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Tax Law

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This chapter covers in varying detail the principal 2014 court decisions, legislative changes, and administrative developments affecting Wisconsin taxpayers and tax attorneys. Although most 2014 income tax, franchise tax, withholding tax, sales and use tax, and property tax developments are discussed, this chapter is not all-inclusive.[1]

[1] Textual references to the Wisconsin Statutes are indicated as "chapter xxx" or "section xxx.xx," without the designation "of the Wisconsin Statutes." Unless otherwise indicated, in the Statutory Developments section of this chapter, all references to the Wisconsin Statutes are to the 2013–14 Wisconsin Statutes.

CASE LAW

Individual and Fiduciary Income Tax

Withdrawal from 401(k) Account by Agent Is Still Income. The tax appeals commission held that a taxpayer must pay income tax on amounts withdrawn from his 401(k) retirement account by his agent, even though he never received the funds because they were allegedly taken from his agent by fraud or coercion. *Bvocik v. Wisconsin Dep't of Revenue*, No. 13-I-720 (Wis. Tax App. Comm'n Nov. 12, 2014). Petitioner Clifford Bvocik gave his former wife Brenda Bvocik power of attorney over his financial affairs. Pursuant to that power of attorney, Mr. Bvocik authorized Ms. Bvocik to withdraw funds from his 401(k) retirement account. The petitioner did not claim these amounts on his 2009 income tax return. When the Department of Revenue (DOR) audited the petitioner's income tax return, he claimed he should not be taxed on the funds because Ms. Bvocik was duped or coerced into transferring those funds to another person. The tax appeals commission held that even if the petitioner's claim were true, the theft of his 401(k) funds occurred after they had been distributed via his attorney-in-fact. The funds still constituted income to the petitioner.

Earned Income Tax Credit. The tax appeals commission held that a married taxpayer was not eligible to receive the earned income credit because, although the taxpayer filed a separate return, she was not treated as single under I.R.C. § 7703(b). *Thomas v. Wisconsin Dep't of Revenue*, St. Tax Rep. (CCH) ¶ 401-857 (Wis. Tax App. Comm'n July 8, 2014). The petitioner met the first two requirements of I.R.C. § 7703(b) by filing a separate tax return from her husband and furnishing more than one-half of the cost of maintaining the household. However, the petitioner's husband lived at the household intermittently throughout the tax years at issue, failing the requirement that the individual's spouse not be a member of the taxpayer's household during the last six months of the taxable year.

Bad Business Debt of Employee. In *Mariucci v. Wisconsin Department of Revenue*, St. Tax Rep. (CCH) ¶ 401-862 (Wis. Tax App. Comm'n July 31, 2014), the Wisconsin Tax Appeals Commission held that the petitioner failed to establish that he had experienced a "bad business debt of an employee." The petitioner was unable to provide any evidence as to the nature, amount, and terms of the alleged debt, other than testimony from the company president that the commission deemed "not credible."

Corporate Franchise and Income Tax

Manufacturing Sales Tax Credit. In a joint franchise tax and sales and use tax case, the tax appeals commission held that the taxpayer could offset the assessment of sales and use tax on the purchase of natural gas used in manufacturing with a corresponding franchise tax credit generated by the imposition of the sales and use tax. *Primera Foods Corp. v. Wisconsin Dep't of Revenue*, Nos. 10-I-277, 10-S-278, 2013 WL 1395599 (Wis. Tax App. Comm'n Mar. 14, 2013). On a sales and use tax audit, Primera admitted that it had not paid a use tax on the purchase of natural gas used in its manufacturing operation. Primera argued that the payment of the use tax entitled it to a dollar-for-dollar offset on its franchise tax paid for the year pursuant to the manufacturing sales tax credits under section 71.28(3). The DOR argued that the statute provides a franchise tax credit for any sales or use tax "paid" by the corporation in such taxable year on fuel and electricity consumed in the manufacture of tangible personal property. The tax appeals commission initially held that the years-later assessment of the use tax can generate a franchise tax credit and that no net tax is due. The tax appeals commission later granted the DOR's request for a rehearing of the matter, and, in early 2014, reversed its decision. *Primera Foods Corp. v. Wisconsin Dep't of Revenue*, Nos. 10-I-277, 10-S-278, 2014 WL 1101319 (Wis. Tax App. Comm'n Mar. 7, 2014). The taxpayer has not appealed this decision.

Economic Development Surcharge—Tiered Partnerships. The issue in *GP Tangible Investments, LLC v. Wisconsin Department of Revenue*, No. 12-R-151, 2014 WL 703570 (Wis. Tax App. Comm'n Feb. 13, 2014), is of only historical significance because, effective for taxable years beginning on or after January 1, 2013, the economic development surcharge no longer applies to individuals, estates, trusts, partnerships, and limited liability companies (LLCs) taxed as partnerships. 2013 Wis. Act 20, §§ 1501d, 1501e, 1501f, 1501g, 1501h, 1501i, 1501k, 1501m, 1501r (repealing Wis. Stat. §§ 77.92(1), (4), (4m), and (5), 77.93(2), (3), (5), 77.94(1)(b), and 77.947); *id.* §§ 1501L, 1501n, 1501p, 1501q, 1501s (consolidating, amending, and renumbering Wis. Stat. §§ 77.94(1)(intro.), (a) as Wis. Stat. § 77.94(1), and amending Wis. Stat. §§ 77.94(2)(a)2., (b)(intro.), 1., 77.96(5)).

