a set-off against a claim brought by an opposing party, provided the claim arises from the same transaction or occurrence as the opponent's claim, seeks relief of the same kind or nature, and does not seek an amount in excess of the opponent's claim.

Taxation of Custom Software. The court of appeals upheld the commission's conclusion that the taxpayer's license of the SAP R/3 modular enterprise software system was a license of custom software, instead of prewritten software, and therefore exempt from sales and use tax, in *Wisconsin Department of Revenue v. Menasha Corp.*, 2007 WI App 20, 299 Wis. 2d 348, 728 N.W.2d 738 (review granted), *rev'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 400-786 (Wis. Cir. Ct. Dane County Oct. 26, 2004), *rev'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 400-719 (Tax App. Comm'n Dec. 1, 2003). The court held that the commission reasonably interpreted and applied the factors set forth in the all-facts-and-circumstances test in section Tax 11.71(1)(e) and (k) of the Wisconsin Administrative Code when it held that whether software is custom or prewritten depends on the effort required to make the system usable. In this case, the taxpayer made a significant investment in presale consultation and analysis, training, written documentation, enhancement, and maintenance and support, and its consultants had to make more than 3,000 modifications before the system was usable to the taxpayer.

Taxation of Intercompany Transfers. The Wisconsin Supreme Court upheld a court of appeals decision holding that transfers between related subsidiary corporations of a common parent were not taxable transactions in *Wisconsin Department of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, 299 Wis. 2d 561, 729 N.W.2d 396, *aff'g* 2006 WI App 34, 289 Wis. 2d 628, 712 N.W.2d 351, *rev'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 400-777 (Wis. Cir. Ct. Dane County Aug. 2, 2004), *rev'g* No. 200-S-163, 2003 WL 22017203, [2 Wis.] St. Tax. Rep. (CCH) ¶ 400-701 (Tax App. Comm'n Aug. 19, 2003). The subsidiary corporations transferred to each other items such as trucks, tractors, and tractor trailers. The sole consideration received for each transfer consisted of a book entry to an intercompany account payable or receivable. The supreme court found that the subsidiary corporations lacked the requisite mercantile intent in transferring the assets and therefore were not "retailers" under section 77.51(13)(a). Further, the court reasoned that recording intercompany payables and receivables did not amount to "consideration" pursuant to section 77.51(12)(a). (The legislature effectively repealed this decision by amending the definitions of those terms, as discussed below in the Statutory Developments section of this chapter.)

Additionally, the supreme court limited imposition of the negligence penalty to those situations in which the DOR makes a finding of neglect. The court noted that section 77.60(3) starts with the phrase "[i]f due to neglect an incorrect return is filed," not "[i]f an incorrect return is filed." Therefore, the court held, the legislature intended the penalty to be available only in those situations in which the DOR makes a factual finding of neglect.

Taxability of Real Property Improvements. In an unpublished opinion, the court of appeals affirmed the Dane County Circuit Court's determination that the installation of sewer liners in previously existing sewer lines is subject to Wisconsin sales and use tax as real property construction activity. *Visu-Sewer Clean & Seal, Inc. v. Department of Revenue*, No. 2006AP2216, 2007 WL 2873838 (Wis. Ct. App. Oct. 4, 2007) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)), *aff'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 400-920 (Wis. Cir. Ct. Dane County June 12, 2006), *aff'g* No. 2002-S-442, 2005 WL 2569323, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-850 (Tax App. Comm'n Oct. 6, 2005). Section 77.51(2) provides that contractors are consumers of tangible personal property used in real property construction activities. The taxpayer installed liners into host sewer pipes to plug leaks in the pipes and extend their useful lives. The court applied the three factors outlined in *Department of Revenue v. A.O. Smith Harvestore Products, Inc.*, 72 Wis. 2d 60, 67–68, 240 N.W.2d 357 (1976), and determined that the sewer liners, once installed, became part of the real estate. The court found that (1) the sewer liners were physically annexed to the real estate, (2) the liners are adapted to the purpose to which the sewers are devoted, and (3) such installation formed a permanent accession to the property. The court rejected the taxpayer's argument that such activities constitute exempt manufacturing activities. The court reasoned that section Tax 11.39(4) of the Wisconsin Administrative Code makes real property construction activities mutually exclusive from exempt manufacturing activities.

Real Estate Transfer Fee Exemption. In *Lawrence v. Department of*

[1] Textual references to the Wisconsin Statutes are hereinafter indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes."

Revenue, No. 05-T-83, 2007 WL 81207, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-969 (Tax App. Comm'n Jan. 4, 2007), the commission held that the transfer of title of real property from a joint venture to a limited liability company (LLC) with the same beneficial owners as the joint venture did not qualify for any exemption from the real estate transfer fee. Two individuals held title to property in their individual names in joint tenancy. The individuals also had a joint venture agreement governing their relationship. They later transferred title to the property to a newly created LLC with ownership identical to the joint venture. The commission noted that none of the documents indicated the individuals held the property on behalf of the joint venture as trustees or nominees. Accordingly, the taxpayers did not prove an exemption applied to the transfer.

Property Tax

Exemptions: Computers. Section 70.39 exempts from property tax "mainframe computers, minicomputers, personal computers, networked personal computers, servers, terminals, monitors, . . . electronic peripheral equipment, [and] printers," but the exemption does not apply to "fax machines, copiers, [or] equipment with embedded computerized components." The issue in *Xerox Corp. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-042 (Wis. Cir. Ct. Dane County Sept. 21, 2007), was whether the exemption applies to multifunction document processing equipment that combines a computer server, scanner, printer, and fax capabilities (MFDs).

