Tax Law

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This chapter covers in varying detail the principal 2008 court decisions and legislative changes affecting Wisconsin taxpayers and tax attorneys. Although most 2008 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

Corporation's Payment of Shareholder's Expense Treated as Constructive Dividends. In *Wink v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-129 (Tax App. Comm'n Sept. 2, 2008), the tax appeals commission disallowed a service corporation's deduction of amounts paid by the corporation to cover the personal expenses of its sole shareholder, director, and officer, and recharacterized such amounts as dividends to the taxpayer shareholder. The commission also rejected the taxpayer's characterization of the payments as a loan, because there was no documentary evidence supporting such characterization, and the taxpayer had not repaid the loan.

Deduction of Trade and Business Expense and Other Expenses Disallowed. In *Veglia-Dansky v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-085 (Tax App. Comm'n Feb. 11, 2008), the taxpayer taught music in the Milwaukee Public School System and at the Wisconsin Conservatory of Music. The tax appeals commission ruled that it was unreasonable for the Department of Revenue (DOR) to insist that the taxpayer's expenses related to providing voice or other music lessons in exchange for a fee were personal and not business-related. The commission disallowed, however, the taxpayer's deduction of expenses derived from her "fine arts activities," as well as expenses relating to her partial ownership of a duplex and other expenses, because the taxpayer failed to substantiate any of the claimed expenses.

Corporate Franchise and Income Tax

Apportionment. In *Ameritech Publishing, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-075 (Tax App. Comm'n Jan. 22, 2008), and No. 01-I-227(F), 2008 Wis. Tax LEXIS 18 (Tax App. Comm'n Feb. 28, 2008), the tax appeals commission ruled that a taxpayer's income-producing activity, the sale of advertising (approximately 90% in the Yellow Pages), was performed in Wisconsin because virtually all the members of the target audience were located in Wisconsin. The Dane County Circuit Court affirmed the tax appeals commission's ruling, *Ameritech Publ'g, Inc. v. Department of Revenue*, No. 2008CV1394 (Wis. Cir. Ct. Dane County Jan. 6, 2009), and the taxpayer has appealed the circuit court's decision to the Wisconsin Court of Appeals.

In *Louis Dreyfus Petroleum Products Corp. v. Department of Revenue*,

[2 Wis.] St. Tax Rep. (CCH) ¶ 401-072 (Tax App. Comm'n Jan. 2, 2008), *aff'd as modified*, No. 2008CV494 (Wis. Cir. Ct. Dane County Oct. 7, 2008), the tax appeals commission ruled that gain from the sale of a partnership interest *was* apportionable capital gain, but interest derived from a loan to its parent company was *not* apportionable interest income. The taxpayer appealed this decision to the circuit court; the DOR did not. The Dane County Circuit Court determined that the tax appeals commission erred when it characterized the sale of a partnership interest as the sale of tangible personal property but affirmed the tax appeals commission ruling because the taxpayer and the partnership were a unitary business.

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 *S&D Development & Prototype, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-105 (Tax App. Comm'n Mar. 12, 2008), the commission dismissed the taxpayer's petition for review for lack of jurisdiction because the DOR did not issue an assessment or a redetermination for the commission to review. The DOR only notified the taxpayer that it was required to file franchise/income and sales and use tax returns.

In *Torrington Co. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-119 (Tax App. Comm'n Aug. 6, 2008), the tax appeals commission dismissed the taxpayer's petition for review for failure to prosecute it. The taxpayer failed to appear at two telephone conferences and failed to comply with an order ordering such participation.

In *Burlington Northern Railroad v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-160 (Tax App. Comm'n Dec. 30, 2008), the tax appeals commission denied the taxpayer's motion to obtain discovery that the tax appeals commission characterized as an expansion of the scope of discovery allowed by the tax appeals commission in a ruling dated May 21, 2003.

Sales and Use Tax

Property Incidental to Sale. In *Paintball Dave's, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-103 (Tax App. Comm'n Apr. 9, 2008), the commission held that the taxpayer's sale of paintballs was not eligible for the resale exemption. The taxpayer sold paintballs to its customers for use at the taxpayer's paintball facilities. Citing section 77.52(2m) of the Wisconsin Statutes,[1] the commission reasoned that such sales were incidental to the paid admissions even though the sale of paintballs was essential to providing the admissions.