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GP Operations (GP) and GP Tangible Investments (GPTI) were both LLCs classified as partnerships for income tax purposes. GPTI was one of 37 members of GP. GP derived income from Wisconsin and properly paid the applicable surcharge. A portion of GP's income flowed through to GPTI and was GPTI's *only* source of income. The issue in the case was whether GPTI also owed a surcharge. The tax appeals commission held that it did, finding that GPTI "derived income" from business transacted in the state because it received flow-through income from GP, income that was "derived" from business transacted in the state by GP. The tax appeals commission also noted that the statutes contain a "carve-out" from the surcharge *for individuals* who are partners but no similar carve-out *for partnerships* that are partners. The taxpayer appealed the case to the Dane County Circuit Court, which upheld the tax appeals commission's decision in early 2015. *GP Tangible Invs., LLC v. Wisconsin Dep't of Revenue*, No. 2014CV0773 (Wis. Cir. Ct. Dane Cnty. Mar. 6, 2015).

Sales and Use Tax

Taxable Services. The commission held that payments for environmental remediation services constitute taxable payments for "processing" pursuant to section 77.52(2)(a)11. *Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, [2 Wis.] St. Tax Rep. (CCH) ¶ 401-912 (Tax App. Comm'n Dec. 30, 2014). The taxpayer provided remediation services to treat sediment dredged from the Fox River. Specifically, the taxpayer, through a subcontractor, removed water and sand from the sediment to reduce transportation and landfill costs of contaminated sediment. Section 77.52(2)(a)11. provides that sales and use tax applies to the "processing" of tangible personal property for consideration for consumers who directly or indirectly provide the materials used in the processing. The commission reasoned that the taxpayer in this case was a consumer that provided to a subcontractor the sediment for drying and sorting. The subcontractor's activity of removing the water and the sand met the common interpretation of *processing*. The commission also held that the DOR's assessment was timely, even though the assessment alleged the same charges were taxable under a different provision of the statutes. The commission explained that the DOR was not required to provide every statutory basis or legal argument for making its adjustment.

Substance over Form. The court of appeals upheld the application of the "substance and realities" test to the sale and installation of construction materials to a nonprofit customer via an affiliated entity. *Sullivan Bros. v. Wisconsin Dep't of Revenue*, No. 2013AP818, 2014 WL 321867 (Wis. Ct. App. Jan. 30, 2014) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), *aff'g* [2 Wis. St.] Tax Rep. (CCH) ¶ 401-693 (Wis. Cir. Ct. Dane Cnty. Feb. 22, 2013), *aff'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-600 (Tax App. Comm'n Aug. 14, 2012). In the original decision, the tax appeals commission used the "substance and realities" test to uphold an assessment against Sullivan Brothers. Wisconsin law has long imposed sales and use tax on tangible personal property used by contractors in real property construction activity. *See* Wis. Stat. § 77.51(2). Nonprofit entities may avoid indirectly paying this tax by separately purchasing the material. Here, the taxpayer, Sullivan Brothers, would purchase and install ceiling materials for its customers. For sales to nonprofit entities, Sullivan Brothers would first "sell" materials to Sullivan Supply, which would in turn sell the materials to the nonprofit, for subsequent installation by Sullivan Brothers. Sullivan Brothers and Sullivan Supply are each owned by the same individuals and in the same proportions. The taxpayer argued the DOR admitted in its pleadings that sales between Sullivan Brothers and Sullivan Supply were valid business transactions. The court determined that the taxpayer's failure to adequately raise this reliance-on-admissions argument with the commission precluded the taxpayer from raising this issue on appeal.

Taxable Admission. The Dane County Circuit Court affirmed that a "customer convenience charge" and a per-order "handling fee" collected by Ticketmaster in connection with the sale of concert tickets must be included in the value of the taxable admissions subject to sales tax. *NEJA Grp., LLC v. Wisconsin Dep't of Revenue* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-874 (Wis. Cir. Ct. Dane Cnty. Aug. 22, 2014), *aff'g* No. 08-S-64, 2014 WL 575345 (Wis. Tax App. Comm'n Jan. 13, 2014). The taxpayer operated Alpine Valley Music Theatre, a large outdoor venue featuring national performers. All tickets for events were sold through its agent, Ticketmaster. The taxpayer and Ticketmaster agreed to a pricing mechanism for the amount of the service fees collected. A portion of the fees was shared with Ticketmaster for its selling services. The commission determined that these fees were part of the "gross receipts" subject to tax under section 77.51(4)(a) because the customer must pay the fees to obtain tickets. The court declined to dispute the commission's factual findings because the commission's findings were supported by substantial evidence in the record.