The commission held that MFDs are taxable as copiers and fax machines. *Xerox Corp. v. Department of Revenue*, [2001–2005 Transfer Binder Wis.] St. Tax Rep. (CCH) ¶ 400-814 (Tax App. Comm'n Feb. 17, 2005). This ruling followed an evidentiary hearing, at which the taxpayer demonstrated the equipment and presented expert witness testimony. The commissioner who conducted the hearing retired before issuing a decision, and the two commissioners who issued the decision did not consult with him. Xerox petitioned for circuit court review, arguing that the undisputed facts mandated a decision in its favor or, in the alternative, that if there were disputed factual issues, due process required that the commissioner who conducted the hearing participate in the decision. The circuit court held that section 73.01(4)(b) requires the presiding commissioner to report his or her findings and observations to the absent commissioners if issues of credibility, the weight of the evidence, and the drawing of factual inferences are involved. The court concluded that the commission's findings, which accepted some of the undisputed facts but not others, necessarily resulted from credibility determinations and weighing of the evidence. Because the commissioners who decided the case did not confer with the retired commissioner before making their determinations, the court held that the commission failed to comply with section 73.01(4), and it therefore remanded the matter for further proceedings. *Xerox Corp. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-919 (Wis. Cir. Ct. Dane County July 18, 2006).

On remand, the commissioner who conducted the hearing provided a report and proposed findings of fact that supported Xerox's position. *Xerox Corp.*, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-999, at 34,489–93 (Tax App. Comm'n Mar. 23, 2007). The commission acknowledged that if it followed the hearing commissioner's findings, it would be required to reverse its decision. *Id.* at 34,486–87. The commission held, however, that it was not obligated to adopt the hearing commissioner's proposed findings because of the following reasons:

1. Its decision was not in fact based on witness credibility or a weighing of the evidence.
2. Alternatively, the commission was in as good a position as the hearing commissioner to make credibility determinations.
3. Some of the undisputed findings were irrelevant in light of the commission's legal analysis.
4. The findings lacked record support, although the commission did not identify any such findings.
5. The findings were really conclusions of law on ultimate issues. The commission therefore reaffirmed its original decision without modification.

Id. at 34,484–88.

Xerox filed a renewed petition for review in the same action as its original petition. The DOR insisted that the renewed petition had to be filed as a new action, and the circuit court agreed. When the new action was assigned to the same judge who remanded the case to the commission, the DOR requested a substitution, which was granted. Xerox again argued that it was entitled to the exemption as a matter of law or, alternatively, that the fairness of the proceeding was impaired by the commission's refusal to give weight to the hearing commissioner's proposed findings. The substitute judge upheld the commission's decision on the merits, holding that the determination whether Xerox's equipment fell within the exempt or taxable categories enumerated in section 70.11(39) was a question of law and that the commission's decision was supported by commonly used dictionary definitions of the statutory terms. *Xerox Corp. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-042 (Wis. Cir. Ct. Dane County Sept. 21, 2007). Xerox has appealed to the court of appeals. (Information on the status of the appeal in *Xerox Corp. v. Department of Revenue*, Appeal No. 2007AP2884, is available through Wisconsin Supreme Court and Court of Appeals Case Access, at http://wscca.wicourts.gov/index.sxl.)

Exemptions: Waste Treatment Facilities; Presumption of Correctness. Section 70.11(21) exempts from taxation property "purchased or constructed as a waste treatment facility used for the treatment of industrial wastes, . . . for the purpose of abating or eliminating pollution." In *City of Green Bay v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-070, at 34,971 (Tax App. Comm'n Dec. 21, 2007), the commission upheld the board of assessors' determination that the exemption ap-

plied to a paper recycling and manufacturing plant, relying on *Newark Group, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-740 (Tax App. Comm'n Mar. 22, 2004), *aff'd*, [2001–2005 Transfer Binder Wis.] ¶ 400-809 (Wis. Cir. Ct. Dane County Jan. 31, 2005). The DOR did not appeal the circuit court decision in *Newark* and was deemed to acquiesce in the court's statutory construction pursuant to section 73.015(2), which states that the DOR is obligated to follow a circuit court's statutory construction from which it fails to appeal.

The commission held in *Green Bay* that the city, as the party challenging the assessment, had the burden of overcoming the presumption of correctness of the board of assessors' determination. It rejected the city's argument that the taxpayer, who had intervened in the action, had the burden of proof. *Green Bay*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-070, at 34,972–73.

The city urged the commission to conclude that *Newark* was wrongly decided, based in part on the legislature's post-*Newark* amendment of section 70.11(21). 2007 Wis. Act 19, §§ 1–2. (See the description of this amendment in the Statutory Developments section below.) The commission noted that although the amendment tightened the requirements for the exemption, the amendment was first effective for assessments made as of January 1, 2007, and therefore did not apply to this case, which involved a 2005 assessment. *Green Bay*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-070, at 34,974.

The commission discussed, but did not expressly decide, whether it had authority to reverse its *Newark* decision, were it inclined to do so. The city argued the commission is not bound by its prior decisions and that circuit court decisions have no precedential value. The commission observed, however, that the court of appeals has stated the purpose of section 73.015(2) is served if both the DOR and the commission are bound by unappealed circuit court decisions. *Id.* at 34,975.

The commission reasoned that even if it could choose not to follow *Newark*, the city had failed to prove *Newark* was incorrectly decided. First, contrary to the city's contention, the *Newark* determination that pollution abatement includes pollution prevention was (1) reasonable in light of the legislative history that referenced prevention; (2) necessary to avoid the absurd result that a facility that produced pollution and routed it to a waste treatment facility would benefit from the exemption, whereas a facility that prevented the creation of pollution in the first place would not; and (3) most likely correct because the legislature did not restrict the definition of pollution abatement in its 2007 amendment. *Id.* at 34,974–76. Second, the fact that the property at issue was manufacturing property did not affect the applicability of the waste treatment facility exemption because the exemption required only that pollution abatement be one of the purposes for which the property was used, not the primary purpose. *Id.* at 34,976.

Although it "reaffirmed" *Newark* in the *Green Bay* case, the commission limited the scope of the exemption, accepting the city's "partial exemption" argument, i.e., that only the specific areas of the plant where waste treatment occurred qualified for the exemption. Whereas the commission held in *Newark* that the entirety of the paper mill, including the office and parking lots, was exempt, it held in *Green Bay* that the main office, maintenance shop, parking lots, and shipping building were not exempt. *Id.* at 34,976–77.