Refunds or Credit of Tax. In *Sawvell v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-077 (Wis. Cir. Ct. Dane County Sept. 30, 2008), *aff'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-077 (Tax App. Comm'n Oct. 12, 2007), the circuit court orally affirmed the commission's finding that the state of Wisconsin's assessment of sales tax on the sale of campers to residents of the state of Iowa did not constitute double taxation. The taxpayer sold campers and other nonmotorized vehicles to Iowa residents. The taxpayer applied for Iowa refunds when the Iowa residents registered their purchases in Iowa. When Iowa denied the refund requests on statute of limitation grounds, the DOR declined to credit the Iowa tax against the Wisconsin tax. Since all sales occurred in Wisconsin, the court reasoned Wisconsin tax applies.

Taxation of Custom Software. The Wisconsin Supreme Court affirmed the Wisconsin Court of Appeals' and 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 *Department of Revenue v. Menasha Corp.*, 2008 WI 88, 311 Wis. 2d 579, 754 N.W.2d 95, *aff'g* 2007 WI App 20, 299 Wis. 2d 348, 728 N.W.2d 738, *rev'g* [2001–2005 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 400-786 (Wis. Cir. Ct. Dane County Oct. 26, 2004), *rev'g* [2001–2005 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 400-719 (Tax App. Comm'n Dec. 1, 2003). The supreme 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) (2006) 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. The court also determined that the courts review the commission's, not the DOR's, interpretation of Wisconsin tax laws.

Sale of Admissions. In *Milwaukee Symphony Orchestra, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-100 (Wis. Cir. Ct. Dane County Apr. 23, 2008), *rev'g* [2005–2007 Transfer Binder] [Wis.] St. Tax Rep. (CCH) ¶ 400-959 (Tax App. Comm'n Dec. 15, 2006), the circuit court reversed the commission's finding that the taxpayer's sale of admissions to symphonies were not taxable admissions. Section 77.52(2)(a)2. provides for the taxation for the sale of admissions to amusement, athletic, entertainment, or recreational events, with certain listed exceptions. The commission originally held that the taxpayer's symphonies and other musical events were exempt because such events were primarily for educational, not entertainment, purposes. The court reviewed the commission's decision, granting due weight to the commission's inter-

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

pretation because section 77.52(2)(a)2. is an ambiguous statute. The court reasoned the commission did not reasonably apply section 77.52(2)(a)2. to create a case-by-case application of an exception for educational activities. The court remanded the matter to the commission to determine whether an event is taxable as "entertainment" under an appropriate standard.

Taxable Services. In Private Letter Ruling W 0820001 (Feb. 25, 2008), *reprinted in* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-134 (Oct. 2008), the DOR ruled inspection services provided by a medical physicist were subject to tax, unless a separate exemption applied. In the ruling, the taxpayer provided inspection services of radiology equipment. Generally, inspecting tangible personal property is a taxable service pursuant to section 77.52(2)(a)10. unless a separate exemption applies.

Exemptions. In *Harlan Sprague Dawley, Inc. v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-144 (Tax App. Comm'n Nov. 3, 2008), the commission held that the taxpayer's breeding business did not qualify as farming under the sales and use tax exemption pursuant to section 77.54(3)(a) or (3m). The taxpayer was in the business of breeding, raising, and selling specific pathogen-free, genetically defined animals to the biomedical research community. Wisconsin Administrative Code section Tax 11.12(2)(f) excludes from the definition of *farming* the breeding of animals intended for use in laboratories. The taxpayer argued the Wisconsin Administrative Code provision is counter to the statute and should be ruled invalid. The commission concluded that because such breeding activities were not specifically defined in the statute, the Wisconsin Administrative Code did not conflict with the statute.

