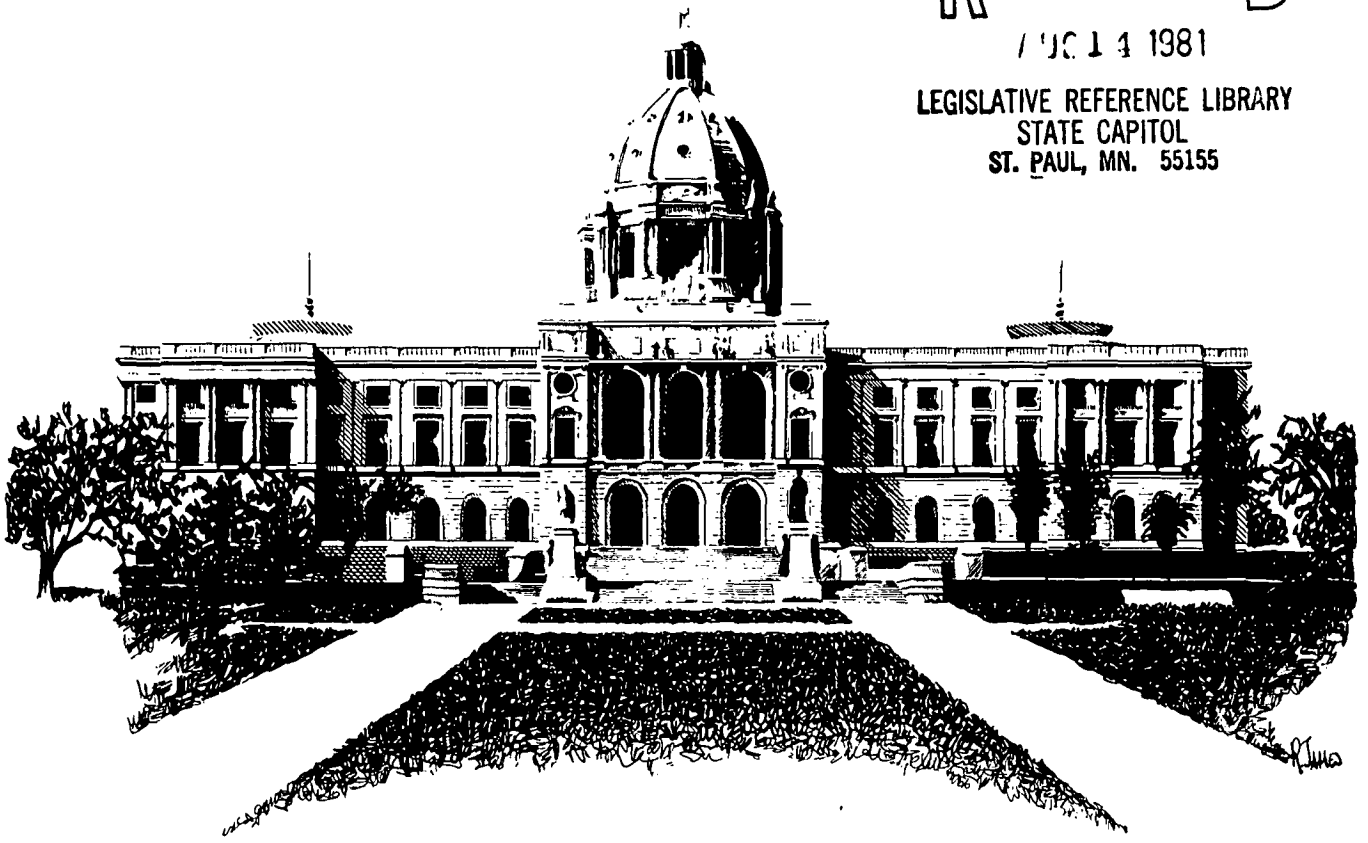
81 August 17

STATE REGISTER

STATE OF MINNESOTA



VOLUME 6, NUMBER 7

August 17, 1981

Pages 181-208

STATE REGISTER

Printing Schedule for Agencies

Issue Number	*Submission deadline for Executive Orders, Adopted Rules and **Proposed Rules	*Submission deadline for State Contract Notices and other **Official Notices	Issue Date
	SCHEDULE FOR VOLUME 6		
8	Monday Aug 10	Monday Aug 17	Monday Aug 24
9	Monday Aug 17	Monday Aug 24	Monday Aug 31
10	Monday Aug 24	Monday Aug 31	Friday Sept 4
11	Monday Aug 31	Friday Sept 4	Monday Sept 14

*Deadline extensions may be possible at the editor's discretion; however, none will be made beyond the second Wednesday (12 calendar days) preceding the issue date for rules, proposed rules and executive orders, or beyond the Wednesday (5 calendar days) preceding the issue date for official notices. Requests for deadline extensions should be made only in valid emergency situations.

**Notices of public hearings on proposed rules and notices of intent to adopt rules without a public hearing are published in the Proposed Rules section and must be submitted two weeks prior to the issue date.

Instructions for submission of documents may be obtained from the Office of the State Register, 506 Rice Street, St. Paul, Minnesota 55103, (612) 296-0930.

The *State Register* is published by the State of Minnesota, State Register and Public Documents Division, 117 University Avenue, St. Paul, Minnesota 55155, pursuant to Minn. Stat. § 15.0411. Publication is weekly, on Mondays, with an index issue in August. In accordance with expressed legislative intent that the *State Register* be self-supporting, the subscription rate has been established at $130.00 per year, postpaid to points in the United States. Second class postage paid at St. Paul, Minnesota, Publication Number 326630. (ISSN 0146-7751) No refunds will be made in the event of subscription cancellation. Single issues may be obtained at $3.00 per copy.

Subscribers who do not receive a copy of an issue should notify the *State Register* Circulation Manager immediately at (612) 296-0931. Copies of back issues may not be available more than two weeks after publication.

The *State Register* is the official publication of the State of Minnesota, containing executive orders of the governor, proposed and adopted rules of state agencies, and official notices to the public. Judicial notice shall be taken of material published in the *State Register*.