Exemptions: Beneficial Ownership of County Property; Educational Association. Section 70.11(2) exempts from taxation property owned by certain governmental entities, including counties, and section 70.11(4) exempts from taxation property owned by educational, religious, and benevolent institutions. The issue in *Milwaukee Regional Medical Center, Inc. v. City of Wauwatosa*, 2007 WI 101, 304 Wis. 2d 53, 735 N.W.2d 156, was whether a day care facility constructed on land owned by Milwaukee County and leased to the Milwaukee Regional Medical Center was exempt under these provisions. The circuit court granted summary judgment in favor of the medical center, holding that the property was exempt under section 70.11(2). The court of appeals reversed, holding that the property was not exempt under either section 70.11(2) or section 70.11(4). *Milwaukee Regional Med. Ctr., Inc. v. City of Wauwatosa*, 2006 WI App 139, 295 Wis. 2d 211, 720 N.W.2d 161. The supreme court affirmed, but it modified the court of appeals' analysis of beneficial ownership.

The issue under section 70.11(2) was whether the county or the medical center "owned" the property under principles of beneficial ownership. The court of appeals gleaned from prior case law a two-part test to determine beneficial ownership. Under this test, a tax-exempt title holder is deemed the beneficial owner if it (1) receives not-inconsequential benefits from the property, and (2) has substantial control focused on preserved or enhancing those benefits. *Id.* ¶ 29. The supreme court rejected this test as too narrow, instead reaffirming the broader "totality of the circumstances" test articulated in previous cases, under which "not all 'sticks' have the same weight." *Milwaukee Regional Med. Ctr.*, 2007 WI 101, ¶ 35 & n.8, 304 Wis. 2d 53. The supreme court held that the medical center's indicia of ownership outweighed the county's and therefore affirmed the holding that the section 70.11(2) exemption did not apply. Of particular import were the following facts:

1. The medical center had a 50-year lease, which permitted long-term planning.
2. The medical center was the property's exclusive occupant.
3. The medical center held title to the day care facility, the most valuable part of the property.
4. The medical center paid only token rent for the land.
5. The county was not involved with the day care center and therefore did not really control the property.

The court noted that if the lease terms or other circumstances changed over time, beneficial ownership may change as well. *Id.* ¶¶ 55–66. Justice Butler dissented from this part of the court's opinion, opining that the majority erred

in focusing almost entirely on the current financial benefits of the lease, and that its analysis was biased and incomplete because it highlighted the indicia of the medical center's ownership without discussing in any depth the indicia of the county's ownership. *Id.* ¶ 81 (Butler, J., dissenting).

With respect to the exemption for educational institutions under section 70.11(4), the supreme court agreed with the court of appeals that to qualify for this exemption, an organization must be (1) a nonprofit organization substantially and primarily devoted to educational purposes and (2) devoted to "traditional" educational activities. *Id.* ¶ 70. The court held that the medical center failed the first prong of this test because the educational function of the day care center was merely incidental to the center's primary health care purpose. In so holding, the court agreed with the city that the focus should be on the center's activities as a whole, not only its activities at the day care center. To be exempt under 70.11(4), an organization must qualify for exemption under subsection (4), and the property of the organization must be owned and used exclusively for the purposes of the exempt organization. *Id.* ¶¶ 67–73.

Exemptions: Benevolent Association; No-Profit-to-Members Restriction. In *Ridge Side Coop. v. City of Madison*, No. 2006AP1100, 2007 WL 610943, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-980 (Wis. Ct. App. Mar. 1, 2007) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)), the court held that a limited equity cooperative organized for the purpose of providing affordable housing to low- and moderate-income households did not qualify for exemption as a benevolent association under section 70.11(4). Residents, who were members of the cooperative, were required to pay a transfer fee to purchase occupancy rights. When they departed they could sell such rights for the purchase price plus a five percent annual increase, which would allow them to receive up to $150 per year from the sale of their rights. The court held that this gain disqualified the cooperative from the section 70.11(4) exemption because benevolent associations must be "'*completely free from the fact or even possibility of profits accruing to its . . . members*.'" *Id.* ¶ 7 (quoting *Milwaukee Protestant Home for the Aged v. City of Milwaukee*, 41 Wis. 2d 284, 294, 164 N.W.2d 289 (1969)).

Exemptions: Rented Personal Property. Section 70.111(22) exempts from taxation (subject to various conditions) personal property held for rental to multiple users for temporary use, if the rental period is for one month or less. In *United Rentals, Inc. v. City of Madison*, 2007 WI App 131, 302 Wis. 2d 245, 733 N.W.2d 322, the court of appeals held that the exemption is not available if the property also may be rented for periods of more than one month. In this case, the taxpayer's standard rental agreements established rental rates for one day, one week, or four weeks. For longer-term rentals, the taxpayer sent customers monthly bills. Approximately 10% of the taxpayer's equipment rentals extended beyond four weeks. *Id.* ¶ 3. The city assessed the rental property, and the taxpayer filed a refund action in circuit court. The court granted summary judgment to the city. The court of appeals affirmed, holding that the plain language of the statute unambiguously evinced the legislature's intent to limit the exemption to property held for rent only for one month or less and did not permit incidental rentals of more than one month. The court rejected the taxpayer's argument that reading in the word "only" violated the prohibition against implying limiting language. *Id.* ¶¶ 17–21.

Classification: Agricultural Land. Agricultural land is assessed at less than its fair market value pursuant to section 70.11(32)(2r). In *Winter v. Department of Revenue*, No. 2005AP2376, 2007 WL 59371, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-970 (Wis. Ct. App. Jan. 10, 2007) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)), the taxpayer challenged an assessment because he disagreed with the assessor's determination as to the amount of the 107-acre parcel that should be classified as agricultural. After obtaining an adverse decision from the local board of review, the taxpayer invoked section 70.85 to obtain review by the DOR bureau of equalization. The DOR upheld the assessment, and the court of appeals affirmed on certiorari review. The court rejected the contention that acreage devoted to environmental buffers and conservation efforts qualified as agricultural, because the land was not enrolled in a federal conservation program as required by the statute. *Id.* ¶ 8. The court also rejected the argument that more land should have been classified for use in grazing honeybees. Although the taxpayer submitted supporting evidence, the DOR assessor made his determination based on his own inspection and was not obligated to accept the taxpayer's position. *Id.* ¶ 11.

Valuation: Income Approach; Contract Versus Market Rents. In *Walgreen Co. v. City of Madison*, 2007 WI App 153, 303 Wis. 2d 620, 735 N.W.2d 543 (review granted), the court of appeals affirmed the circuit court's determination, in a de novo refund action under section 74.37(3)(d), upholding the assessments of properties leased to Walgreen. The assessments were based on income valuations premised on Walgreen's above-market contract rents.

