

## Taxation

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beneficiaries also have a right to rely on the statute for the protection of their interest in the deposits.

However disquieting this decision, it is Wisconsin law. Banks and beneficiaries alike are left without statutory protection in the case of gifts of bank deposits where those gifts are sustainable with clear and convincing evidence of strong donative intent. There need be no possession of the bank deposit book by the donee nor any writing indicating the gift delivered to the bank so long as the bank deposits are part of a larger interest, a partnership interest, given as a valid gift to the donee.

BARBARA BECKER

## TAXATION

The Wisconsin Supreme Court, in its 1974 term, was confronted with very few tax questions. Of those encountered, three are especially noteworthy. The first is significant for a Wisconsin resident who invests as a limited partner in a partnership which is not engaged in business in Wisconsin, the second for a Wisconsin manufacturer who contracts with the federal government, and the third for a Wisconsin landowner who is concerned with the methods used to determine real estate assessments.

### I. INCOME TAXATION

Generally, income or loss is included in one's Wisconsin adjusted gross income if the situs of the income or loss is Wisconsin.<sup>1</sup> Determining the situs of income is controlled by Wisconsin Statute section 71.07(1).<sup>2</sup> In that statute, various categories of income or loss are described, and the situs of each category is specified.<sup>3</sup>

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1. WIS. STAT. §§ 71.02(2)(e), 71.05(1), and 71.07 (1973).

2. WIS. STAT. § 71.07(1) was amended by Wis. Laws 1971, ch. 125. The 1971 amendment applies to tax returns for calendar year 1973 or the corresponding fiscal year and years thereafter. For income years prior to 1973, the 1969 statute should be used. It must be noted that although the 1969 statute was applied in *Sweitzer v. Department of Revenue*, 65 Wis. 2d 235, 222 N.W.2d 662 (1974), the principal case in this Income Taxation section of the Term of Court, the outcome of the case would not have been affected by the 1971 amendment, the bulk of which affects corporations, not individuals.

3. WIS. STAT. § 71.07(1) (1973):

*Sweitzer v. Department of Revenue*<sup>4</sup> is the first Wisconsin Supreme Court determination of the situs of income or loss from a limited partner's interest in a partnership engaged in business outside of Wisconsin. In 1968, a limited partnership, which had sixty-three limited partners including Joseph M. Sweitzer, a Wisconsin resident, and two general partners, suffered a loss. The partnership did not engage in business in Wisconsin. Sweitzer deducted his share of the loss in determining his Wisconsin adjusted gross income for 1968.

The Wisconsin Department of Revenue disallowed the loss deduction on the grounds that it was "income or loss from business" and that its situs was the place of business under section 71.07(1).<sup>5</sup> The Wisconsin tax appeals commission and the Circuit Court for Marathon County each affirmed the department's determination on appeals.

Sweitzer claimed that the loss arose from intangible personal property and was in the "all other income or loss" category of section 71.07(1). Thus, he argued, the loss followed the residence of the recipient and was properly deducted.<sup>6</sup> The Wisconsin Supreme Court agreed and reversed the judgment of the circuit court.

The court found that the principle in this case was indistinguishable from that in *A. L. Skolnik v. Wisconsin Department of Taxation*.<sup>7</sup> In *Skolnik*, the Wisconsin board of tax appeals held that a Wisconsin resident's income from his interest in an Illinois trust, over which the trustees had exclusive control, fit into the "all other income or loss" category of section 71.07(1) and was subject to Wisconsin income tax because his interest

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(1) For the purposes of taxation income or loss from business, not requiring apportionment under sub. (2), (3) or (5), shall follow the situs of the business from which derived. Income or loss derived from rentals and royalties from real estate or tangible personal property, or from the operation of any farm, mine or quarry, or from the sale of real property or tangible personal property shall follow the situs of the property from which derived. . . . Income from personal services and from professions of resident individuals shall follow residence. Income from personal services of nonresident individuals, including income from professions, shall follow the situs of the services. All other income or loss, including income or loss derived from land contracts, mortgages, stocks, bonds and securities or from the sale of similar intangible personal property, shall follow the residence of the recipient, except as provided in sub. (7).

4. 65 Wis. 2d 235, 222 N.W.2d 662 (1974).

5. *Id.* at 239, 222 N.W.2d at 664.