Cover graphic: *Minnesota State Capitol*, ink drawing by Ric James.

CONTENTS

NOTICE

How to Follow State Agency Rulemaking Action in the *State Register*

State agencies must publish notice of their rulemaking action in the *State Register*. If an agency seeks outside opinion before promulgating new rules or rule amendments, it must publish a NOTICE OF INTENT TO SOLICIT OUTSIDE OPINION. Such notices are published in the OFFICIAL NOTICES section. Proposed rules and adopted rules are published in separate sections of the magazine.

The PROPOSED RULES section contains:

- Calendar of Public Hearings on Proposed Rules.
- Proposed new rules (including Notice of Hearing and/or Notice of Intent to Adopt Rules without A Hearing).
- Proposed amendments to rules already in existence in the Minnesota Code of Agency Rules (MCAR).
- Proposed temporary rules.

The ADOPTED RULES section contains:

- Notice of adoption of new rules and rule amendments (those which were adopted without change from the proposed version previously published).
- Adopted amendments to new rules or rule amendments (changes made since the proposed version was published).
- Notice of adoption of temporary rules.
- Adopted amendments to temporary rules (changes made since the proposed version was published).

All ADOPTED RULES and ADOPTED AMENDMENTS TO EXISTING RULES published in the *State Register* will be published in the Minnesota Code of Agency Rules (MCAR). Proposed and adopted TEMPORARY RULES appear in the *State Register* but are not published in the MCAR due to the short-term nature of their legal effectiveness.

The *State Register* publishes partial and cumulative lisitngs of rule action in the MCAR AMENDMENTS AND ADDITIONS list on the following schedule:

Issues 1-13, inclusive
Issues 14-25, inclusive
Issue 26, cumulative for 1-26
Issue 27-38, inclusive
Issue 39, cumulative for 1-39
Issues 40-51, inclusive
Issue 52, cumulative for 1-52

The listings are arranged in the same order as the table of contents of the MCAR.

MCAR AMENDMENTS AND ADDITIONS

PROPOSED RULES

Pursuant to Minn. Laws of 1980, § 15.0412, subd. 4h, an agency may propose to adopt, amend, suspend or repeal rules without first holding a public hearing, as long as the agency determines that the rules will be noncontroversial in nature. The agency must first publish a notice of intent to adopt rules without a public hearing, together with the proposed rules, in the *State Register*. The notice must advise the public:

1. that they have 30 days in which to submit comment on the proposed rules;
2. that no public hearing will be held unless seven or more persons make a written request for a hearing within the 30-day comment period;
3. of the manner in which persons shall request a hearing on the proposed rules;

and

4. that the rule may be modified if modifications are supported by the data and views submitted.

If, during the 30-day comment period, seven or more persons submit to the agency a written request for a hearing of the proposed rules, the agency must proceed under the provisions of § 15.0412, subds. 4 through 4g, which state that if an agency decides to hold a public hearing, it must publish in the *State Register* a notice of its intent to do so. This notice must appear at least 30 days prior to the date set for the hearing, along with the full text of the proposed rules. (If the agency has followed the provisions of subd. 4h and has already published the proposed rules, a citation to the prior publication may be substituted for republication.)

Pursuant to Minn. Stat. § 15.0412, subd. 5, when a statute, federal law or court order to adopt, suspend or repeal a rule does not allow time for the usual rulemaking process, temporary rules may be proposed. Proposed temporary rules are published in the *State Register*, and for at least 30 days thereafter, interested persons may submit data and views in writing to the proposing agency.

Department of Administration Cable Communications Board

Proposed Rule Repealing Certain Restrictions on Interests in or Ownership, Operation, and Control of Cable Communications Systems

Notice of Hearing

Notice is hereby given that a public hearing on the above captioned matter will be held at Cable Communications Building, 500 Rice Street, Saint Paul, MN. commencing at 9:00 a.m. on September 29, 1981, and continuing until all persons have had an opportunity to be heard.

One free copy of these proposed rules may be obtained by writing the Cable Communications Board, 500 Rice Street, St. Paul, Minnesota 55103. Additional copies of these proposed rules will be distributed at the September 29th hearing.

The statutory authority of the board to adopt these rules is provided in Minn. Stat. § 238.01 and in Minn. Stat. § 238.05, Subd. 11 (1980).

Notice: The proposed rule amendments may be modified as the result of the hearing process. The board therefore strongly urges those who are potentially affected in any manner by the proposed rule amendments to participate in the hearing process.

All interested or affected persons will have an opportunity to participate concerning the proposed rule amendments appearing below. Statements may be made orally and written material may be submitted. In addition, whether or not an appearance is made at the hearings, written statements or material may be submitted to Hearing Examiner Peter C. Erickson, Office of Administrative Hearings, Room 300, 1745 University Avenue, St. Paul, Minnesota 55104, either before the hearings or within five (5) working days prior to the close of the hearing, unless the Hearing Examiner orders at the hearing that the record will remain open for a longer period not to exceed twenty (20) calendar days. All such statements will be entered into and become part of the record. For those wishing to submit written statements or exhibits, it is requested that at least three (3) copies be furnished. In addition, in order to save time and avoid duplication, it is suggested that those persons, organizations or associations having a common viewpoint or interest in these proceedings join together where possible and present a single statement in behalf of such interests. The conduct of the hearings shall be governed by the rules of the Office of Administrative Hearings, Minn. Stat. §§ 15.0411-15.0417 and 15.052, and by 9 MCAR §§ 2.101-2.113 (Minnesota Code of Agency Rules). Questions relating to procedures may be directed to Hearing Examiner Peter C. Erickson.