Walgreen's business plan calls for it to lease, rather than own, properties where it locates new stores. Instead of locating its own building sites and directly financing construction, Walgreen works with developers who acquire land in locations matching Walgreen's specifications, construct buildings to Walgreen's specifications, and enter into long-term leases with Walgreen. Walgreen pays rent in a fixed amount calculated to reimburse the developers for land acquisition and construction costs and financing and provide a return on the developers' investment. *Id.* ¶ 4. In assessing the leased properties, the assessor used an income approach based on the locked-in rents. Walgreen argued that the assessor should have used the comparable sales approach and, to the extent the income approach was relevant, the assessor should have used estimated market rents rather than contract rents. Walgreen also argued that the assessments violated the uniformity requirement in article VIII,

section 1, of the Wisconsin Constitution.

Absent a recent sale of the subject property, Wisconsin law requires assessors to base assessments on the comparable sales valuation method, provided evidence of recent sales of reasonably comparable properties is available. Wis. Stat. § 70.32(1); *State ex rel. Markarian v. City of Cudahy*, 45 Wis. 2d 683, 686, 173 N.W.2d 627 (1970). The assessor argued in *Walgreen* that because there were no sales of properties with Walgreen's atypical leasing arrangement, the income approach was the appropriate assessment method, and use of the income approach resulted in an assessed value of $4.6 million. *Walgreen Co.*, 2007 WI App 153, ¶ 8, 303 Wis. 2d 620. Walgreen argued that the goal of real property tax assessment is to value the fee simple interest without regard to lease terms. Its expert valued the property at $1.8 million using the comparable sales method. *Id.* ¶¶ 7, 9, 15. The court of appeals rejected Walgreen's fee simple interest argument and held the goal of property assessment is to determine the amount that could be obtained in an arm's-length private sale taking into account the lease. The court further held that the circuit court was entitled to ignore Walgreen's comparable sales evidence since the other sales did not involve properties with comparably lucrative rent arrangements. *Id.* ¶¶ 16–17, 39–40.

With respect to application of the income approach, Walgreen argued that its lease payments were not the equivalent of "rent" because they included reimbursement for land acquisition, development, and financing costs as well as a profit margin for the developer. It therefore argued that instead of using the actual guaranteed lease payments, the income valuation should be based on what a hypothetical tenant would pay assuming it negotiated the lease after the land was acquired and the building was constructed. *Id.* ¶¶ 12, 36. The court of appeals characterized this argument as "form over substance," reasoning that regardless of whether the payments were "rent," they were rights appended to the properties by virtue of the lease agreements and therefore were properly includable in the assessable real estate under section 70.03 (defining *real property* as including rights and privileges appertaining thereto). *Id.* ¶¶ 35–37. The court also rejected Walgreen's effort to distinguish case law requiring the use of actual rents instead of market rents in income valuations, on the ground that the contract rents in those cases reduced rather than increased the assessed values. The court read those cases as establishing a general rule that assessors should consider actual rents arrived at in the course of arm's-length negotiations, regardless of whether the rents were above or below market. *Id.* ¶¶ 18, 28.

The court of appeals further rejected Walgreen's argument that assessing properties with profitable leases higher than properties with nonprofitable or no leases violated the rule of uniformity, i.e., the constitutional requirement that the method of taxing real property be applied uniformly to all classes of property within a tax district. Wis. Const. art. VIII, § 1. The court reasoned that valuations based on contract rents ensure that in all cases, properties will be assessed on the basis of the price that would be paid in an arm's-length sale. *Id.* ¶¶ 48–51.

Walgreen petitioned for supreme court review of the court of appeals' decision, and the supreme court accepted review.

Valuation; Board of Review Deliberations. The court of appeals reaffirmed the necessity of meaningful board of review deliberations in *State ex rel. Market Square Associates Phase I, LLP v. Board of Review*, No. 2006AP1874, 2007 WL 1266890, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-004 (Wis. Ct. App. May 2, 2007) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)). The property owner presented the report and testimony of an appraiser who estimated the fair market value of the subject apartment building to be $3.9 million. The appraisal was based on comparable sales, albeit outside Menomonee Falls. The assessor, in contrast, limited his search for comparable sales to Menomonee Falls. Finding no comparable sales, he instead relied on income and cost approaches to arrive at a valuation of $4.3 million. At the conclusion of the testimony at the hearing, the chair of the Menomonee Falls board of review announced that the board was obligated to sustain the assessment absent "overwhelming evidence" and stated it was the "opinion of this board" that Market Square had not met that burden. The three-person board then voted unanimously to uphold the assessment without any deliberation. The circuit court upheld the board's decision on certiorari review, and Market Square appealed.

The court of appeals reversed and remanded, finding that the chair's articulation of an improper review standard, combined with the board's failure to deliberate, amounted to the board's exercise of its will rather than its judgment and rebutted the presumption of correctness in section 70.47(8)(i). That statute provides that the presumption of correctness is overcome by a "sufficient showing" that the valuation is incorrect, not "overwhelming evidence" as the board chair suggested. The court concluded that the presumption is rebutted when there is no record that the board deliberated on the evidence presented. The court therefore reversed and remanded to the board of review for further proceedings. The concurring opinion explains that the court purposefully did not reach the issue of the relevancy of comparable sales outside the locale, reserving that question for a case presenting a proper record.

Valuation: Property Measurements; Depreciation. A discrepancy in square footage measurements made by the assessor and by the taxpayers' appraiser prompted the appeal in *Krukowski v. Village of Greendale*, No. 2007AP330, 2007 WL 3355454 (Wis. Ct. App. Nov. 14, 2007) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)). In *Krukowski*, the court of appeals affirmed the circuit court, which had sustained a residential assessment on certiorari review. The taxpayers challenged the assessor's measurements on the grounds that the measurements were made by a staff member rather

than the assessor personally and included measurements only of the exterior of the residence and not the interior. The court of appeals rejected the taxpayers' hearsay argument, noting the assessor's measurements were admitted into evidence at the board of review hearing without objection, the rules of evidence do not apply to administrative hearings, and section 70.47(8)(d) permits the board to consider appraisals, documents, and other data. *Id.* ¶¶ 12, 15. Additionally, since the Wisconsin Property Assessors Manual requires only exterior measurements, it was within the board's fact-finding authority to decide whether to adopt the assessor's approach or the taxpayers' appraiser's approach with respect to interior measurements. *Id.* ¶¶ 14, 16.