➢ ***Comment.*** The parties filed cross-motions for summary judgment. The commission interprets cross-motions as meaning there is no dispute of fact, and such decisions may be decided on stipulated facts. The

parties did not agree to stipulated facts. Instead, the commission applied the DOR's proposed findings for purposes of evaluating the DOR's motion. Caution is advised before making a cross-summary-judgment motion without stipulated facts.

Lodging—Internet Booking Fees. The Dane County Circuit Court affirmed that Wisconsin sales and use tax applies only to the portion of the fee charged to the extent the taxpayer forwards proceeds to the provider of the lodging. *Orbitz, LLC v. Wisconsin Dep't of Revenue*, No. 14-CV-1708 (Wis. Cir. Ct. Dane Cnty. Dec. 15, 2014), *aff'g* [2 Wis.] St. Tax Rep. (CCH) ¶ 401-844 (Wis. Tax App. Comm'n May 14, 2014). Section 77.52(2)(a)1. applies sales and use tax to the "furnishing of rooms or lodging to transients by hotelkeepers, motel operators and other persons furnishing accommodations." Orbitz provides an online booking service that matches consumers with available hotel rooms. Consumers book and pay for the lodging via Orbitz's website. Orbitz then passes a portion of the collection to the operator of the lodging and keeps the balance. The commission reasoned that the services provided are not listed in the statute. Additionally, Orbitz does not control, have custody of, or have any risk of loss of any hotel room. The court noted that ambiguity must be interpreted in favor of the taxpayer because the underlying statute seeks to impose a tax. The DOR has appealed the decision.

Unauthorized Tax—Fee in Lieu of Room Tax. The court of appeals reversed a circuit court decision concerning the imposition of a fee in lieu of room tax. *Bentivenga v. City of Delavan*, 2014 WI App 118, 358 Wis. 2d 610, 856 N.W.2d 546 (review denied). Here, a developer of a condominium project and the city of Delavan agreed that each owner of each condo that chose not to rent that owner's condo to the general public would pay a fee in lieu of the room tax that would be due on rentals of the condo. In the purchase agreement for each condo, the developer included a contractual provision requiring the payment of the fee. A group of condo owners subsequently challenged the fee on the grounds that the fee is a tax that is not authorized by the legislature. The circuit court ruled in favor of the city. The court of appeals reversed on the grounds that the fee was really an unauthorized tax. In reaching its conclusion, the court noted that the city did not provide any services or direct support for the project, so the fee could not be viewed as a form of liquidated damages for recoupment of the city's investment. Moreover, the funds from the fee went directly to the city's general fund.

Property Tax

Notice Exception to Board-of-Review Exhaustion Requirement. Northbrook Wisconsin, LLC v. City of Niagara, 2014 WI App 22, 352 Wis. 2d 657, 843 N.W.2d 851 (review denied), addressed whether the notice exception in section 74.37(4)(a)—which allows a taxpayer to bring a claim for excessive assessment without first exhausting board-of-review objection procedures if the municipality failed to provide an assessment-change notice pursuant to section 70.365—applied when the reason no assessment notice was sent was that the assessment did not change from the prior year. The court answered in the negative, reasoning that the notice exception applies only when the municipality failed to provide a *required* notice of assessment, and no notice is required if the assessment did not change from the prior year.

Remedy for Uniformity Violation. In *3301 Bay Road LLC v. Town of Delavan*, 2014 WI App 18, 352 Wis. 2d 721, 845 Wis. 2d 666 (review denied), a group of property owners challenged their assessments as excessive and as violating the uniformity requirement in the Wisconsin Constitution. The circuit court found the assessments excessive and also determined the town had violated uniformity by assessing the plaintiffs' properties at or above market value, while assessing properties in other neighborhoods at below market value. The plaintiffs argued that, to redress the uniformity violation, they were entitled to a further reduction of their assessments to the same level below market value as the other below-market-value assessments. The circuit court instead limited the plaintiffs' uniformity remedy to the difference between their taxes after correcting the excessive assessments and the taxes they would have paid if the other neighborhoods had been assessed at fair market value. The court of appeals upheld the limited uniformity remedy, applying the erroneous-exercise-of-discretion standard. The supreme court denied review of the court of appeals' decision.

Exception to Board-of-Review Exhaustion Requirement When Prior Year's Objection Pending; Appeal Due Date for "Deemed Disallowed" Claims for Excessive Assessment. In *Walgreen Co. v. City of Oshkosh*, 2014 WI App 54, 354 Wis. 2d 17, 848 N.W.2d 314, the court of appeals clarified the circumstances in which a taxpayer is excused from exhausting board-of-review objection procedures when a prior year's objection is pending. The court held that this exception applies if three requirements are met: (1) the property owner has filed a procedurally correct

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objection to the prior year's assessment; (2) the assessment has not changed from the prior year; and (3) the prior year's objection is still unresolved as of the date of the first meeting of the board of review for the current year's assessment. *Id.* ¶ 18. The court also held that the 90-day limit for filing a de novo refund action in section 74.37(3)(d) does not apply if the tax authority did not give written notice of action on the claim for excessive assessment. In other words, if the tax authority does not act on a claim for excessive assessment within 90 days and the claim, therefore, is "deemed disallowed," that does not trigger the 90-day deadline for filing a refund action in the circuit court. *Id.* ¶ 21.