6. *Id.*

7. 5 W.B.T.A. 41 (1962).

in the trust was analogous to that of a shareholder in a corporation since they both have equitable ownership but no right to manage operations.

In *Sweitzer*, the court held that a limited partner's interest in a partnership could be similarly analogous.<sup>8</sup> The partnership agreement, to which Sweitzer was a party, provided that the two general partners had exclusive control over the management and operation of the business, and that the distribution of the partnership's funds was in their sole discretion. Furthermore, the general partners were not accountable to, nor could they be held liable to, the limited partners for their activities unless undertaken in bad faith or in a grossly negligent manner. As in other limited partnerships, the limited partner's risk of loss was limited to the amount of his investment. These factors, the court held, indicated that the limited partner's interest was in the nature of intangible personal property in that the limited partner had equitable ownership of the business but no power to manage it.

The court thus ruled that where a limited partner's interest in a partnership is passive, indicated by a complete lack of control over the management or operation of the business, any income or loss derived from that interest falls within the "all other income or loss" category of section 71.07(1) and the tax situs is the place of residence of the recipient.<sup>9</sup>

## II. PERSONAL PROPERTY TAXATION

In determining to whom specific personal property will be assessed for taxation purposes, Wisconsin Statute section 70.18(1) is controlling.<sup>10</sup> In applying that section, the Wisconsin Supreme Court has determined that title and ownership are not always the same, and that the tax on personal property should be assessed against the true or beneficial owner of the property.<sup>11</sup>

In *Teledyne Industries, Inc. v. Milwaukee*,<sup>12</sup> the court was faced with the question of whether Teledyne or the federal

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8. 65 Wis. 2d at 240-41, 222 N.W.2d at 665.

9. *Id.* at 242, 222 N.W.2d at 666.

10. WIS. STAT. § 70.18(1) (1973):

(1) Personal property shall be assessed to the owner thereof, except that when it is in the charge of possession of some person other than the owner it may be assessed to the person so in charge or possession of the same.

11. *American Motors Corp. v. Kenosha*, 274 Wis. 315, 80 N.W.2d 363 (1957).

12. 65 Wis. 2d 557, 223 N.W.2d 586 (1974).

government was the beneficial owner of certain personal property, specifically, raw materials, purchased parts, and work-in-process inventories. The property was connected with a defense contract between Teledyne and the federal government. The court had ruled on a similar question in *American Motors Corp. v. Kenosha*<sup>13</sup> (which found beneficial ownership in the company) and in *State ex rel. General Motors Corp. v. Oak Creek*<sup>14</sup> (which found beneficial ownership in the government). While *Teledyne* does not result in any new law, its discussion and comparison of the facts in *American Motors*, *General Motors*, and *Teledyne* helps to clarify the law in this area.

In determining who was the beneficial owner of the inventories, the factors that were examined included: (1) who had legal title, (2) who could use the property and under what conditions, if any, (3) who bore the risk of loss for damage and destruction, (4) who was responsible for minor repairs, (5) who controlled the acquisition and disposition of the property, (6) to what degree the government inspected the property, and (7) whether special records were required.<sup>15</sup> An overview of the three cases indicates that no one factor was controlling, but rather, all the facts of the particular situation were considered as a whole. However, while the facts in the three cases were very similar, there are three areas where significant differences arise: control, inspection, and risk of loss.

In *American Motors*, the court found that the company had an unrestricted right to acquire or dispose of the property,<sup>16</sup> that the government did not inspect the property, and that the company bore the risk of loss. The court ruled that this was inconsistent with ownership in the government and that *American Motors* was the beneficial owner of the property.

In *General Motors*, the government had control over the acquisition and disposition of the property, inspectors were in the plant at all times, and the risk of loss remained in the government. The company did have the right to rent the government property, but that was held to be a minimal ownership interest. The court determined that *General Motors* did not

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13. 274 Wis. 315, 80 N.W.2d 363 (1957).

14. 49 Wis. 2d 299, 182 N.W.2d 481 (1971).

15. *Id.* at 309, 182 N.W.2d at 486.

16. In *Teledyne Industries, Inc. v. Milwaukee*, 65 Wis. 2d at 572 n. 10, 223 N.W.2d at 594, at n. 13 [sic] the court notes that three cases from other jurisdictions have questioned that conclusion in the *American Motors* case.

have beneficial ownership of the property.