The court of appeals also rejected the taxpayers' argument that the board of review erred in its application of the comparable sales approach by failing to make reductions for depreciation and obsolescence of fixed assets associated with the taxpayers' property. The court held that the assessor properly relied on the comparable sales approach instead of the cost approach given the availability of evidence of sales of comparable properties in the locale (*Markarian*, 45 Wis. 2d at 686), and that depreciation and obsolescence are not appropriate standards to apply in a comparable sales approach. *Krukowski*, No. 2007AP330, 2007 WL 3355454, ¶¶ 18, 25. Further, the taxpayers failed to introduce any evidence to support their claim of a reduction in fair market value because of negative aspects of their swimming pool, hot tub, and other features. *Id.* ¶¶ 24, 26.

Procedure: Equitable Recoupment; Waiver of Sovereign Immunity. In *Oneida Tribe of Indians v. Village of Hobart*, 500 F. Supp. 2d 1143 (E.D. Wis. 2007), the court considered whether a municipality could rely on the equitable recoupment doctrine to bring counterclaims against a federally recognized Indian tribe. (The doctrine is defined in the discussion of *Badger State Ethanol, L.L.C.*, *supra*.)

After the Oneida tribe purchased land in an industrial park, the village passed a resolution to extend a street through the tribe's property. The tribe objected, but the village proceeded with the project and collected more than $1.3 million from the tribe in special assessments. The tribe later purchased additional land within its reservation boundaries. The village announced plans to initiate condemnation proceedings to obtain easements for water and sewer upgrades. The tribe then filed suit against the village, seeking (1) a declaration that the property it purchased within its reservation boundaries was not subject to state laws authorizing property taxes and special assessments, and (2) an injunction directing the village to refund the $1.3 million in assessments for the industrial park improvements and enjoining future assessments. *Id.* at 1144. The village counterclaimed, seeking (1) a declaration that the land acquired by the tribe was subject to land use regulation, condemnation, assessment, and taxation under state law, and (2) an injunction directing the tribe to pay all unpaid taxes and assessments. *Id.* The tribe moved to dismiss the counterclaims on sovereign immunity grounds. The village argued that, under the equitable recoupment doctrine, the tribe had waived immunity by filing its own action against the village. *Id.* at 1146.

The court held that by invoking the court's jurisdiction to obtain a declaration of the parties' rights with respect to the land in question, the tribe expressly waived its immunity from the village's claim for a determination in its favor on the same issue. Because the village's declaratory relief counterclaim was the mirror image of the tribe's declaratory relief claim, the court denied the motion to dismiss with respect to the declaratory judgment counterclaim. *Id.* at 1149. The court granted the motion to dismiss as to the village's counterclaim for injunctive relief, however, finding that the counterclaim was a separate and independent claim for affirmative relief instead of a claim seeking a set-off against the amount due and owing on the tribe's claim. *Id.* at 1148–49.

Procedure: Jurisdiction; Timeliness of Objection. In *Best Embroidery, L.L.C. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 400-997 (Tax App. Comm'n Mar. 21, 2007), the commission dismissed a manufacturer's appeal of its 2004 and 2005 personal property assessments, holding it lacked jurisdiction because the manufacturer had failed to file timely objections with the state board of assessors. The taxpayer therefore was not aggrieved by a determination of the board of assessors, which is a prerequisite to confer jurisdiction on the commission under section 73.01(5).

Inheritance, Estate, and Gift Tax

In *Wisconsin Department of Revenue v. Estate of Schweitzer (In re Estate of Schweitzer)*, 2008 WI App 2, ___ Wis. 2d ___, 744 N.W.2d 861, a case decided in December 2007, the court ruled that a decedent's gross estate for purposes of calculating the Wisconsin estate tax is the taxable estate determined under federal law and that gifts made in contemplation of death are not added to the decedent's gross estate when calculating the Wisconsin estate tax.

STATUTORY DEVELOPMENTS[2]

Individual and Fiduciary Income Tax

Reference to the Internal Revenue Code Updated. For taxable years beginning on or after January 1, 2007, the term *Internal Revenue Code* (I.R.C.) for individuals, estates, and trusts (except nuclear decommissioning trusts or reserve funds) means the federal I.R.C. as amended to December 31, 2006, with certain exceptions. *See* 2007 Wis. Act 20, §§ 1936, 1937, 2130, 1942, 1944, 1945 (repealing Wis. Stat. §§ 71.01(6)(L), (m), .765, amending Wis. Stat. § 71.01(6)(r), and creating Wis. Stat. § 71.01(6)(t), (7r)(c)).

Disclosure of Certain Transactions Required. Wisconsin now requires that certain disclosures be made (1) by tax-

[2] Hereinafter, and unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2005–06 Wisconsin Statutes, as affected by acts through 2007 Wisconsin Act 41.

payers who have entered into transactions the Internal Revenue Service (IRS) has designated as "reportable transactions" or "listed transactions" and (2) by "material" advisors providing material aid, assistance, or advice with respect to aspects of "reportable transactions." These requirements apply to applicable transactions entered into on or after January 1, 2001, or transactions entered into before January 1, 2001 that reduced the taxpayer's tax liability for taxable years beginning on or after January 1, 2001. *See* 2007 Wis. Act 20, § 2138 (creating Wis. Stat. § 71.81).

Tax Avoidance Transaction Voluntary Compliance Program Created. If a taxpayer has participated in a *tax avoidance transaction*, the taxpayer is eligible to receive a waiver of all penalties with respect to such transaction, if the taxpayer files an amended tax return during the period of January 1, 2008, through May 31, 2008, for each applicable taxable year. The taxpayer must report the total Wisconsin net income and tax for the applicable taxable year, computed without regard to any tax avoidance transaction and without regard to any other adjustment that is unrelated to any tax avoidance transaction, and timely pay the resulting additional tax. *See* 2007 Wis. Act 20, § 2137 (creating Wis. Stat. § 71.805).