Presumption of Correctness; Reassessments. The court of appeals clarified the presumption of correctness, as well as reassessment requirements, in *West Capitol, Inc. v. Village of Sister Bay*, 2014 WI App 52, 354 Wis. 2d 130, 848 N.W.2d 875 (review denied). In this case, the circuit court determined that the assessor's 2009 valuation of the owner's shoreline property was excessive. The circuit court also rejected the owner's appraisal as unreliable. The court then reduced the 2009 assessment to the same level as the lower 2010 assessment, which itself was under review. The owner appealed, arguing the court erred in proceeding to judgment without ordering a reassessment for 2009 pursuant to section 74.39. The court of appeals upheld the lower court's determination that the 2009 assessment was excessive, clarifying there are two ways to overcome the statutory presumption of correctness of property tax assessments: (1) by presenting significant contrary evidence, or (2) by showing the assessor failed to comply with the Wisconsin Property Assessment Manual. The court of appeals reversed the judgment in part, however, ruling that the lower court erroneously exercised its discretion by not ordering a reassessment. The court of appeals observed that section 74.39 requires a reassessment unless the circuit court finds that proceeding to judgment is in the parties' best interests, and the circuit court is able to determine the amount of the unlawful taxes with reasonable certainty. Here, the circuit court failed to explain its reasoning in adopting the 2010 assessment for 2009, even though the 2010 assessment was being challenged. Further, there was no evidentiary record to support a finding it was in the parties' best interests for the court not to order a reassessment.

Presumption of Correctness; Issue Preclusion and Award of Interest. In a previous decision by the court of appeals in this lengthy litigation determining the multiple-year assessments of Lands' End's property in Dodgeville, the court of appeals held that issue preclusion required the 2008 assessment to be equal to the 2006 assessment (the circuit court's de novo determination of the 2006 assessment was affirmed by the court of appeals in yet another decision, *Lands' End, Inc. v. City of Dodgeville*, No. 2009AP2627, 2010 WL 2103968 (Wis. Ct. App. May 27, 2010) (unpublished opinion not citable per section 809.23(3))), since it was undisputed that the property did not materially increase in value between these years. *See Lands' End, Inc. v. City of Dodgeville*, No. 2010AP1185, 2013 WL 4836701 (Wis. Ct. App. Sept. 12, 2013) (unpublished opinion citable for persuasive value per section 809.23(3)(b)) (review denied). In *Lands' End, Inc. v. City of Dodgeville*, Nos. 2013AP1490, 2013AP1491, 2013AP1492, 2014 WL 1810118 (Wis. Ct. App. May 8, 2014) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), the court of appeals' latest decision addressed whether issue preclusion also applied to the 2007, 2009, and 2010 assessments. The court concluded that issue preclusion did apply for 2007 and 2009, but not for 2010. For 2010, the court held that the 2006 assessment did not apply, since the evidence at trial showed that the city assessor did not rely on the 2006 appraisal when determining value, but relied on a new appraisal. The court found the circuit court's posttrial determination of the 2010 assessment was supported by the evidence and was consistent with the applicable law. Lastly, the court reviewed section 74.37(5) and determined that the circuit court erred in finding that an award of interest on Lands' End's 2007 refund was discretionary. The court of appeals reversed the circuit court's decision to deny interest entirely and explained that the circuit court's reading of the statute (and the city's argument on appeal adopting the same argument) was "easily rejected" based on the plain language in the statute. *Id.* ¶ 54.

Presumption of Correctness; Burden of Proof. In *J.L. French, LLC v. Wisconsin Department of Revenue*, Nos. 10-M-105, 11-M-063, 11-M-319, 2014 WL 2573220 (Wis. Tax App. Comm'n May 21, 2014), the tax commission found that J.L. French failed to overcome the statutory presumption of correctness of its 2009, 2010, and 2011 assessments. The commission found the DOR appropriately used the sales approach to value J.L.'s manufacturing plant, given that there was no recent arm's-length sale of the property. The tax commission rejected as minor complaints all of J.L. French's challenges to the DOR's assessment, including the DOR's use of six comparable sales, rather than the three to five mentioned in the Wisconsin Property Assessment Manual; the DOR's use of three comparable sales that were more than three years old; and the DOR's mislabeling of its appraisal report as a "self-contained report" when it was in actuality a summary report. The commission did slightly modify the assessments

for 2010 and 2011 because the market value evidence that the DOR offered was slightly below the assessments for those years.