Though the facts in *Teledyne* were very similar to both of these cases, the court ruled that it was more analogous to *General Motors*.<sup>17</sup> *Teledyne's* right to acquire and dispose of the property was restricted and government inspectors were in the plant at all times. However, like *American Motors*, the company, under the contract, had to bear the risk of loss. The city relied heavily on this fact in its brief and oral argument, but the court was not impressed. The court, rather than finding that this was an indication of beneficial ownership by *Teledyne*, came to the opposite conclusion saying:

The only way the government could protect itself was to: (1) insure its own property; (2) specify the conditions under which *Teledyne* would be liable for loss as was done in *General Motors*; or (3) make *Teledyne* in effect an insurer by contracting that the risk of loss would be on *Teledyne*. The latter method was followed. It was stipulated that *Teledyne* insured the property. The fact that *Teledyne* was in essence an insurer of property, title to which was in the government, strengthens rather than detracts from the concept that the government is the beneficial owner as well as the legal title holder of the property in question.<sup>18</sup>

In past decisions, the court's conclusion, that bearing the risk of loss was one of the indications of ownership, was based on the assumption that the owner of property usually bears the risk of its loss. In view of the simple logic of this past position, the court's reasoning that the concept of beneficial ownership in the government is strengthened by *Teledyne* bearing the risk of loss seems strained. Perhaps what the court really wanted to say was indicated by a later statement that "[c]ases from other jurisdictions involving similar circumstances have held that placing the risk of loss on the contractor is not by itself inconsistent with government ownership."<sup>19</sup>

Thus, the court's decision in *Teledyne* indicates two things with respect to determining who is the beneficial owner of property connected with a government contract. First, all the factors involved in a particular situation must be considered as a whole with no one factor controlling. Second, in examining

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17. 65 Wis. 2d at 573, 223 N.W.2d at 594.

18. *Id.* at 569, 223 N.W.2d at 592.

19. *Id.* at 569-70, 223 N.W.2d at 592.

these factors, who bears the risk of loss now appears to be of less significance, but special emphasis should be placed on the degree of government control over the acquisition and disposition of the property and the amount of government inspection of the property.

### III. REAL PROPERTY TAXATION

Wisconsin Statute section 70.32(1)<sup>20</sup> controls the valuation of real estate for real property tax purposes. It requires that an assessor use the best information available to value real estate "at the full value which could ordinarily be obtained therefor at private sale."<sup>21</sup> In interpreting this statute, the Wisconsin Supreme Court has held that the best information of fair market value, in the order of priority, is (1) a sale of the property involved, (2) sales of reasonably comparable property, or (3) all the factors collectively which have a bearing on the value of the property. The information of the highest priority must be used, and it is error to do otherwise.<sup>22</sup>

Fair market value has been defined in Wisconsin as "the amount the property could be sold for in the open market by an owner willing and able but not compelled to sell to a purchaser willing and able but not obliged to buy."<sup>23</sup> Normally, an actual sale of the property involved would be "the best of the best information" of fair market value. However, there are two occasions when it would be inappropriate to use a sale of the property as a guide in assessing its value. The first is when the sale price does not reflect the true fair market value because

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20. Wis. Stat. § 70.32(1) (1973):

(1) Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03(2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value the assessor shall consider, as to each piece, its advantage or disadvantage of location, quality of soil, quantity of standing timber, water privileges, mines, minerals, quarries, or other valuable deposits known to be available therein, and their value; but the fact that the extent and value of minerals or other valuable deposits in any parcel of land are unascertained shall not preclude the assessor from affixing to such parcel the value which could ordinarily be obtained therefor at private sale.

21. *Id.*

22. *State ex rel. Enterprise Realty Co. v. Swiderski*, 269 Wis. 642, 70 N.W.2d 34 (1955).