Additional Exemption to Withholding with Respect to Nonresident Members of Pass-Through Entities Created. Under current law, a pass-through entity for federal income tax purposes is required to pay a withholding tax on a nonresident member's share of income attributable to Wisconsin, unless either of the two following exceptions applies: (1) the member is exempt from Wisconsin income tax, or (2) the member's share of income from the pass-through entity is less than $1,000. Effective for taxable years beginning on or after January 1, 2006, in addition to the two exemptions described above, a pass-through entity need not withhold Wisconsin income tax on a member's share of income attributable to Wisconsin if the member files an appropriate affidavit with the DOR in which the member agrees to file a Wisconsin income or franchise tax return and be subject to the personal jurisdiction of the DOR, the commission, and Wisconsin courts for the purpose of determining and collecting Wisconsin income and franchise tax and related interest and penalties. *See* 2007 Wis. Act 20, §§ 2131, 2133, 2134, 2135, 2132 (amending Wis. Stat. § 71.775(3)(a)2., (4)(b)2., (4)(d), (f), and creating Wis. Stat. § 71.775(3)(a)3.).

Nonresidents' Wisconsin Taxable Income Revised to Include Covenant Not to Compete. Effective for taxable years beginning on or after January 1, 2007, income derived by a nonresident individual from a covenant not to compete is taxable by Wisconsin to the extent the covenant was based on a Wisconsin-based activity. *See* 2007 Wis. Act 20, §§ 1946, 1947 (amending Wis. Stat. §§ 71.02(1), .04(1)(a)).

Attorney Fees and Court Costs Attributable to Unlawful Discrimination Claims Added to Wisconsin Adjusted Gross Income. Effective for taxable years beginning on or after January 1, 2008, when determining Wisconsin adjusted gross income, a nonresident or part-year resident of Wisconsin must add to the federal adjusted gross income any amount deducted on the federal income tax return attributable to attorney fees or court costs involving an unlawful discrimination claim if the judgment or settlement resulting from the claim is not taxable in Wisconsin. *See* 2007 Wis. Act 20, § 1951 (creating Wis. Stat. § 71.05(6)(a)23.).

Corporate Franchise and Income Tax

Definition of Internal Revenue Code. The definition of I.R.C. has been updated after two years of neglect and now generally means the I.R.C. as amended to December 31, 2006. 2007 Wis. Act 20, § 2006 (creating Wis. Stat. § 71.22(4)(t)). Thus, federal laws enacted after December 31, 2006, do not apply. In addition, the list of federal I.R.C. provisions not adopted by Wisconsin continues to grow. The definitions of the I.R.C. for tax years beginning in 2006 were retroactively amended to generally mean the I.R.C. as amended to December 31, 2005. 2007 Wis. Act 20, § 2005 (creating Wis. Stat. § 71.22(4)(s)). The definition of the I.R.C. for prior years was also retroactively amended to adopt generally changes made by Public Law Numbers 109-7, 109-58, 109-135, and 109-280. 2007 Wis. Act 20, §§ 1998, 1999 (repealing Wis. Stat. § 71.22(4)(L), (m)), *id.* §§ 2000, 2001, 2002, 2003, 2004 (amending Wis. Stat. § 71.22(4)(n), (o), (p), (q), (r)). Similar rules apply to nonprofit corporations, *id.* §§ 2007, 2008 (repealing Wis. Stat. § 71.22(4m)(j), (k)), *id.* §§ 2009, 2010, 2011, 2012, 2013 (amending Wis. Stat. § 71.22(4m)(L), (m), (n), (o), (p)), *id.* §§ 2014, 2015 (creating Wis. Stat. § 71.22(4m)(q), (r)); S corporations, *id.* §§ 2067, 2068 (repealing Wis. Stat. § 71.34(1g)(L), (m)), *id.* §§ 2069, 2070, 2071, 2072, 2073 (amending Wis. Stat. § 71.34(1g)(n), (o), (p), (q), (r)), *id.* §§ 2074, 2075 (creating Wis. Stat. § 71.34(1g)(s), (t)); and insurance companies, *id.* §§ 2078, 2079 (repealing Wis. Stat. § 71.42(2)(k), (L)), *id.* §§ 2080, 2081, 2082, 2083, 2084 (amending Wis. Stat. § 71.42(2)(m), (n), (o), (p), (q)), *id.* §§ 2085, 2086 (creating Wis. Stat. § 71.42(2)(r), (s)).

Noticeably absent from the updated definition are regulated investment companies (RICs), real estate investment trusts (REITs), real estate mortgage investment conduits (REMICs), and financial asset securitization investment trusts (FASITs).

Deductions. Deductions for depreciation and section 179 expenses for property used in farming by nonprofit corporations and S corporations now conform to the Internal Revenue Code. 2007 Wis. Act 20, §§ 2016, 2076 (renumbering Wis. Stat. §§ 71.22(5m), .34(1m), as Wis. Stat. §§ 71.22(5m)(a), .34(1m)(a)), *id.* §§ 2017, 2077 (creating Wis. Stat. §§ 71.22(5m)(b), .34(1m)(b)). (I.R.C. § 179 allows a taxpayer to expense the cost of otherwise depreciable property. See also the treasury regulations promulgated under I.R.C. § 179.)

Exemptions. Veterans service organizations are exempt from Wisconsin income and franchise tax. 2007 Wis. Act 20, § 2019 (creating Wis. Stat. § 71.26(1)(am)) (effective for tax years beginning after 2007). Interest income from bonds issued by certain Wisconsin

health and educational facilities is exempt from Wisconsin income tax but is not exempt from the franchise tax. 2007 Wis. Act 20, §§ 2021m, 2087h (creating Wis. Stat. §§ 71.26(1m)(i), .45(1t)(i)) (effective for tax years beginning after 2008).

Apportionment. For taxable years beginning after December 31, 2007, apportionment will be determined based on a single factor—sales. *See* 2003 Wis. Act 37. A phase-in period begins for taxable years beginning after December 31, 2005, as follows:

1. For taxable years beginning after December 31, 2005, and before January 1, 2007, the sales factor represented 60% of the formula and the property and payroll factors each represented 20% of the formula.
2. For taxable years beginning after December 31, 2006, and before January 1, 2008, the sales factor represents 80% of the formula and the property and payroll factors each represent 10% of the formula.
3. For taxable years beginning after December 31, 2007, the apportionment formula will be composed of the sales factor.