Burden of Persuasion; Failure to Establish Assessments Were Excessive. In *Edward J. & Arvilla Duquaine Trust v. City of Algoma*, No. 2013AP2771, 2014 WL 3407297 (Wis. Ct. App. July 15, 2014) (unpublished opinion not citable per section 809.23(3)) (review denied), the court of appeals upheld the circuit court's dismissal of a trust's excessive-assessment claim for refund of property taxes for 2011. The trust argued that it had overcome the presumption of correctness by showing the city's appraiser failed to comply with the relevant statutes and the Wisconsin Property Assessment Manual by (1) failing to base the 2011 assessment on the properties' fair market value as of January 1, 2011, (2) inappropriately considering the city's equalized value when setting the assessment, (3) failing to use the sales comparison approach, and (4) failing to assess the properties from the best information available. *Id.* ¶ 21. The court of appeals assumed, without deciding, that the trust had overcome the presumption of correctness, but the trust's claim for excessive assessment nevertheless failed because the trust did not meet its burden to persuade the court that the assessment was excessive. The circuit court found that the city's assessor and the trust's expert were equally credible, and the court of appeals concluded that this finding was not clearly erroneous. Significant to the court's holding was that the trust's expert did not adequately account for differences between the comparable sales he relied on and the trust's property. The trust argued that the city's assessment was invalid as a matter of law because of the assessor's failure to comply with the Wisconsin Property Assessment Manual. The court of appeals rejected that argument because it was raised for the first time on appeal.

Presumption of Correctness; Comparable Sales Approach. In *Joseph Hirschberg Revocable Living Trust v. City of Milwaukee*, 2014 WI App 91, 356 Wis. 2d 730, 855 N.W.2d 699 (review denied), the court of appeals upheld the circuit court's dismissal of the Hirschberg Revocable Living Trust's claim for a refund of property taxes for 2007–11. The city of Milwaukee had assessed the trust's multiunit apartment building using a mass appraisal technique, which the city argued was necessary because more than 150,000 parcels of real estate are revalued in the city each year. At trial, the city defended its valuation with testimony by the city's chief assessor regarding an assessment report he prepared of the trust's property that resulted in higher values than those derived from the mass appraisal. The trust argued it was erroneous for the circuit court to have allowed that testimony because it contradicted the assessment values listed in the assessment roll. The court of appeals disagreed, noting that a city assessor's affidavit is not a certificate that the assessment roll contains no errors but only that the assessor believes the roll is complete and the valuations are just and equitable. The court of appeals also noted that the trust was not prejudiced because the taxes it already paid could not be increased beyond those paid by the trust and accepted by the city. The court of appeals also held that the circuit court correctly prohibited cross-examination regarding the assessed value of properties used in the city's comparable sales approach, because sale prices of comparable properties were relevant, while assessed values were not.

Notice-of-Claim Requirement; Special Assessments. Wisconsin law prohibits a municipality from imposing business improvement district (BID) special assessments on real property used exclusively for residential purposes. *See* Wis. Stat. § 66.1109. In *Yankee Hill Housing Partners v. City of Milwaukee*, No. 2014AP183, 2014 WL 4328201 (Wis. Ct. App. Sept. 3, 2014) (unpublished opinion citable for persuasive value per section 809.23(3)(b)), when a taxpayer sued the city of Milwaukee for unlawfully imposing such assessments over a seven-year period (a total amount exceeding $196,000), the issue was whether the taxpayer could recover the amounts it had previously paid, or whether a failure to comply with notice-of-claim requirements barred relief. In an unpublished decision reversing the circuit court, the court of appeals found that the taxpayer met an exception to the notice-of-claim requirement, since it had given the city actual notice of its claim and the city had not been prejudiced by any failure to give notice. The court further found that the taxpayer's claim, which sought recovery of special assessments dating back as early as 2005, was not subject to the one-year statute of limitation otherwise applicable to special assessments (*see* Wis. Stat. § 893.72), since the city lacked the power to impose the assessments. The court of appeals not only reversed the circuit court order dismissing the claim but expressly granted the taxpayer summary judgment.

Presumption of Correctness; Assessor's Improper Inclusion of Business Value. Walgreen Co. v. City of Oshkosh, No. 2013AP2818, 2014 WL 7151754 (Wis. Ct. App. Dec. 17, 2014) (unpublished opinion citable for persuasive value per section 809.23(3)(b)). In another decision relating to Walgreen's fight over how its real property taxes are assessed, the court of appeals affirmed a circuit court ruling that the city of Oshkosh's assessments (and court-ordered reassessments) were not entitled to the presumption of correctness because the assessor did not comply with

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the Wisconsin Property Assessment Manual and Wisconsin Supreme Court precedent. In *Walgreen Co. v. City of Madison*, 2008 WI 80, 311 Wis. 2d 158, 752 N.W.2d 687, the supreme court determined that, when contractual rights inflate the value of leased retail property, assessors must look to the market to reach their valuations rather than valuing the business concern that may be using the property. The Oshkosh city assessor failed to follow this mandate, instead assessing two Walgreen stores by using contracted rental amounts and actual sales of the properties, which included contractual rights and inflated the properties' values. The court held that use of this method was improper because it valued the business concern, not the real estate.