Notice is hereby given that 25 days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary

KEY: PROPOSED RULES SECTION — Underlining indicates additions to existing rule language. ~~Strike outs~~ indicate deletions from existing rule language. If a proposed rule is totally new, it is designated "all new material." ADOPTED RULES SECTION — Underlining indicates additions to proposed rule language. ~~Strike outs~~ indicate deletions from proposed rule language.

of all the evidence and argument which the board anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules or rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

Notice: Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the board may not take any final action on the rules for a period of five working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the board. If you desire to be so notified, you may so indicate at the hearing. After the hearing, you may request notification by sending a written request to the Hearing Examiner (in the case of the Hearing Examiner's Report), or to the board (in the case of the board's submission or resubmission to the Attorney General).

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five days after he or she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1979 Supp.) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses, and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials.

The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, Saint Paul, Minnesota 55155, telephone: (612) 296-5615.

Rochelle Barnhart
Vice-Chairman

Rule as Proposed

4 MCAR § 4.100 Certain ownership prohibited. None of the following shall directly or indirectly own, operate, control or have a legal or equitable interest in a cable communications system:

D. A telephone company within its local exchange area, unless a proper and timely waiver is obtained from the Federal Communications Commission~~; or~~.

~~E. A publisher and/or owner of a newspaper company and the newspaper company within the primary market area, as defined by the Audit Bureau of Circulation, served by the newspaper; or~~

~~F. A radio or television broadcast station, broadcasting from within the Twin Cities metropolitan area as designated in Minn. Stat. § 473.121, subd. 4.~~

Energy Agency
Data and Analysis Division

Proposed Rules Relating to Reducing Demand and Increasing Supply of Petroleum Products During an Energy Supply Emergency

Notice of Postponement and Rescheduling of Hearings

Notice is hereby given that the public hearings on the above encaptioned proposed rules which were originally noticed in 5 S.R. 2110 (*State Register*, Monday, June 29, 1981) and scheduled to be held on August 18, 1981, in Grand Rapids, Minnesota, August 20, 1981, in Mankato, Minnesota, and August 24, 1981, in St. Paul, Minnesota, have been postponed and rescheduled. The hearings have been rescheduled and relocated to the following locations on the dates indicated, commencing at the times listed and continuing until all persons representing themselves or associations or other interested groups have had an opportunity to be heard concerning the adoption of the proposed rules.

Room 202 Mullins Hall, Itasca Community College, 1851 East Highway 169, Grand Rapids, Minnesota. September 29, 1981; 2:00 p.m. and 7:00 p.m.

Emergency Operations Center Room, Law Enforcement Center, 710 South Front Street, Mankato, Minnesota; October 1, 1981; 1:00 p.m. and 7:00 p.m.

Room G-15, State Capitol Building, St. Paul, Minnesota; October 5, 1981; 9:30 a.m. and 7:00 p.m.

All interested or affected persons will have the opportunity to participate. Oral or written data, statements or arguments may be submitted at the hearing. In addition, written materials may be submitted by mail to Hearing Examiner Allan W. Klein, Office of Administrative Hearings, Room 300, 1745 University Avenue, Saint Paul, Minnesota 55104 (612) 296-8104. Unless a longer period not to exceed twenty calendar days is ordered by the hearing examiner at the hearing, the record will remain open for the inclusion of written material for five (5) working days after the hearing ends. The proposed rules are subject to change as a result of the rules hearing process. The agency therefore strongly urges those who may be affected in any manner by the substance of the proposed rules applicable to this hearing to participate in the rules hearing process.

A copy of the rules was previously mailed to all persons on the agency's mailing list and was published at 5 S.R. 2111 (*State Register*, Monday, June 29, 1981) and is hereby incorporated by reference. One free copy of this notice and the proposed rules may be obtained by contacting David Miller at the Minnesota Energy Agency, 980 American Center Building, 160 East Kellogg Boulevard, Saint Paul, Minnesota 55101, telephone (612) 296-7043. Additional copies will be available at the door on the dates of the hearings.

The proposed rules set out the procedures and measures the state will use to deal with an energy supply emergency resulting from a shortage of petroleum products, including fuel oils and motor fuels. The rules include many measures which will be available for reducing demand and increasing supply during energy emergency. The rules also set forth the state operating organization for energy emergencies and provide an appeals process for persons aggrieved by actions taken. Priority uses of petroleum products are established.

The agency is authorized to adopt the proposed rules by Minn. Stat. § 116H.08a (1980) and, primarily, Minn. Stat. § 116H.09 (1981).

Minn. Stat. ch. 10A requires each lobbyist to register with the State Ethical Practices Board within five (5) days after he/she commences lobbying. A lobbyist is defined in Minn. Stat. § 10A.01, subd. 11 (1980) as any individual:

(a) Engaged for pay or other consideration, or authorized by another individual or association to spend money, who spends more than five (5) hours in any month or more than $250, not including his own travel expenses and membership dues, in any year, for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials; or

(b) Who spends more than $250, not including his own traveling expenses and membership dues, in any year for the purpose of attempting to influence legislative or administrative action by communicating or urging others to communicate with public officials. The statute provides certain exceptions. Questions should be directed to the Ethical Practices Board, 41 State Office Building, St. Paul, Minnesota 55155, telephone (612) 296-5615.

Notice: Any person may request notification of the date on which the Hearing Examiner's Report will be available, after which date the agency may not take any final action on the rules for a period of five (5) working days. Any person may request notification of the date on which the hearing record has been submitted (or resubmitted) to the Attorney General by the agency. If you desire to be notified, you may so indicate at the public hearing. After the hearing, you may request notification by sending a written request to the hearing examiner (in the case of the Hearing Examiner's Report) or to the agency (in the case of the agency's submission or resubmission to the Attorney General).

Notice is hereby given that 25 days prior to the hearing, a Statement of Need and Reasonableness will be available for review at the agency and at the Office of Administrative Hearings. This Statement of Need and Reasonableness will include a summary of all the evidence and argument which the agency anticipates presenting at the hearing justifying both the need for and the reasonableness of the proposed rules. Copies of the Statement of Need and Reasonableness may be obtained from the Office of Administrative Hearings at a minimal charge.

The rule hearing procedure is governed by Minn. Stat. §§ 15.0411-15.417 and 15.052 (1980) and by 9 MCAR §§ 2.101-2.113. Any questions regarding the procedures may be directed to the hearing examiner.