Id.

Credits. Revisions now apply to the following credits: early stage seed/ angel investment credit, 2007 Wis. Act 20, §§ 2051, 2107 (renumbering Wis. Stat. §§ 71.28(5b)(d), .47(5b)(d), as Wis. Stat. §§ 71.28(5b)(d)1., .47(5b)(d)1.), *id.* §§ 1997, 2022, 2050, 2066, 2088, 2106, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .28(5b)(c)1., .34(1)(g), .45(2)(a)10., .47(5b)(c)1., .92(4)), *id.* §§ 2052, 2108, 2154 (creating Wis. Stat. §§ 71.28(5b)(d)2., .47(5b)(d)2., 73.03(63)) (various effective dates); the credit for film production companies, 2007 Wis. Act 20, §§ 2056, 2057, 2058, 2112, 2113, 2114, 2121 (amending Wis. Stat. §§ 71.28(5h)(a)4., (c)2., (c)3., .47(5h) (a)4., (c)2., (c)3., .49(1)(f)), *id.* § 2064 (renumbering Wis. Stat. § 71.30(3)(epp) to (eps) and amending as renumbered), *id.* § 2120 (renumbering Wis. Stat. § 71.49(1)(epp) to (eps) and amending as renumbered), *id.* § 2065 (amending Wis. Stat. § 71.30(3)(f)) (effective Oct. 27, 2007); the development zone credit, 2007 Wis. Act 20, §§ 2034, 2035, 2036, 2037, 2038, 2090, 2091, 2092, 2093, 2094 (amending Wis. Stat. §§ 71.28(1dx)(a)5., (b)2., 3., 4., 5., .47(1dx)(a)5., (b)2., 3., 4., 5.) (effective Oct. 27, 2007); and the enterprise zone jobs credit based on payroll, 2007 Wis. Act 20, §§ 2048, 2104 (repealing Wis. Stat. §§ 71.28(3w)(bm)3., .47(3w)(bm)3.), *id.* § 2047 (consolidating Wis. Stat. §§ 71.28(3w)(bm)(intro.) and 4. and renumbering to Wis. Stat. § 71.28(3w)(bm) and amending as renumbered), *id.* § 2103 (consolidating Wis. Stat. § 71.47(3w)(bm)(intro.) and 4. and renumbering to Wis. Stat. §71.47(3w)(bm) and amending as renumbered), *id.* §§ 2041, 2042, 2043, 2044, 2045, 2046, 2049, 2097, 2098, 2099, 2100, 2101, 2102, 2105, 1997, 2022, 2065, 2066, 2088 (amending Wis. Stat. §§ 71.28(3w)(a)6., (b)1.a., 1.b., 2., 3., 4.,(d), .47(3w)(a)6., (b)1.a., 1.b., 2., 3., 4.,(d), .21(4), .26(2)(a), .30(3)(f), .34(1)(g), .45(2)(a)10.), *id.* §§ 2040, 2096 (creating Wis. Stat. §§ 71.28(3w)(a)5m., .47(3w)(a)5m.) (effective for tax years beginning on or after July 1, 2007).

Credits are now available for the following: ethanol and biodiesel fuel pumps, 2007 Wis. Act 20, §§ 2060, 2062, 2116, 2118 (creating Wis. Stat. §§ 71.28(5j), .30(3)(ed), .47(5j), .49(1)(ds)), *id.* §§ 1997, 2022, 2066, 2088, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .34(1)(g), .45(2)(a)10., 77.92(4)) (effective for tax years beginning after 2007 and before 2018); and investments in dairy manufacturing facilities, 2007 Wis. Act 20, §§ 2039, 2095 (creating Wis. Stat. §§ 71.28(3p), .47(3p)), *id.* §§ 1997, 2022, 2065, 2066, 2088, 2121, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .30(3)(f), .34(l)(g), .45(2)(a)10., .49(1)(f), 77.92(4)) (effective for tax years beginning after 2006 and before 2015).

Credits will become available in 2009 for the following activities: biodiesel fuel production, 2007 Wis. Act 20, §§ 2038h, 2060s, 2094h, 2116s (creating Wis. Stat. §§ 71.28(3h), .30(3)(cn), .47(3h), .49(1)(cn)), *id.* §§ 1997, 2022, 2066, 2088, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .34(1)(g), .45(2)(a)10., 77.92(4)) (effective for tax years beginning after 2009 and before 2013); community rehabilitation programs, 2007 Wis. Act 20, §§ 2060m, 2060n, 2116m, 2116n (creating Wis. Stat. §§ 71.28(5k), .30(3)(bn), .47(5k), .49(i)(bn)), *id.* §§ 1997, 2022, 2066, 2088, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .34(1)(g), .45(2)(a)10., 77.92(4)) (effective for tax years beginning after July 1, 2009); and electronic medical records hardware and software, 2007 Wis. Act 20, §§ 2059, 2063, 2115, 2119 (creating Wis. Stat. §§ 71.28(5i), .30(3)(epa), .47(5i), .49(1)(epa)), *id.* §§ 1997, 2022, 2066, 2088, 2483 (amending Wis. Stat. §§ 71.21(4), .26(2)(a), .34(1)(g), .45(2)(a)10., 77.92(4)) (effective for tax years beginning after 2009).

Extensions. A seven-month automatic extension of time to file a return is now available. 2007 Wis. Act 20, §§ 2018, 2087 (amending Wis. Stat. §§ 71.24(7), .44(3)). Further, any extension of time granted by law or the IRS also extends the time to file a Wisconsin return by the length of such extension plus 30 days. *Id.*

Disclosure Requirements. Special disclosure requirements for reportable transactions and listed transactions as designated by the IRS now apply. 2007 Wis. Act 20, § 2138 (creating Wis. Stat. § 71.81). There are new requirements for material advisors and penalties for tax shelter promotion. *Id.* A limited period voluntary compliance program is available. 2007 Wis. Act 20, § 2137 (creating Wis. Stat. § 71.805) (effective Jan. 1, 2008, through May 31, 2008).

Sales and Use Tax

Rock County adopted a county sales tax effective April 1, 2007.