In *Engel v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-104 (Tax App. Comm'n May 27, 2008), the commission determined that the taxpayer's tractors were not exempt manufacturing equipment pursuant to section 77.54(6)(a). The taxpayer was in the business of running a ski hill. The tractors were used to groom manufactured snow and naturally occurring snow on the ski hill. The taxpayer argued its customers purchased the "corduroy groomed surface condition" manufactured by the taxpayer. Citing a lack of evidence to support the taxpayer's argument, the commission determined that the taxpayer's primary purpose was selling paid admissions and the sale of any snow was simply incidental to the sale of admissions.

Transfer Fee. In *Fourth Street Villas, LLC v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-147 (Tax App. Comm'n Nov. 19, 2008), the commission determined that the consideration subject to the real estate transfer fee includes the value of limited liability company interests received. The taxpayer exchanged its real estate for a combination of cash and limited liability company interests in the transferee. Section 77.21(3)(a) imposes the real estate transfer fee on the "full actual consideration paid." The commission reasoned the statute should not be limited to cash received, but should apply to anything of value received in the transfer.

In *Bay Hill Associates Ltd. Partnership v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-146 (Tax App. Comm'n Nov. 24, 2008), the commission determined that the consideration subject to the real estate transfer fee includes the face amount of any debt assumed by the transferee. The taxpayer exchanged its real estate for the assumption of various promissory notes, including promissory notes with below-market interest subsidized by the United States of America Rural Development Housing Service. The taxpayer argued the transfer fee should apply to the present value of debt assumed rather than the face value with a below-market interest rate. The commission reasoned that the "full actual consideration" including "the amount of any lien or liens" under section 77.21(3)(a) does not provide a mechanism for adjusting the liens to their fair market value. Therefore, the face amount of such liens should control.

In *Abrahamson v. Department of Revenue*, No. 07-T-141, 2008 WL 5085885, 2008 Wis. Tax LEXIS 15 (Tax App. Comm'n Nov. 26, 2008), the commission held that the transfer of real estate to a limited liability company does not qualify for an exemption. Section 77.25(15s) provides for an exemption for a transfer to a limited liability company when all the members are related and the transfer has no consideration other than the assumption of debt or an interest in the limited liability company. The real estate in question was titled in the name of a Wisconsin general partnership. The taxpayer argued that the since the general partnership dissolved pursuant to state law several years before the transfer, the transferor was an individual instead of a general partnership. The commission reasoned that substance over form does not control the real estate transfer fee. Since the title was in the name of the general partnership, the general partnership would be treated at the transferor.

Property Tax

Valuation: Income Approach; Contract Versus Market Rents; Waiver of Income Disclosure Requirement. In *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687, the supreme court reversed the court of appeals and overturned assessments 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, thereby resulting in above-market rental payments. *Id*. ¶ 6. In assessing the leased properties, the assessor used an income approach based on the above-market contract rents.

In overturning the assessments, the supreme court observed that section 70.32(1) requires assessors to value real property in accordance with the *Wisconsin Property Assessment Manual*

(the manual). The manual in turn requires assessment of the fee simple interest in the property and states that when the income valuation method is used, the assessor must use market rents rather than contract rents, with exceptions not applicable to Walgreen. *Id.* ¶¶ 20, 26. The court cited as a nationally recognized principle that a lease never increases the market value of the fee simple interest. *Id.* ¶¶ 3, 47, 57. Although leases run with the land, they constitute contract rights rather than real property rights and are not assessable. *Id.* ¶¶ 33, 48. Similarly, creative financing and business arrangements reflected in leases that do not truly bear on the value of the real property must be disregarded by assessors. *Id.* ¶¶ 54, 56, 64. These principles avoid dramatic fluctuations in market values resulting from unusual lease terms. *Id.* ¶ 60.

The supreme court found no conflict between Wisconsin case law and the manual's reliance on market rents rather than contract rents. Both the manual and case law recognize an exception to the rule favoring the use of a market-rent measurement when contract rents are *below* market rents, in which event the assessor is to use the contract rents, thereby reducing the assessment. *Id.* ¶¶ 27–28, 37. There is no parallel provision allowing an assessor to increase a property assessment based on above-market contract rents. The court also found no conflict between a rule requiring reliance on market rents and prior Wisconsin court rulings in the "inextricably intertwined" line of cases—cases that held that "a property's business value or income-producing capacity that is 'inextricably intertwined' with the property may be . . . assessed as part of its value," *id.* ¶ 62; the court described the latter as recognizing a "narrow exception to the general rule that business value should not be included in real estate assessments," *id.* ¶ 63.