Burden of Persuasion; Failure to Rebut "Highest and Best Use" Classification. In *Domtar AW Corp. v. Wisconsin Department of Revenue*, Nos. 10-M-85 to 10-M-91, 10-M-93, 10-M-94, 11-M-33 to 11-M-37, 11-M-39, 11-M-41, 11-M-42, 11-M-338 to 11-M-342, 11-M-344, 11-M-346, 11-M-347, 2014 WL 7735588 (Wis. Tax App. Comm'n Dec. 29, 2014), the tax commission found that Domtar failed to overcome the statutory presumption of correctness of its 2009, 2010, and 2011 assessments. Domtar contended the DOR's appraiser erred by determining the highest and best use of its property—a paper mill—was commercial/industrial/manufacturing. Domtar argued the highest and best use of the property was redevelopment, because Domtar had made the decision to close the paper mill. Domtar argued that once it closed the paper mill, the highest and best use of the property changed to redevelopment. The tax commission disagreed, noting that Domtar's decision to close the paper mill was a business decision made in the context of Domtar's other businesses and properties, and the evidence at trial did not show any attempt to market the property as a mill. The tax commission also highlighted that the DOR's appraiser had identified several recent sales of paper mills in Wisconsin, reflecting that a market existed for the sale of paper mills. The tax commission also found that the appraisal done by Domtar's expert did not qualify as the uncontroverted, credible evidence needed to overcome the presumption of correctness of Domtar's assessments because the appraisal was done three years after the assessments were issued and was manipulated by Domtar with respect to the information made available to the appraiser.

STATUTORY DEVELOPMENTS

Individual and Fiduciary Income Tax

Subtraction Created for Amounts Received from the Primary Care and Psychiatry Shortage Grant. Effective for taxable years beginning on or after January 1, 2014, if an amount received by a physician or psychiatrist from the primary care and psychiatry shortage grant program under section 39.385 is included in federal adjusted gross income, the taxpayer may subtract that amount for the taxable year. 2013 Wis. Act 128 (creating Wis. Stat. § 71.05(6)(b)51.).

College Savings Accounts. Taxpayers may subtract from income the amounts contributed to Wisconsin state-sponsored college savings accounts. The following changes for this subtraction take effect in tax years beginning on or after January 1, 2014:

1. The contribution deadline is extended to on or before the 15th day of the 4th month beginning after the close of the taxable year to which the subtraction relates.
2. The subtraction is expanded to include contributions made by the owner of the account and any other individual authorized by the owner of the account for the benefit of any beneficiary of an account.
3. The maximum allowable subtraction amount is increased each year by a percentage equal to the percentage change in the U.S. consumer price index for all urban consumers, U.S. city average, between August of the previous year and August 2012, as determined by the federal Department of Labor. An adjustment may occur only if the resulting amount is greater than the corresponding amount that was calculated for the previous year. "Each amount that is revised under [section 71.05(6)(b)32.a.] shall be rounded to the nearest multiple of $10 if the revised amount is not a multiple of $10 or, if the revised amount is a multiple of $5, the amount shall be increased to the next higher multiple of $10."
4. A contribution that exceeds the maximum allowable subtraction amount may be carried forward to the next taxable year.

Taxpayers must add to income the following amounts received from Wisconsin state-sponsored college savings accounts on or after June 1, 2014:

1. Amounts received by the owner or beneficiary of the account that
   a. Result in a federal penalty under I.R.C. § 529(c)(6) for not being used for qualified higher education expenses; and
   b. Were contributed to the account on or after January 1, 2014; and
2. Amounts rolled over by an owner into another state's qualified tuition program, to the extent the amount was previously claimed as a subtraction from income.

2013 Wis. Act 227 (amending Wis. Stat. § 71.05(6)(b)32.(intro.) and a. and creating Wis. Stat. § 71.05(6)(a)26.).

Income Tax Rate Reduced. The lowest tax rate is reduced from 4.4% to 4%. 2013 Wis. Act 145 (amending Wis. Stat. § 71.06(1q)(a), (2)(i)1., (j)1.) (effective for taxable years beginning on or after January 1, 2014).

Exception to Limitation on Business Relocation Subtraction Created. No person may claim the business relocation for taxable years beginning after December 31, 2013, except that a claimant who is first eligible to claim a subtraction for a taxable year beginning after December 31, 2012, and before January 1, 2014, may claim the subtraction the following taxable year. 2013 Wis. Act 145 (amending Wis. Stat. § 71.05(6)(b)47am., b., and c. and creating Wis. Stat. § 71.05(6)(b)47dm. (effective for taxable years beginning after December 31, 2012, and before January 1, 2014)).