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SUPREME COURT

Decisions Filed Friday, August 7, 1981

51743/Sp. Zimpro, Inc. v. Commissioner of Revenue, State of Minnesota. Ramsey County.

To determine whether or not purchases made by a contractor in the construction of a sewage treatment plant are exempt from a sales tax, additional evidence and findings are necessary.

Remanded. Otis, J.

51335/26, 51721, 51883 In the Matter of the Estate of Elisabeth M. Congdon, a.k.a. Elisabeth Mannering Congdon, Deceased. No. 51335 and Marjorie Caldwell, Appellant, v. 51721 Suzanne LeRoy, Heather LeRoy, Rebecca LeRoy Williams, Children of Marjorie Caldwell, and In the Matter of the Estate of: Elisabeth M. Congdon, a.k.a. Elisabeth Mannering Congdon, Decedent. In the Matter of the Living Trust of Elisabeth M. Congdon Created by Agreement of September 18, 1974, as amended by Agreements dated July 11, 1975 and December 29, 1976. In the Matter of the Trust Created under the Last Will and Testament of Chester Adgate Congdon, a.k.a. Chester A. Congdon, decedent. In the Matter of the Trust Created by Indenture of August 3, 1916, between Chester A. Congdon, and others, known as the Congdon Trust. No. 51883. St. Louis County.

As a general rule, a probate court has jurisdiction to exercise all incidental powers necessary for the effective adjudication of those matters within its exclusive original jurisdiction.

Upon review of the entire record, evidence regarding the validity of the will was properly admitted and was sufficient to support the judicial officer's decision to admit the will to probate.

Under the circumstances of this case, a civil proceeding pursuant to Minn. Stat. § 524.2-803 (1980) is proper to determine appellant's entitlement to receive from the various trusts and to inherit from the estate of her mother.

In light of the procedural history, there is no merit to the contention that the statute of limitations prevents respondents from proceeding pursuant to Minn. Stat. § 524.2-803 (1980).

Affirmed. Scott, J. Concurring specially, Todd, J. and Yetka, J.

51355/Sp. Wayne M. Iepson, Appellant, v. Randy Noren, *et al.*, Vernon Lehmann. Anoka County.

Under the facts of this case, a finding of primary assumption of risk was improper.

The issue of comparative negligence should go to the jury when it is uncertain whose negligence caused the accident.

The jury should also have been allowed to determine the comparative negligence in respect to the counterclaim for property damage.

Reversed. Scott, J.

51486 Lucy Bjordahl, Appellant, v. Jerome Anthony Bjordahl. Clay County.

Continuing jurisdiction extends to modification or enforcement of a divorce decree.

The continuing obligations of a divorce decree, together with the continuing jurisdiction vested in the trial court to enforce or modify the decree, constitute continuing contacts with the state sufficient to satisfy due process.

Reversed and remanded. Simonett, J.

Decision Filed Wednesday, July 29, 1981

81-369/Sp. State of Minnesota v. Edward Fairbanks, Appellant. Hennepin County.

District Court properly departed from presumptive sentence established by Sentencing Guidelines in sentencing defendant for aggravated robbery because defendant committed the crime with "particular cruelty" toward the victim.

Affirmed. Sheran, C. J.

TAX COURT

Pursuant to Minn. Stat. § 271.06, subd. 1, an appeal to the tax court may be taken from any official order of the Commissioner of Revenue regarding any tax, fee or assessment, or any matter concerning the tax laws listed in § 271.01, subd. 5, by an interested or affected person, by any political subdivision of the state, by the Attorney General in behalf of the state, or by any resident taxpayer of the state in behalf of the state in case the Attorney General, upon request, shall refuse to appeal. Decisions of the tax court are printed in the *State Register*, except in the case of appeals dealing with property valuation, assessment, or taxation for property tax purposes.

State of Minnesota
County of Kandiyohi

Tax Court
Regular Division

Northland Aluminum Products, Inc.,

Appellant,

-v-

The Commissioner of Revenue,

Appellee.

Docket No. 2943

Conclusions of Law and Order for Judgment

This matter came on for hearing on March 10, 1980 before the Honorable Jack Fena, then Judge of the above entitled Court. Judge Fena left the Court on February 2, 1981 and by agreement of the parties the matter was submitted to the Honorable Carl A. Jensen, Judge of the Minnesota Tax Court, on the basis of the records, transcripts, proceedings and oral argument heard on June 16, 1981 in the Minnesota Tax Court hearing room in St. Paul.

Corrine D. Lynch of Lynch & Lynch, Willmar, Minnesota, appeared for the appellant.

Thomas K. Overton, Special Assistant Attorney General, appeared for the appellee.

Syllabus

The issue was whether various types of detachable tools and equipment used in connection with the manufacture of cookware and other type products were subject to the Minnesota Use Tax. On the basis of the evidence, exemption was allowed for some of the items and disallowed for other items. The principal question was the proper interpretation of Minn. Stat. 297A.25, Subd. 1(h) which states in part as follows:

". . . Accessory tools, equipment and other short lived items, which are separate detachable units used in producing a direct effect upon the product, where such items have an ordinary useful life of less than twelve months, are included within the exemption provided herein:"

Findings of Fact

1. The Commissioner assessed a use tax against the Appellant for certain items purchased by the Appellant between July 1, 1975 through June 30, 1978. No sales or use taxes had been paid on these items.

2. Petitioner is engaged in the manufacture of cookware and other metal items.

3. The decision in this case involves the interpretation of Minn. Stat. § 297A.25, Subd. 1(h) which states that all materials used or consumed in industrial production of personal property are exempt from sales and use tax and which also states that machinery is not exempt but accessory tools and equipment and other short lived items having a useful life of less than twelve months are exempt.