In addition to reaffirming that market rents control in income valuations except when properties are unencumbered by below-market rate leases, the supreme court disposed of the city's argument that Walgreen had waived its right to object to the assessments by failing to produce financial information as required by section 70.47(7). The court held that, by conducting a hearing, accepting assessment evidence, and rendering a decision, the board of review waived its right to object to Walgreen's failure to comply with section 70.47(7). Moreover, any noncompliance was moot in any event because Walgreen pursued de novo court review under section 74.37. *Id.* ¶¶ 78, 81.

Valuation: Comparable Sales; Arm's-Length Sale. Section 70.32(1) requires assessors to consider "recent arm's-length sales of the property to be assessed." In *Forest County Potawatomi Community v. Township of Lincoln*, 2008 WI App 156, ___ Wis. 2d ___, 761 N.W.2d 31, the assessor for the township of Lincoln based his 2005 assessment of two 40-acre land parcels on an allocation of the total 2003 purchase price for the mining company—made up also of "substantial other land and company assets," *id.* ¶ 2—that owned the land. The circuit court held that the purchase price controlled and refused to consider the owner's other evidence of value, granting summary judgment to the township. The court of appeals reversed, holding that the 2003 sale was not a sale of "the property" under section 70.32(1). As the court observed, "A value derived by analyzing a complex corporate transaction involving the sale of a variety of assets—tangible and intangible, independent and interdependent—is not equivalent to the price obtained in a sale of one component of that transaction." *Id.* ¶ 16. The taxpayer overcame the presumption of correctness by presenting issues of fact regarding highest and best use and other valuation considerations, and the court of appeals held that the circuit court therefore erred in granting summary judgment.

Valuation: Comparable Sales Analysis Versus Formula. In *Anic v. Board of Review*, 2008 WI App 71, 311 Wis. 2d 701, 751 N.W.2d 870, the court of appeals upheld the 2005 assessments of 18 beachfront properties along Lake Michigan in Sheboygan County. The assessor evaluated 14 comparable sales and concluded that the size and shape of individual lots had no measurable impact on price per beachfront foot. He established an average price per beachfront foot and adjusted the average based on his observation of beach quality for each of the assessed properties. In their certiorari appeal to the circuit court pursuant to section 70.47(13) (2005–06), the owners argued that the assessor's methodology was a formulaic approach of the type held to be impermissible in *State ex rel. Campbell v Township of Delavan*, 210 Wis. 2d 239, 565 N.W.2d 209 (Ct. App. 1997). The court of appeals disagreed, noting that the valuations assigned to the subject properties reflected the assessor's evaluation of comparable sales and consideration of different characteristics that would affect value, as required by section 70.32.

Classification: Issue Preclusion; Frivolous Appeal. The taxpayer's third appeal of his property's classification not only failed, but subjected him to sanctions for filing a frivolous appeal in *Estate of Sabol v. Village of Mt. Pleasant Board of Review*, No. 2007AP2766, 2008 WL 5336913 [2 Wis.] St. Tax Rep. (CCH) ¶ 401-151, at 35,637 (Ct. App. Dec. 23, 2008) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)) (petition for review filed). In the taxpayer's appeal from the 2002 assessment, the court of appeals held that using a portion of the property to grow some produce did not qualify the property for a reduced agricultural use assessment under section 70.32(2r) because agricultural use does not include personal gardens and hobby farms. When the taxpayer's estate raised the same issue in appealing the 2003 assessment, the court of appeals held the appeal was barred by issue preclusion. When the taxpayer raised the same issue again in appealing his 2004 assessment, the court of appeals, in its opinion issued in 2008, upheld summary judgment in favor of the village and found the taxpayer's appeal frivolous because the use of the property had not changed since the previous adverse determinations.