23. *State ex rel. Lincoln Fireproof Warehouse Co. v. Board of Review*, 60 Wis. 2d 84, 89, 208 N.W.2d 380, 382 (1973), quoting from *State ex rel. Markarian v. Cudahy*, 45 Wis. 2d 683, 685, 173 N.W.2d 627, 629 (1970).

the sale was not an arm's-length transaction or because one of the parties was compelled to act. The burden is on the person attacking the assessment, which was not based on the sales price, to show the fairness of the sale.<sup>24</sup> The second is a result of the Wisconsin Constitution. Article VIII, section 1 requires that "taxation shall be uniform." This has been held to mean "all property within a class 'must be taxed on a basis of equality as far as practicable.'"<sup>25</sup> As a result, a Wisconsin taxpayer has successfully argued that his property should be assessed at a value lower than its recent sale price in view of the assessment of similar properties.<sup>26</sup>

In *State ex rel. Geipel v. Milwaukee*,<sup>27</sup> the court was faced with the question of whether an option price in an option to purchase agreement could be considered a sale for valuation purposes. The property involved consisted of two adjacent tracts of land, one of 20 acres and one of 40 acres. With the exception of the Geipel's home located on the smaller tract, the lots were unimproved. The assessment under attack, which occurred on May 1, 1970, was based only on sales of "comparable" property and resulted in the 1970 assessment being roughly triple the 1969 assessment. On December 1, 1967, Skyline Realty, Inc. had entered into an exclusive option agreement with Geipel to purchase 304 acres of land, which included this 60 acres, over ten-and-one-half years. The option was set at \$3,305 per acre with adjustments for fluctuations in the Consumer Price Index, and the price on May 1, 1970 was \$3,837 per acre. The assessor had valued the property on that same day at \$6,000 per acre for the 20-acre tract and \$7,000 per acre for the 40-acre tract. It is important to note that the question involved was not whether the assessment was reasonable, but rather, whether the assessment was made on a statutory basis.<sup>28</sup>

The court ruled that "[i]f the agreement was the result of arm's-length negotiations and is reasonably contemporaneous with the assessment, the agreed [option] price, like a sale

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24. *State ex rel. Collins v. Brown*, 225 Wis. 593, 275 N.W. 455 (1937).

25. *State ex rel. Hensel v. Town of Wilson*, 55 Wis. 2d 101, 106, 97 N.W.2d 794, 796 (1972).

26. 55 Wis. 2d 101, 197 N.W.2d 794 (1972).

27. 68 Wis. 2d 726, 229 N.W.2d 585 (1975).

28. When the question involves the reasonableness of the assessment, *State ex rel. Pierce v. Jodon*, 182 Wis. 645, 197 N.W. 189 (1924), is the leading case.



price, is the best indicator of market value.”<sup>29</sup> The fact that the property had been for sale for many years, that this was the highest offer ever received, and that sales under the option agreement were consummated before and after the assessment date, was sufficient, in the absence of contrary evidence, to establish the arm’s-length nature of the transaction.

The court, however, was quick to point out that this does not mean that an option price will always indicate fair market value. Where, for example, changing conditions after the option agreement, result in an unanticipated increase in market value, the option price may be an inappropriate measure of value. The court also notes that some “unscrupulous individuals” might attempt to establish a lower tax assessment with a contrived option to purchase agreement. However, the fact that the burden of proof is on the taxpayer to show an arm’s-length transaction should provide an adequate safeguard.<sup>30</sup>

RANDY S. NELSON

## TORTS

### I. MEDICAL MALPRACTICE: INFORMED CONSENT

The standard of care required of physicians under Wisconsin’s informed consent doctrine was modified during this term of court in *Scaria v. St. Paul Fire & Marine Ins. Co.*<sup>1</sup> The trial court upheld a jury verdict that respondent-doctors were negligent in failing to adequately inform the plaintiff-patient of the risks involved before the performance of a percutaneous femoral aortogram. The jury also held, however, that the doctors’ negligence was not causal of the plaintiff’s injuries, and judgment was entered against the plaintiff. As part of the operation, a dye was injected into the aorta through a catheter inserted in the groin so that the arteries leading to the kidneys could be visualized by X-rays. There was considerable dispute in the testimony as to what was actually told Scaria with respect to the risks of the procedure.<sup>2</sup> Although Scaria did sign a

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29. 68 Wis. 2d at 734, 229 N.W.2d at 589.

30. *Id.* at 737, 229 N.W.2d at 591.

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1. 68 Wis. 2d 1, 227 N.W.2d 647 (1975).

2. *Id.* at 6, 7, 227 N.W.2d at 650, 651.