4. A large number of different items are involved in this proceeding. The parties have agreed that the items can be treated in different categories. Some of the categories are exempt and some are not exempt. The parties in their briefs have considered the various items in the categories as described in Appellant's Exhibit No. 8 and this decision will use the same category numbers as used in Appellant's Exhibit No. 8. The determinations are as follows:

CATEGORY 1. This relates to sandblasting tubs and some other components of sandblasting machines. All of which are used or consumed within twelve months. This Court finds that these items are exempt under the terms "accessory tools, equipment and other short lived items, which are separate detachable units used in producing a direct effect upon the product."

CATEGORY 2. This involves the purchases of numerous screws, bolts, washers, lock washers, nuts and miscellaneous packing and raw materials. There was conflicting evidence as to the portion of these materials that were used by Appellant in the maintenance of its equipment and the portion that was used in the product's manufacture. Appellant estimated that 85 percent of these purchases should be tax exempt as that amount was used in the product produced. This Court is persuaded that this figure may be fairly correct but the evidence was not substantial and the evidence was all in the control of the Appellant. On this basis this Court allows 50 percent of these purchases to be exempt. It would appear that in the future, Appellant would be able to better substantiate the proportions used in products manufactured.

CATEGORY 3. This involved the purchase of certain jigs and detachable tools for stud welding machines. The words "collets, chucks, collet assemblies and air collets" were used in referring to various items in addition to the word jig. These words do not have any precise meaning except in relation to particular operations. Jigs may mean something in one business and something entirely different in another business. This Court finds that these items are exempt on the same basis as Category 1.

CATEGORY 4. This involves shot sleeves and automatic ladles used in connection with the die casting machines. This category is exempt on the same basis as Category 1. It was agreed that certain land ladles were not exempt.

CATEGORY 5. This involves furnace lining materials, spark plugs, channels and heating coils. Although the life expectancy of these items is apparently less than twelve months, they do not appear to be in the exempt category as they are really basic equipment. These items are not exempt.

CATEGORY 6. This will be considered with Category 12.

CATEGORY 7. This involves the purchases of catalogs, price lists, and other advertising materials. The portion of these materials used within Minnesota is taxable. There was conflicting evidence as to the amount used within Minnesota. The Court agrees with the Commissioner that 15 percent of these materials should be attributed to Minnesota as 15 percent of the sales are made in Minnesota. Appellant might disprove this with more specific evidence but it would appear to be very difficult.

CATEGORY 8. This involves miscellaneous painting jigs. The evidence was conflicting on these items but we find that they are exempt. Should a question be raised again relative to these items, the Appellant would be required to provide more definite proof that the useful life is less than twelve months.

CATEGORY 9. This relates to air filters that filter the air entering and leaving the plant. Some of the filters are specifically to remove paint spray. These filters protect the workers, the public, the equipment, and the product. Although these filters may be changed and used up more frequently than in some other manufacturing businesses it would appear that they would not be exempt items as the evidence was introduced at this trial. It would appear that possibly such filters used in direct and specific connection with the painting room or painting process might be exempt in the future.

CATEGORY 10. This relates to the purchases of miscellaneous steel and other metals and materials for fabrication of jigs and other detachable tools. Appellant's evidence was certainly not as good as it should have been. Appellant estimated that 50 percent of these purchases went into the final product which was sold and that the other 50 percent went into producing jigs and other sand blasting components. We accept Appellant's estimate that 50 percent of these purchases were in fact used in the products sold. As to the other 50 percent, materials used in the production of jigs and other components which we have here held to be exempt, are exempt, and materials used in components that we have held not to be exempt, are not exempt.

CATEGORY 11. This relates to equipment leased from others. Appellant claims that this tax should have been collected and paid by the lessor. The burden to show that the sales or use tax on the leasing of this equipment has been paid is on the Appellant. There was no showing that the tax had been paid so the tax must be assessed.

CATEGORY 12. This involves purchases of molds and dies. The testimony appeared to indicate that if these forms or dies were used continuously they would not last 12 months. Although some of these items were capitalized and depreciated over a period from 3 to 10 years and some were expensed in the year of purchase, they are held to be exempt since it appears that they had a useful life of less than 12 months, if used continuously.

Conclusions of Law

1. This Court finds that some of the items involved in this proceeding are exempt from sales and use tax and some of them are taxable. Respondent is directed to assess the sales and use taxes in accordance with the Findings of Fact relating to Categories 1 through 12. IT IS SO ORDERED. A STAY OF 15 DAYS IS HEREBY ORDERED.

MINNESOTA TAX COURT
Carl A. Jensen, Judge

Dated: July 30, 1981.

Memorandum

The resolution of this case is somewhat more difficult since we did not hear the evidence. We did, however, read all of the transcripts and examine all of the other records and exhibits. Basically the case involves findings of fact on which it is certainly possible that reasonable men can differ.

It is true as claimed by Respondent, that exemptions from taxes must be clear and explicit but the determination of whether or not an item is included in an explicit exemption becomes a matter of fact determination. The determinations in this case are controlled by Minn. Stat. 297A.25, Subd. 1(h), part of which reads as follows:

"The gross receipts from the sale of and the storage, use, or consumption of all materials, . . . used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail, whether or not the item so used

becomes an ingredient or constituent part of the property produced. . . . machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures, used in such production and fuel, electricity, gas or steam used for space heating or lighting, are not included within this exemption; however, accessory tools, equipment and other short lived items which are separate detachable units used in producing a direct effect upon the product, where such items have an ordinary useful life of less than twelve months, are included within the exemption provided herein;"

In addition, Sales & Use Tax Regulation No. 408D controls where the statute is not explicit.

Respondent has contended that the statutes and regulations require a very narrow interpretation of when something produces a direct effect upon the product. In making the fact determinations herein, we have relied more heavily on the requirement that the exempt items have an ordinary useful life of less than twelve months. This Court in *Plastic, Inc. v. The Commissioner of Revenue*, Docket No. 2948, Order dated September 22, 1980 stated the following:

"The legislature, in adopting this 1973 Amendment has given us a more precise test. Now the Commissioner need only to determine whether the tool, equipment or mold has an 'ordinary useful life of less than twelve months.' If it does, it is exempt. Except in this case, that test lays to rest most disputes."