Exemptions: Computers; Computer Exemption Guidelines. Section

70.11(39) exempts from property tax "mainframe computers, minicomputers, personal computers, networked personal computers, servers, terminals, monitors, . . . [and] electronic peripheral equipment," but the exemption does not apply to "equipment with embedded computerized components." In *City of La Crosse v. Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-106 (Tax App. Comm'n June 9, 2008), the commission ruled that this exemption applies to the following categories of computerized medical devices owned and operated by Gundersen Clinic, Ltd.: ultrasound equipment, magnetic resonance imaging (MRI) equipment, radiation oncology and linear accelerator equipment, laser equipment, cardiology equipment, nuclear medicine equipment, digital imaging equipment, and diagnostic equipment.

In *City of La Crosse*, the board of assessors ruled that the medical devices were exempt, and the city petitioned for review by the tax appeals commission. The taxpayer moved for summary judgment. The commission considered expert testimony from the city's and taxpayer's experts as to whether the medical devices at issue fell within the exempt or taxable categories under section 70.11(39). The city's expert was a medical physicist with expertise in the application of the medical equipment at issue but with no experience in computer engineering or design. The taxpayer's expert was a biomedical engineer with 25 years of experience designing and building electronic devices for use in medical research. The commission agreed with the taxpayer that the city's expert lacked relevant expertise; that his broad interpretation of "embedded computerized components" was impermissible because it obliterated the distinction between the mutually exclusive exempt and taxable categories in the statute; and that, as a matter of law, his testimony could not satisfy the city's burden of proof.

In finding the medical devices exempt, the commission also relied upon the Computer Exemption Guidelines (Guidelines) published by the DOR as part of the *Wisconsin Property Assessment Manual*. The Guidelines state with respect to medical devices that "certain electronic imaging and monitoring devices" are exempt if they are "computer or electronic peripheral equipment" and cite as examples of exempt medical devices "ultrasound imaging device, magnetic resonance imaging device (MRI), and computerized axial tomography." The Guidelines state that x-ray imaging equipment, on the other hand, is taxable because it is "[n]ot a computer or connected to and operated by a computer." In granting summary judgment for the taxpayer, the commission explicitly ruled that the Guidelines are authoritative because they do not conflict with section 70.11(39), but give effect to the statute by further defining the distinctions between the exempt and taxable categories it establishes. This ruling should fortify the argument that other types of electronic equipment the Guidelines categorize as exempt, but which tax assessors currently treat as taxable, are entitled to the exemption.

The city petitioned the Dane County Circuit Court for review of the commission's decision. The parties' cross-motions regarding the finality and appealability of the Commission's decision are pending. *City of La Crosse v. Wisconsin Dep't of Revenue*, No. 08-CV-2935 (Wis. Cir. Ct. Dane County).

Exemptions: Waste Treatment Facilities; Partial Exemption. Before 2007, section 70.11(21) exempted 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." (Section 70.11(21) was amended effective January 1, 2007, to impose a "used exclusively and directly" requirement, supply a statutory definition of *used exclusively*, and define *industrial waste* to exclude waste with monetary or market value. 2007 Wis. Act 19, §§ 1–2.) In *City of De Pere v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-107, at 35,317 (Tax App. Comm'n June 16, 2008), the commission upheld the board of assessors' 2006 determination that the exemption applied 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 in part, rev'd in part*, [2001–2005 Transfer Binder Wis.] ¶ 400-809 (Wis. Cir. Ct. Dane County Jan. 31, 2005). However, adhering to its decision 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 departed from *Newark Group* and allowed only a partial exemption, limiting the exemption to the specific areas of the plant where waste treatment occurred. In contrast, *Newark Group* held the entirety of the paper mill was exempt, including the office and parking lots. On rehearing, the commission clarified the exempt areas. *City of De Pere v. Wisconsin Department of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-117, at 35,433 (Tax App. Comm'n Aug. 6, 2008).

