



Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher Court.

The following decisions are included:

Corporation Franchise and Income Taxes

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CORPORATION FRANCHISE AND INCOME TAXES

Apportionment – income-producing activities. *Ameritech Publishing, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, June 24, 2010). This is an appeal of a January 6, 2009, order of the Circuit Court for Dane County affirming a February 28, 2008, decision of the Wisconsin Tax Appeals Commission. The Commission's decision and Circuit Court's affirmation were not previously summarized in the *Wisconsin Tax Bulletin*, but the Commission's decision is briefly summarized below.

The issue on appeal is whether directory advertising services from 1994 to 1997 by Ameritech for advertisements in Wisconsin telephone directories constituted the performance of income-producing activities in Wisconsin for corporate franchise tax purposes.

The Commission granted summary judgment to the department on the issue, relying on its prior decision in *The Hearst Corporation vs. Wisconsin Department of Revenue* (see *Wisconsin Tax Bulletin* 69 [October 1990], page 10 for a summary of the decision in *Hearst*). It concluded the income-producing activity occurred in Wisconsin, at the time the Wisconsin users received their advertising directories. Ameritech had complete control over the content of the directories, including the distribution schedule of the directories in Wisconsin by a third party.

The Court of Appeals reviewed the Commission's decision, giving it due weight deference. It concluded the Commission's reliance on *Hearst* and determination the service of providing access to Wisconsin consumers was income-producing activity performed within Wisconsin were reasonable. Although Ameritech's interpretation that part of its income-producing activity was performed outside Wisconsin was also reasonable, it was not more reasonable than the Commission's because it failed to account for the fact the primary income-producing activity was furnishing access to a Wisconsin audience. The Court therefore affirmed the Circuit Court's decision affirming the Commission's decision.

The taxpayer has appealed this decision to the Wisconsin Supreme Court.

SALES AND USE TAXES

Admissions. *Milwaukee Symphony Orchestra, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, May 5, 2010). See *Wisconsin Tax Bulletin* 150 (January 2007), page 31, *Wisconsin Tax Bulletin* 157 (July 2008), page 23, and *Wisconsin Tax Bulletin* 161 (April 2009), page 10, for summaries of the Wisconsin Tax Appeals Commission, Dane County Circuit Court, and Court of Appeals decisions, respectively.

The main issue in this case was whether revenues received by Milwaukee Symphony Orchestra, Inc. ("MSO") from admissions to its concerts are subject to Wisconsin sales tax under sec. 77.52(2)(a)2., Wis. Stats., which imposes Wisconsin sales and use tax on the sale of admissions to amusement, athletic, entertainment, or recreational events or places. The Department of Revenue contended that MSO's performances are *primarily entertainment* in nature. It was the assertion of MSO that its purpose of performing was *primarily educational* in nature.

The Wisconsin Tax Appeals Commission ("the Commission") previously held that admissions to MSO's concerts were subject to sales tax under sec. 77.52(2)(a)2., Wis. Stats., because the concerts were *not primarily educational* events. The Commission separately concluded that the ticket sales to the Milwaukee Symphony Orchestra concerts were taxable as "admissions to musical performances" under sec. Tax 11.65(1)(a), Wis. Adm. Code.

The Circuit Court concluded that the Commission had erred in basing its decision on a distinction between “education” and “entertainment,” when sec. 77.52(2)(a)2., Wis. Stats., does not use the word “education.” The Circuit Court remanded the action back to the Commission to develop a standard for determining whether an event is “entertainment” within the meaning of sec. 77.52(2)(a)2., Wis. Stats., and then apply its standard to MSO’s concert receipts. The Circuit Court stated that the Commission would be free to conclude that MSO’s concerts are taxable entertainment events, but not by applying an educational test that has no basis in the statute.

The Court of Appeals reversed the judgment of the Circuit Court. The Court of Appeals gave the Commission’s interpretation and application of the statute due weight deference and held that the Commission’s interpretation of the statute is reasonable and that no more reasonable interpretation was available.

The Wisconsin Supreme Court affirmed the decision of the Court of Appeals by giving the Commission’s interpretation and application of the statute due weight deference and determined that the Commission reasonably interpreted and applied sec. 77.52(2)(a)2., Wis. Stats. The Wisconsin Supreme Court concluded that the sales of admission to the MSO concerts were sales of admission to “entertainment events” under sec. 77.52(2)(a)2., Wis. Stats., and are, therefore, subject to sales tax.