The definitions of *gross receipts*; *purchase*; *retail sale*; *retailer*; *sale*; *sale, lease or rental*; *sale at retail*; and *seller* have all been expanded to repeal the decision in *River City Refuse Removal* (discussed *supra*). The definitions now include transactions with the consideration of a sale on credit, for which there is an obligation to pay money in the future or the creation of a receivable to be received in the future. Additionally, sales tax now applies to

transactions regardless of (1) whether the transaction is mercantile in nature, the seller sells smaller quantities from inventory, the seller makes or intends to make a profit, or the seller or buyer obtains a benefit the seller or buyer bargained for; (2) the percentage of the seller's total sales represented by the transaction; and (3) the existence of any activities other than those described in pars. (a) to (o) of section 77.51(13). These changes are all effective retroactive to January 1, 2006. 2007 Wis. Act 20 (amending Wis. Stat. § 77.51(4)(c)1., (12)(a), and creating Wis. Stat. § 77.51(13)(p), (14)(m), (n), (17)(a) to (f)).

The exception for taxability of printing services for advertising materials to be transported outside the state has been modified. The exception now applies to "the printing or imprinting of tangible personal property that results in printed materials, catalogs or envelopes that are exempt under s. 77.54(25) or (25m)." 2007 Wis. Act 20 (amending Wis. Stat. § 77.52(2)(a)11.).

The printed material exemption has been modified to exclude "catalogs and the envelopes in which the catalogs are mailed." 2007 Wis. Act 20 (amending Wis. Stat. § 77.54(25)).

A new exemption has been created for the gross receipts from the sale and storage, use, or other consumption of catalogs and the envelopes in which they are mailed, for catalogs designed to advertise and promote the sale of merchandise or to advertise the services of individual business firms. 2007 Wis. Act 20 (creating Wis. Stat. § 77.54(25m)).

The gross receipts from the sale of biomass that is used for fuel sold for residential use are now exempt. 2007 Wis. Act 20 (creating Wis. Stat. § 77.54(30)(a)1m.).

An exemption now applies to the gross receipts related to a product whose power source is wind energy, direct radiant energy received from the sun, or gas generated from anaerobic digestion of animal manure and other agricultural waste, if the product produces at least 200 watts of alternating current or 600 British thermal units per day. The exemption does not apply to an uninterruptible power source that is designed primarily for computers. 2007 Wis. Act 20 (creating Wis. Stat. § 77.54(56)).

An exemption has been created for gross receipts related to tangible personal property or taxable services that are sold by a home exchange service that receives money from the appropriation under section 20.485(1) and is operated by the Department of Veterans Affairs. 2007 Wis. Act 20 (creating Wis. Stat. § 77.54(54)).

An exemption now applies to tangible personal property of a cemetery company or corporation described under IRC § 501(c)(13) if the cemetery company or corporation uses the tangible personal property exclusively for its purposes. 2007 Wis. Act 20 (creating Wis. Stat. § 77.54(9a)(i)).

The exemption for motion pictures now includes "motion pictures or radio or televisions for listening, viewing or broadcast." 2007 Wis. Act 20 (amending Wis. Stat. § 77.54(23m)).

Property Tax

Exemption for Industrial Waste Treatment Facilities. Section 70.11(21), which exempts waste treatment facilities, has been amended to (1) impose a "used exclusively and directly" requirement, (2) supply a statutory definition of *treatment* as removing, storing, or causing a physical or chemical change in industrial waste for the purpose of abating or eliminating pollution, and (3) define *industrial waste* to exclude waste with monetary or market value. *Used exclusively* means to the exclusion of all other uses except (1) other use not exceeding 5% of total use, or (2) production of heat or steam for a manufacturing process, if the fuel consists of either 95% or more industrial waste that would otherwise be considered superfluous, discarded, or fugitive material or 50% or more of wood chips, sawdust, or other wood residue from the paper and wood products manufacturing process if such materials otherwise would be considered superfluous, discarded, or fugitive material. 2007 Wis. Act 19, §§ 1–2 (renumbering and amending Wis. Stat. § 70.11(21)(a), and creating Wis. Stat. § 70.11(21)(ab)) (effective Jan. 1, 2007).

Exemption for Olympic Ice Training Center. Newly created section 70.11(44) establishes an exemption from taxation for property owned by a nonprofit corporation that operates an Olympic ice training center on land purchased from the state, if the property is located or primarily used at the center. The exemption extends to property that is leased to a nonprofit entity, regardless of the use of the leasehold income, and up to 6,000 square feet of property leased to a for-profit entity regardless of the use of the leasehold income. 2007 Wis. Act 20, § 1934f (creating Wis. Stat. § 70.11(44)) (effective Oct. 26, 2007).

Exemption for High Density Sequencing System. Newly created section 70.111(26) establishes a personal property tax exemption for high density sequencing systems that by mechanical or electronic operation move printed materials from one place to another within the production process, organize the materials for optimal staging, or store and retrieve the materials to facilitate the production or assembly of such materials. 2007 Wis. Act 20, § 1935d (creating Wis. Stat. § 70.111(26)) (effective Oct. 26, 2007).

Deadline to Pay Second Installment of Property Taxes. For property located in the village of Bagley and the town of Wyalusing, the second installment of property taxes due and payable on or before July 31, 2007, was extended to October 31, 2007, if the taxpayer certifies to the taxation district that the property has been damaged or destroyed by flooding. 2007 Wis. Act 20, § 9141(2v) (nonstatutory provision).

Inheritance, Estate, and Gift Tax

Termination of Wisconsin Estate Tax. The Wisconsin estate tax terminated on December 31, 2007. Under 2001 Wisconsin Act 16, Wisconsin suspended use of the state death tax credit computed on federal estate tax returns and applied its own estate tax for the period from October 1, 2002, through December 31, 2007. On January 1, 2008, Wisconsin returned to use of the state death tax credit computed on federal estate tax returns. The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub.

L. No. 107-16, 115 Stat. 38, eliminated the state death tax credit and, as a result, there is no state death tax credit available for Wisconsin after December 31, 2007. Without a change in the federal tax code, the Wisconsin estate tax, section 72.02, is ineffective until EGTRRA restores the state death tax credit in 2011.