Procedure: De Novo Review; Limitation on Assessment. In *Trailwood Ventures, LLC v. Village of Kronenwetter*, 2009 WI App 18, ___ Wis. 2d ___, ___ N.W.2d ___ (review denied), the court of appeals held that a circuit court lacks the authority to increase an assessment above the level from which the taxpayer has appealed. In this case, the board of review reduced the taxpayers' assessments, but not to a level with which the taxpayers were satisfied. The taxpayers exercised their right to file an action for de novo review under section 74.37 after the village denied their claims for excessive assessment. Following trial, the circuit court determined the parcels' values were the higher values as originally determined by the assessor. The court of appeals reversed, holding that sections 74.37 and 74.39 do not permit a court to impose a greater tax burden than the one the taxpayers challenge.

Procedure: Equitable Estoppel; Failure to File Correct Tax Form. A Wisconsin manufacturer that overpaid more than $200,000 in personal property taxes because it filed the wrong tax form had no claim for equitable estoppel against the city whose employee provided the incorrect form, ruled the court of appeals in *Independence Corrugated, LLC v. City of Oak Creek*, No. 2008AP41, 2008 WL 4348517, [2

Wis.] St. Tax Rep. (CCH) ¶ 401-126, at 35,463 (Ct. App. Sept. 25, 2008) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)). The taxpayer was a closely held limited liability company owned by nine corrugated box companies, three of which were based in Wisconsin. The taxpayer located its facility in Wisconsin in part so its manufacturing assets would be exempt from personal property tax pursuant to section 70.11(27). A city employee provided the taxpayer with a tax form intended for nonmanufacturers. As a result, the taxpayer incorrectly reported more than $11 million in assets as taxable and was assessed accordingly. After missing the deadline to appeal the state assessment of manufacturing property, the taxpayer sued the city on a claim of equitable estoppel to recover the excess taxes.

The court of appeals found it unnecessary to resolve the question whether equitable estoppel properly may be used as the basis of a claim rather than just a defense, upholding the circuit court's determination that the taxpayer failed as a matter of law to prove reasonable reliance on the city employee. The facts demonstrated that the taxpayer was a sophisticated company familiar with Wisconsin's exemption of manufacturing property. It was unreasonable as a matter of law for the taxpayer to rely on an unidentified city employee with unknown expertise to reap a significant tax benefit provided by the state, not the city.

Procedure: Collection; Piercing the Corporate Veil. A city's claim against a corporate officer to collect unpaid personal property taxes owed by the corporation failed in *City of Hillsboro v. Hardy*, No. 2007AP1929, 2008 WL 2522334, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-112, at 35,346 (Ct. App. June 26, 2008) (unpublished opinion not to be cited as precedent or authority per section 809.23(3)). Following a trial, the circuit court ruled that the city had failed to satisfy its burden of proving fraud or dishonesty as required to pierce the corporate veil, and this finding was not clearly erroneous. The city's alternative theory that the defendant was liable under section 180.1408(2) also failed because the evidence supported the trial court's determination that any transfers of corporate property were not made in the defendant's role as a shareholder, but as a corporate officer carrying out the dissolution of the corporation.

Inheritance, Estate, and Gift Tax

There were no noteworthy developments in the area of inheritance, estate, and gift tax law in 2008.

STATUTORY DEVELOPMENTS[2]

Individual and Fiduciary Income Tax—Addback of Interest Expense and Rental Expense

For taxable years beginning on or after January 1, 2008, individuals, fiduciaries, and certain entities are required to add to their federal income interest expenses and rental expenses that are directly or indirectly paid, accrued, or incurred to, or in connection with transactions with, a related party. The new law then allows a deduction for these expenses if they are disclosed in the manner prescribed by the DOR and certain conditions are met. For this purpose, *related party* means (1) any person related to a taxpayer as provided under section 267 or 1563 of the Internal Revenue Code (I.R.C.), during all or a portion of the taxpayer's taxable year, and (2) any real estate investment trust (REIT), other than a qualified REIT, if more than 50% of any class of the beneficial interests or shares of the REIT are owned directly, indirectly, or constructively by the taxpayer, or any person related to the taxpayer, during all or a portion of the taxpayer's taxable year. A modified version of I.R.C. § 318(a) applies to determine the ownership of stock, assets or net profits of any person. *See* 2007 Wis. Act 226, §§ 53–58, 60–62 (creating Wis. Stat. §§ 71.01(1am), (1t), (5s), (9ad), (9am), (9an), .05(6)(a)24., (b)45., 46.).