That case also held that the useful life was determined by the life of the item if it were used continuously even though the item was used for more than twelve months but only for short periods at each use.

Respondent cited *Standard Building Materials Company v. Commissioner of Revenue*, Minn. Tax Ct. Docket No. 1486 (May 13, 1970), as holding that replacement parts for taxable equipment are not exempt from sales tax. This case was decided prior to the above statutes which were enacted in 1973. The regulations adopted pursuant to those statutes specifically state the following:

"if these items are included in the purchase price of the basic machine, and are not separately stated, they will be considered as part of the basic machine and taxable. Subsequent replacement of these items will be considered exempt."

The regulations also state the following:

"The phrase 'used in producing a direct effect upon the product' shall not be deemed to imply a requirement for a direct physical contact with the product."

It appears to us that the Respondent, as in this case, attempted to apply a much more strict interpretation of this requirement than is intended by either the statute or the regulations.

Since the statute indicates that tools are not exempt but accessory tools which are separate detachable units are exempt, it is necessary to distinguish between tools which are attached to the machinery and other generally used tools. We have held that tools which are attached to the machinery which have a useful life of less than twelve months are exempt.

Appellant contended that the sellers of leased equipment had the responsibility of collecting and paying the sales tax on equipment leased to the Appellant. Although we can feel some sympathy for the Appellant, this matter has been settled by *Berghuis Construction Company v. The Commissioner of Taxation*, Docket No. 1896, Order entered December 16, 1975, and the citations of various courts contained therein. It is the responsibility of the lessee to show that sales or use taxes have been paid.

The rulings in this case have been made on the basis of what this Court felt that the preponderance of the evidence showed. In the event of future questions as to the taxability of some of the items involved herein where a percentage allocation has been allowed, the Appellant will be required to show more clearly the proper allocation since such evidence is in its hands. In other words, the Appellant will have a greater burden of proof since it is now clear that some of its accounting procedures are not really adequate if they wish to continue to obtain these exemptions.

C.A.J.

State of Minnesota

Tax Court

Dorothy C. Fussard, Jean W. Ambler, and The First Trust Company of St. Paul, Personal Representative of the Estate of Florence C. Seeger (Deceased),

Appellants,

-v-

The Commissioner of Revenue,

Appellee.

In the Matter of an Appeal from the Commissioner's Order dated June 16, 1980, Relating to Minimum Income Tax of Appellants for the year 1977.

Docket No. 3183

Order dated July 30, 1981

The above matter was submitted to the Court for decision on a Stipulation of Facts and written briefs on April 23, 1981.

John M. Sullivan and Steven Z. Kaplan of Briggs and Morgan, P.A., appeared on behalf of Appellants.

Jean Stepan, Special Assistant Attorney General, appeared on behalf of Appellee.

Issues

In 1977 Minnesota enacted Minn. Stat. § 290.091, a minimum income tax based on federal tax preference items. The first issue is whether the Minnesota minimum tax may be assessed against a taxpayer who had items of tax preference for the federal minimum tax but no items of preference for Minnesota income tax purposes. The second issue is whether the Tax Court has jurisdiction to decide the question of the constitutionality of Minn. Stat. § 290.091, as applied to Appellants. The third issue is whether the Minnesota minimum tax can be retroactively applied to transactions that occurred prior to its enactment. The fourth issue is whether the tax unconstitutionally discriminates against owners of stock in out-of-state small business corporations.

Decision

The Minnesota minimum income tax (Minn. Stat. § 290.091) incorporates by reference the federal "tax benefit rule." There being no Minnesota tax benefit or "preference" to Appellants, no Minnesota tax should be assessed.

The Commissioner's motion that all "constitutional issues" raised by Appellants be dismissed is denied. The Tax Court will continue to consider the rule on constitutional issues raised by Appellants unless the taxpayer is seeking to have a statute declared invalid and unenforceable on its face.

The retroactive application of the tax to transactions occurring prior to its enactment is constitutional. The imposition of the minimum tax as applied to Appellants unconstitutionally discriminates against them as owners of stock in an out-of-state small business corporation.

The Commissioner's Order is reversed.

Findings of Fact

1. Florence C. Seeger ("decedent") died on June 8, 1977, while a resident of Minnesota. Following her death, Appellants were duly appointed the co-executors of her will.

2. At the time of her death, the decedent owned shares of the common stock of Intertec Corporation, a Colorado corporation, which she had acquired in 1973 for $1,722,513. Intertec qualified to be taxed as a small business corporation for federal income tax purposes but not for Minnesota income tax purposes.

3. For the years 1974 through 1977, Intertec sustained net operating losses. Pursuant to the Internal Revenue Code, the decedent deducted from her gross income her pro rata portion of such net operating losses on her federal income tax returns for the years 1974 through 1977. Consequently, the decedent's basis in her Intertec stock for federal income tax purposes was reduced each year by her pro rata share of these losses.

4. Decedent was unable to take these losses as deductions for Minnesota income tax purposes because they were out-of-state losses not deductible under Minnesota law at that time. Consequently, the decedent's basis in the Intertec stock for Minnesota income tax purposes remained unchanged from 1973 to 1977.

5. As of June 8, 1977, the decedent's basis in her shares of Intertec stock for Minnesota income tax purposes remained $1,722,513. As of that date, her basis in these shares for purposes of federal income taxation had been reduced to $204,786. It is this difference in basis which gives rise to the issues raised by this appeal.

6. In 1977, prior to her death, the decedent sold some shares of 3M stock on which she realized a long-term capital gain of $900,307. Also in 1977, her Intertec stock became worthless, entitling her to a long-term capital loss in the amount of her basis in that stock. Because of the difference in basis in the Intertec stock for federal and Minnesota income tax purposes, the following different results were realized:

a) For federal income tax purposes:

Long-term capital gain on 3M stock	$900,307
Long-term capital loss on Intertec stock	(204,786)
Net long-term capital gain	$695,521

b) For Minnesota income tax purposes:

Long-term capital gain on 3M stock	$900,307
Long-term capital loss on Intertec stock	(1,722,513)
Net long-term capital loss	($822,206)

7. In 1977 both the federal government and Minnesota imposed a so-called minimum tax on tax preference items in addition to the regular income tax. In computing her 1977 federal income tax, decedent was allowed to deduct one-half of her net long-term capital gain, or $347,760, in arriving at taxable income. That deduction constituted a tax preference item under the Internal Revenue Code, and was subject to the federal minimum tax.