Net Operating Loss Carry-Back and Carry-Forward Provisions Revised. For taxable years beginning on or after January 1, 2014, a Wisconsin net operating loss may be carried back against Wisconsin taxable income of the previous two years and then carried forward against Wisconsin taxable incomes of the next 20 taxable years, if the taxpayer was subject to Wisconsin taxation in the taxable year in which the loss was sustained. This practice is allowed to the extent the loss is not offset against other income of the year of loss and to the extent it is not offset against Wisconsin modified taxable income of the two years preceding the loss and of any year between the loss year and the taxable year for which the loss carry-forward is claimed.

1. A taxpayer need not make the offset against Wisconsin modified taxable income of the two years preceding the loss if the taxpayer chooses not to carry back the net operating loss to the two years preceding the loss.
2. For refunds paid on or after January 1, 2014, the DOR cannot pay interest on any overpayment that results from the carry-back of a net operating loss.

2013 Wis. Act 145 (renumbering Wis. Stat. § 71.05(8)(b) as Wis. Stat. § 71.05(8)(b)1. and creating Wis. Stat. § 71.05(8)(b)2., (c)).

Order of Credits Revised. The computation order is revised to allow the following credits to offset alternative minimum tax:

1. For taxable years beginning on or after January 1, 2013, the manufacturing and agriculture credit.
2. For taxable years beginning on or after January 1, 2014, the research credit and state historic rehabilitation credit.

2013 Wis. Act 145 (renumbering Wis. Stat. § 71.10(4)(cr) as Wis. Stat. § 71.10(4)(fn), Wis. Stat. § 71.10(4)(dr) as Wis. Stat. § 71.10(4)(fp), and Wis. Stat. § 71.10(4)(er) as Wis. Stat. § 71.10(4)(fr), and amending Wis. Stat. § 71.07(4k)(b)1., (5m)(a)4., (5n)(b)(intro.), and (9r)(a) and 71.08(1)(intro.)).

Depletion Computation Changed. The provision in section 71.98(3) requiring depletion to be computed under the federal Internal Revenue Code in effect on January 1, 2014, was amended to provide that, for purposes of computing depletion, the Internal Revenue Code means the federal Internal Revenue Code in effect for the year in which the property is placed into service. 2013 Wis. Act 145 (amending Wis. Stat. § 71.98(3)) (effective for taxable years beginning on or after January 1, 2014).

Corporate Franchise and Income Tax

Wisconsin Depreciation, Depletion, and Amortization. As noted above, for tax years beginning on or after January 1, 2014, Wisconsin adopted the Internal Revenue Code prospectively for purposes of computing depletion on assets

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placed in service in tax years beginning after December 31, 2013. For purposes of computing depreciation and amortization, however, Wisconsin adopted the Internal Revenue Code in effect on January 1, 2014. 2013 Wis. Act 145, § 41d (amending Wis. Stat. § 71.98(3)).

Net Business Losses. For tax years beginning on or after January 1, 2014, Wisconsin net business losses may now be carried forward 20 years. 2013 Wis. Act 145, §§ 36d, 38d (amending Wis. Stat. §§ 71.26(4)(a), 71.45(4)(a)).

Relocated Business Credit. As reported in last year's Tax Law chapter, the business relocation credit was repealed for tax years beginning on or after January 1, 2014. *See* 2013 Wis. Act 20, §§ 1398k, 1398L, 1434k, 1434L (amending Wis. Stat. §§ 71.28(9s)(b), 71.47(9s)(b) and creating Wis. Stat. § 71.28(9s)(d)3., 71.47(9s)(d)3.). A one-year carry-forward is permitted for 2013 credits. 2013 Wis. Act 145, §§ 38, 40 (amending Wis. Stat. §§ 71.28(9s)(d)3., 71.47(9s)(d)3.).

Electronic Medical Records Credit. The credit has been repealed for amounts paid after December 31, 2013. 2013 Wis. Act 145, §§ 37, 39 (amending Wis. Stat. §§ 71.28(5i)(c)3., 71.47(5i)(c)3.).

Development Zone Credits. For tax years beginning on or after January 1, 2014, development zone credits may now be transferred if certain requirements are met. 2013 Wis. Act 184, § 1 (creating Wis. Stat. § 238.3045).

Withholding Tax

Withholding on Entertainers. Payments to entertainers are subject to withholding unless a surety bond is filed or a cash deposit is made by the entertainer. Effective for taxable years beginning on or after January 1, 2014, the threshold total contract price or remuneration received that subjects an entertainer to the requirement to file a surety bond or make a cash deposit is increased from $3,200 to $7,000. For this purpose, the total contract price may be reduced by travel expenses, or advance payments of travel expenses, made pursuant to an accountable plan under Treasury Regulation § 1.62-2. *Travel expenses* means amounts paid to, or on behalf of, an entertainer for actual transportation, lodging, and meals that are directly related to the entertainer's performance in Wisconsin. 2013 Wis. Act 349, § 1 (amending Wis. Stat. § 71.64(4)); *id.* § 2 (renumbering and amending Wis. Stat. § 71.80(15)(b)); *id.* § 3 (creating Wis. Stat. § 71.80(15)(b)2.).