Corporate Franchise and Income Tax

Definition of Internal Revenue Code. Noticeably absent from the updated definition of the *I.R.C.* in 2007 Wisconsin Act 20 were regulated investment companies (RICs), REITs, real estate mortgage investment conduits (REMICs), and financial asset securitization investment trusts (FASITs). This oversight has now been corrected. The definition of I.R.C. has been updated retroactively and now generally means the I.R.C. as amended to December 31, 2006. 2007 Wis. Act 151, § 9 (creating Wis. Stat. § 71.26(2)(b)20.) (effective for tax years beginning after December 31, 2006). 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 during 2006 were retroactively amended to mean generally the I.R.C. as amended to December 31, 2005. 2007 Wis. Act 151, § 8 (creating Wis. Stat. § 71.26(2)(b)19.). 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 151, §§ 1–2 (repealing Wis. Stat. § 71.26(2)(b),12., 13.), 3–7 (amending Wis. Stat. § 71.26(2)(b),14., 15., 16., 17., 18.).

Deductions. Retroactive for tax years beginning in 2008, the deductions for interest and rent expense paid or accrued to related parties are disallowed, except in certain limited circumstances. 2007 Wis. Act 226, §§ 63–68, 70–72 (creating Wis. Stat. §§ 71.22(1b), (1tm), (3m), (9ad), (9am), (9an), .26(2)(a)7., 8., 9.), 69 (amending and renumbering Wis. Stat. § 71.26(2)(a) to Wis. Stat. § 71.26(2)(a)(intro.)), 95 (amending Wis. Stat. § 71.80(1)(b)).

To deduct related party interest or rental expenses, the taxpayer must (1) disclose the transactions on Schedule RT *and* (2) meet one or more of the following:

1. The interest or rental expense must reimburse the related party for the expenses paid to an unrelated party.

[2] Hereinafter, and unless otherwise indicated, all references in this chapter to the Wisconsin Statutes are to the 2007–08 Wisconsin Statutes.

2. The related party is subject to Wisconsin income/franchise tax on the interest or rental income.
3. The transaction is not primarily for the avoidance of Wisconsin income/franchise tax.

2007 Wis. Act 226, § 96 (creating Wis. Stat. § 71.80(23)).

Presumably, if the interest or rent deduction is disallowed, the related party may exclude the income from Wisconsin taxable income. Wis. Tax Bull. No. 159, Jan. 2009, at 18.

Similar rules apply to S corporations, 2007 Wis. Act 226, § 73 (amending Wis. Stat. § 71.30(2)), §§ 75–83 (creating Wis. Stat. §§ 71.34(1am), (1b), (1e), (1k)(j), (1k)(k), (1k)(L), (1L), (1p), (1r)), and insurance companies, 2007 Wis. Act 226, § 91 (amending Wis. Stat. § 71.45(2)(a)10.), 85–90 (creating Wis. Stat. § 71.42(1b), (1s) (1t), (4d), (4m), (4n)), 92–94 (creating Wis. Stat. § 71.45(2)(a)16., 17., 18.).

Credits. Several minor technical corrections to the various tax credit provisions were made. *See* 2007 Wis. Act 96, 97, and 100.

Sales and Use Tax

There are no noteworthy changes to the sales and use tax statutes.

Property Tax

Appeal Procedures: Optional Elimination of Right to De Novo Review. Sections 70.47 and 74.37 have been amended to curtail nonmanufacturing property owners' options for challenging property tax assessments in municipalities that adopt ordinances allowing taxpayers to obtain a 60-day postponement of board review hearings. 2007 Wis. Act 86 (eff. Jan. 1, 2008) (Act 86).