8. In computing the Minnesota minimum tax Appellants recomputed the decedent's capital gain using her Minnesota basis in the Intertec stock, thereby arriving at a net capital loss rather than a gain. The result of this adjustment was the elimination of any preference item for Minnesota income taxes. Appellants, therefore, reported no Minnesota minimum tax liability.

9. The Commissioner contends that the adjustments made to the federal tax preference items were not permissible in computing the decedent's Minnesota minimum tax, and that Appellants owe a minimum tax based upon the federal preference item, the capital gain deduction.

Conclusions of Law

1. The Minnesota minimum tax (Minn. Stat. § 290.091) incorporates the federal "tax benefit rule."

2. There being no Minnesota tax benefit or "preference" to the decedent taxpayer, the Appellants should not be required to pay any minimum tax.

3. The Tax Court has jurisdiction to consider and rule on constitutional issues raised by taxpayers in a given case with the exception of claims that a tax statute is unconstitutionally invalid on its face and, therefore, unenforceable in all cases.

4. The retroactive application of the Minnesota minimum tax to transactions occurring prior to its enactment is not unconstitutional.

5. The imposition of the Minnesota minimum tax to Appellants unconstitutionally discriminates against them as owners of stock in an out-of-state small business corporation.

6. The Commissioner of Revenue's Order dated June 16, 1980, is reversed.

LET JUDGMENT BE ENTERED ACCORDINGLY. A STAY OF 15 DAYS IS HEREBY ORDERED.

MINNESOTA TAX COURT
Earl B. Gustafson, Judge

Memorandum

In 1969, Congress enacted a minimum tax on specified items of tax preference such as accelerated appreciation allowances and the 50 percent capital gain deduction. Tax Reform Act of 1969, P.L. 19-172, 91st Cong., 1st Sess. Taxpayers who had significantly reduced or avoided their federal income taxes by taking advantage of these tax benefits (preferences) were required to pay a minimum tax of 10 percent over any combination of preferences exceeding $30,000. In 1976, this was raised to 15 percent and the U.S. Treasury was directed to prescribe regulations implementing a "tax benefit rule" which would eliminate the minimum tax if the taxpayer's tax preference item did not, in fact, reduce the taxpayer's income tax liability. Tax Reform Act of 1976, P.L. 95-455, 94th Cong., 2nd Sess.

Subsequently, on June 2, 1977, Minnesota adopted its own minimum tax on preference items and followed the federal law by imposing a 40 percent tax on the amount of the taxpayer's minimum federal tax liability.

The applicable Minnesota minimum tax statute, Minn. Stat. § 290.091, reads in relevant part as follows:

In addition to all other taxes imposed by Chapter 290, there is hereby imposed for each taxable year beginning after December 31, 1976, a tax which, in the case of a resident individual . . . *shall be equal to 40 percent of the amount of the taxpayer's minimum tax liability for tax preference items pursuant to the provisions of Sections 56 to 58 and 443(d) of the Internal Revenue Code of 1954, as amended through December 31, 1976*, except that for purposes of the tax imposed by this section, excess itemized deductions as defined in Section 57(b) shall not include any deduction taken for Minnesota income taxes paid. In the case of any other taxpayer the tax shall equal 40 percent of that federal liability, multiplied by a fraction the numerator of which is the amount of the taxpayer's preference item income allocated to this state pursuant to the provisions of Sections 290.17, subdivision 1, to 290.20, and the denominator of which is the taxpayer's total preference items income for federal purposes. (Emphasis added)

In this case the taxpayer had a large federal tax preference item in the form of a net long-term capital gain deduction of $347,760. For Minnesota taxes she had a net long-term capital loss in 1977 rather than a net gain and, therefore, had no Minnesota tax benefit or "preference."

The Commissioner applied the Minnesota 40 percent minimum tax to taxpayer's federal tax liability. The Commissioner's Order is based upon an interpretation of Minn. Stat. 290.091 which ignores the "tax benefit rule" found in the federal statutes and adopted by reference into the Minnesota law.

For several years the taxpayer had been deducting for federal income taxes her pro rata share of losses from a Sub-Chapter S Colorado Corporation, Intertec Corporation. By deducting these losses she reduced her federal income taxes and also reduced her basis in the stock. She was unable to deduct these losses on her Minnesota returns because out-of-state losses were not deductible at that time. That kept her Minnesota basis unchanged. When the stock became worthless, she had a much smaller long-term capital loss for federal taxes than for Minnesota taxes to offset a large long-term capital gain from selling 3M stock. This resulted in a large 50 percent capital gain deduction or "preference item" for federal taxes but no deduction or "preference item" for Minnesota taxes.

Because Minnesota did not follow federal law regarding deductions and denied the taxpayer these out-of-state losses, her estate has now been ordered to pay a Minnesota tax. We feel this is an incorrect interpretation of Minn. Stat. § 290.091.

It is the clear intent of U.S. Code Sec. 58(h) that the federal minimum tax includes a tax benefit rule which eliminates the tax on a preference item if no reduction in tax is received. The details of such a rule is left to the U.S. Treasury Department. Section 58(h) reads as follows:

(h) *Regulations to include tax benefit rule.*—The Secretary shall prescribe regulations under which items of tax preference shall be properly adjusted where the tax treatment giving rise to such items will not result in the reduction of the taxpayer's tax under this subtitle for any taxable years.

Because Minn. Stat. § 290.091 specifically incorporates Sec. 58(h) by reference, it is entirely consistent and appropriate to consider the Minnesota minimum tax law as implicitly including a similar rule.