Sales and Use Tax

New Deduction for Private Label Credit Card Bad Debt. For sellers that issue dual-purpose credit cards, a new deduction for sales and use tax purposes has been created. A dual-purpose credit card is generally a card that allows credit purchases directly from the issuer whose name or logo appears on the card, in addition to purchases from unrelated third parties. Under the new deduction, the seller gets a deduction when either the seller or a direct purchaser of the debt recognizes the bad-debt deduction under I.R.C. § 166. The deduction only applies to the portion of the bad debt attributable to sales by the seller whose name or logo appears on the credit card. Estimates of bad debt may be made using estimates approved by the DOR. The deduction is effective July 1, 2015. 2013 Wis. Act 229 (renumbering and amending Wis. Stat. § 77.585(1)(a) as Wis. Stat. § 77.585(1)(a)(intro.), and amending Wis. Stat. § 77.585(1)(b) and (c), and creating Wis. Stat. § 77.585(1)(a)2.–6. and (bm)).

New Exemption for Fertilizer Blending, Feed Milling, or Grain Drying. The taxation of machines and processing equipment used exclusively and directly in fertilizer-blending, feed-milling, or grain-drying operations will be exempt from Wisconsin sales and use tax. Additionally, building materials used solely in the construction or repair of holding structures used for weighing and dropping feed or fertilizer ingredients into a mixer or storage bin will also be exempt, if used in connection with the foregoing activities. Previously, such items were taxable. 2013 Wis. Act 324 (creating Wis. Stat. § 77.54(6)(am)4. and 77.54(6)(am)5.) (effective Apr. 14, 2014).

New Exemption for Property Used by Commercial Radio and Television Stations. The taxation of tangible personal property by a person who is licensed to operate a commercial radio or television station in Wisconsin will be exempt from Wisconsin sales and use tax if the property is used exclusively and directly in the origination or integration of various sources of program material for commercial radio or television transmissions that are generally available to the public free of charge. The exemption expressly includes vehicles licensed for highway use and equipment used

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to transmit or receive signals from a satellite. Previously, such items were taxable. 2013 Wis. Act 346 (creating Wis. Stat. § 77.54(23n)) (effective July 1, 2014).

Property Tax

Process for Challenging Local Property Tax Assessments. The process for challenging local property tax assessments has been modified for assessments beginning January 1, 2015. Most importantly, boards of review will be permitted, either on their own initiative or at the request of the property owner or assessor, to waive the hearing on the owner's assessment objection so the owner can go straight to court. The waiver also constitutes disallowance of a claim for excessive assessment if the property owner seeks de novo rather than certiorari court review, thereby eliminating the cost and delay of seeking the municipality's review of the board's determination. If the board of review hearing is waived, the owner has 90 days after the notice of hearing waiver to seek certiorari court review under section 70.47(13), or 60 days after the notice to file a de novo refund action under section 74.37. 2013 Wis. Act 228.

Other changes enacted by Act 228 include (1) extending the required notice period for changed assessments from 15 days before the board-of-review hearing to 30 days in revaluation years, (2) extending the required notice of the date of the board of review's first meeting from 15 days to 30 days in revaluation years, (3) giving boards of review the discretion to permit taxpayers or their representatives to submit written statements under oath in lieu of appearing personally or by telephone at board-of-review hearings, and (4) permitting the board of review to postpone a hearing once per session at the property owner's request.

Exemption Repealed. The property tax exemption for the Health Insurance Risk-Sharing Plan contained in section 70.11(41m) is repealed as of January 1, 2015. 2013 Wis. Act 20, §§ 1278r, 9437(4L).

Grain Storage Tax Repealed. The grain storage tax imposed by section 70.41 is repealed, starting with taxes due in 2014. 2013 Wis. Act 20, §§ 1287b, 9337(3L).

New Exemption for Nonprofit Youth Baseball Associations. Section 70.11(46) was created to allow a property tax exemption for nonprofit youth baseball associations on land not exceeding six acres, starting as of January 1, 2015. 2013 Wis. Act 380.

ADMINISTRATIVE DEVELOPMENTS

Individual and Fiduciary Income Tax

Change in Wisconsin Income Tax Treatment of Same-Sex Couples. The Supreme Court denied Wisconsin's petition for certiorari in *Wolf v. Walker* regarding the ban on same-sex marriage. *Wolf v. Walker*, 986 F. Supp. 2d 982 (W.D. Wis.), *aff'd sub nom. Baskin v. Bogan*, 766 F.3d 648 (7th Cir.), *cert. denied*, 135 S. Ct. 316 (2014). The DOR now considers same-sex marriage as legal in Wisconsin. The Wisconsin income tax treatment of domestic partners is not affected. Wis. Tax Bull. No. 186 (Oct. 2014), at 1.

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