Before the enactment of Act 86, all Wisconsin taxpayers other than manufacturers (who are assessed by the DOR) had the choice of two avenues to obtain court review of local property tax assessments: (1) the certiorari review procedure under section 70.47, or (2) a claim for recovery of an excessive assessment and de novo refund action under section 74.37. Both avenues required the taxpayer first to file an objection to the assessment and participate in a hearing before the local board of review. Court review of the board's determination under the section 70.47 certiorari procedure was limited to a review of the record evidence presented before the board, with the court giving the decision of the board substantial deference. Review under section 74.37, on the other hand, permitted a taxpayer to seek relief from the taxation district and, if unsuccessful, to challenge the assessment anew on any grounds in a de novo refund action filed in the circuit court. In the de novo circuit court action, the parties could present evidence not submitted to the board previously, and the court was not required to give any deference to the board of review's prior decision.

Act 86 eliminated the uniformity of these review options, empowering municipalities to deprive property owners of the section 74.37 claim for excessive assessment and de novo court review option by adopting an ordinance that gives property owners the right to request a 60-day postponement of the board of review hearing (extension ordinance). Under Act 86, other board of review procedures and court review options also vary according to whether the municipality has adopted an extension ordinance.

1. In municipalities that adopt an extension ordinance, and regardless of whether the taxpayer invokes the extension, both the taxpayer and the assessor are required to present "all evidence" (to be specified in the *Wisconsin Property Assessment Manual*) at the board of review hearing.
2. If the municipality has enacted an extension ordinance, and if the taxpayer requests an extension, then the taxpayer and assessor must simultaneously exchange reports and other exhibits they intend to submit at the hearing at least 10 days before the hearing.
3. If the municipality has enacted an extension ordinance, and regardless of whether the taxpayer requests an extension, the board of review may, upon a showing of good cause, compel the attendance of witnesses for deposition before the hearing.
4. If a taxpayer is seeking review of a board of review determination in a municipality that has enacted an extension ordinance, then the traditional certiorari review standards under section 70.47 are modified. So long as the taxpayer rebuts the presumption of correctness (by coming forward with evidence that supports the taxpayer's position), then the court on review determines the assessment without deference to the board of review. Moreover, the court on review may consider evidence outside the board of review record if (1) the evidence was not available as of the time of the board of review hearing, (2) the board of review refused to consider the evidence, or (3) the court otherwise determines the evidence should be considered to determine the correct assessment.

Act 86 also makes a number of modifications to board of review and court review procedures that do not depend on whether the municipality has enacted an extension ordinance. The Act

1. Requires boards of review to allow "a sufficient amount of time for a hearing" on an objection to an assessment to permit both the taxpayer and the assessor to present their evidence;
2. Requires boards of review to compel the attendance of witnesses at the hearing at the request of either the taxpayer or the assessor, whereas prior law only mandated attendance on behalf of the assessor and gave the board the discretion to determine whether to compel witnesses at the taxpayer's request; and
3. Permits the parties to agree that, if a subsequent year's assessment has not been resolved as of the time a section 70.47 action is filed in court to challenge a prior year's assessment, the court may review the subsequent year's assessment in the same action without an additional hearing by the board of review.

Finally, Act 86 reduced the interest rate payable on refund claims. Whereas interest on refunds previously was allowed at the rate of 0.8% per month, or 9.6% per year, the interest rate now is tied to the annual discount rate determined by the last auction of six-month U.S. treasury bills.

➢ ***Note.*** The sections of Act 86 that amended section 74.37(4)(c) and (4)(d) to eliminate the right to de novo review in municipalities that adopt extension ordinances were held unconstitutional under the Equal Protection Clause in *Metropolitan Associates v. Milwaukee City*, No. 08-CV-9866 (Wis. Cir. Ct. Milwaukee County Jan. 20, 2009).

Notice of Changed Assessment: Agricultural Use Conversion. Section 70.365 has been amended to require that, if an assessor determines a person's land is no longer eligible to be assessed as agricultural land under section 70.32(2r), and if the current classification is not undeveloped, agricultural forest, productive forest land, or "other" under section 70.32(2)(a), the assessor must notify the assessed person or occupant it may be subject to agricultural use conversion charges. 2007 Wis. Act 210, § 1 (amending Wis. Stat. § 70.365) (eff. Jan. 1, 2008).

Inheritance, Estate, and Gift Tax

There are no noteworthy changes to the inheritance, estate, and gift tax statutes in 2008.