This means that no Minnesota minimum tax is imposed on a "preference item" unless some Minnesota tax benefit was received from this "preference item." No Minnesota benefit was received in this case and, therefore, no tax should be collected.

Appellant raises two additional issues that come under the rubric "constitutional issues."

First, Appellant contends the statute unconstitutionally denies due process because it applies to Appellant retroactively.

Secondly, Appellant challenges the constitutionality of the statute as applied because it results in this case in unequal tax treatment to owners of non-Minnesota small business corporations. No claim is made that the statute is unconstitutional per se and should be held invalid and unenforceable in all cases.

The Commissioner argues that under the cases of McCannel and Guilliams this Court has no jurisdiction to consider any "constitutional issues." In the Matter of the Petition of McCannel to Review Objections to Real Estate Taxes, 301 N.W. 2d 910 (Minn. 1980), presented the question to the Minnesota Supreme Court of whether the Tax Court has jurisdiction to consider constitutional questions in cases transferred to it by the District Court. In holding that it did, the Supreme Court noted that the Tax Court possess "uniquely judicial powers" and that the broad grant of jurisdiction provided by Minn. Stat. § 271.01, subd. 5 "suggests that the legislature intended the Tax Court to have the power to decide each case completely." The Court concluded that the Tax Court was not limited in its power when considering cases transferred from District Court and observed that "the Tax Court will function most effectively and expeditiously if it has the power to decide constitutional issues." 301 N.W. 2d 910, 920.

In *Guilliams v. Commissioner of Revenue*, 299 N.W. 2d 138 (Minn. 1980), our Supreme Court held that the Tax Court has no original jurisdiction to declare statutes invalid as being in conflict with the Minnesota or United States constitutions. However, we do not read into *Guilliams* a holding that the Tax Court should no longer consider issues that merely question the constitutionality of a statute as it is applied to a given taxpayer in a given fact situation. We feel these issues should be considered and ruled upon for the benefit of the taxpaying public, in addition to the litigants and any appellate court, as long as this Court makes no attempt to declare tax statutes unconstitutionally invalid and unenforceable. In this case Appellants are claiming both a denial of due process because the Commissioner has applied the Minnesota minimum tax retroactively and a denial of equal protection because out-of-state small corporations are treated differently from Minnesota small corporations. Appellants are making no general constitutional challenge to the statute per se.

If we avoid any consideration of these issues, we might leave the taxpayer without any forum to have them considered and decided. To refuse to take evidence on constitutional issues raised at the trial level would leave an appellate court with no record to review and would run counter to the legislative directive that this Court should hear "all questions of law and fact arising under the tax laws of the state." Minn. Stat. § 271.01, subd. 5. To dismiss all "constitutional issues," as the Commissioner urges, could lead to unjust and awkward results. In this case the Appellants might not be able to start over again in District Court because of the statute of limitations. Under our holding today the Appellants have prevailed in this Court on non-constitutional grounds of statutory interpretation and there would be no reason, and perhaps no standing, for Appellants to start over in another court. On appeal, however, the Supreme Court could reverse the Tax Court on the issue of statutory interpretation and would have no record or ruling before it to review the constitutional issues Appellant has raised. This would necessitate a remand to this Court. On remand we would still be without jurisdiction and would have to dismiss the case without

considering the constitutional issues or somehow (without any statutory authority) refer the case to District Court for determination of the constitutional issues. If the case were dismissed at this point after remand, the statute of limitations very likely would bar any action in District Court and this would leave the taxpayer with no remedy and no ruling on the constitutional issues originally raised.

The question of the Tax Court's jurisdiction to consider "constitutional issues" is of more than academic interest to taxpayers. Orders of the Commissioner of Revenue can be challenged and appealed to the Tax Court prior to payment of any deficiency. Actions commenced in District Court require the taxpayer to pay the tax deficiency and sue for a refund. Thus, a taxpayer who raises a "constitutional issue" in a multi-issue case would be required to pay the entire deficiency and sue for a refund unless he was prepared to abandon his constitutional argument.

A dismissal of all cases which raise any type of "constitutional issue" would eliminate many of the appeals from Orders of the Commissioner of Revenue brought into this Court. In recent years there has been an increase in appeals based upon religious and self-incrimination grounds. New and novel constitutional issues are increasingly being raised and argued by taxpayers who typically appear pro se. Often it is argued—as it is in this case—that a statute, as applied to the taxpayer, is unconstitutional without claiming the statute is totally or even partially invalid.

We will continue to consider those "constitutional issues" presented by taxpayers who merely claim a denial of due process or equal protection or some other constitutionally protected right as applied to them in a given case and who are not seeking to have a statute invalidated on constitutional grounds. Cases which directly question the constitutional validity of a statute per se will be dismissed or referred to District Court unless, of course, the case originated in District Court and was transferred to the Tax Court.

We will now consider the "constitutional issues" of due process and unequal protection advanced by Appellants.

The Minnesota Legislature adopted the minimum tax provisions on June 2, 1977. During the period from January 6 through April 11, 1977, decedent sold 3M stock and realized long-term capital gain in the amount of $900,307 for federal income tax purposes. Would the retroactive application of the minimum tax to transactions that occurred prior to its enactment be a violation of the due process clause of the Fourteenth Amendment of the U.S. Constitution? We think not under the cases of *United States v. Darusmont* 81-1 U.S.T.C. § (1981); *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121 (1938); *Sidney v. Commissioner of Internal Revenue*, 273 F.2d 928 (2nd Cir., 1980); *Buttke v. Commissioner*, 72 T.C. 677 (1979) affirmed in *Buttke v. Commissioner*, 625 Fed. 2a 202 (8th Cir., 1980). This minimum tax was admittedly an addition or modification to the existing Minnesota income tax law that increased some taxpayers' liability, but it was not a "wholly new type of tax" which is the only tax that has any possibility of being considered unconstitutional when applied retroactively. There is no general rule that all retroactive changes or increases in income taxes are unconstitutional. See *Welch v. Henry*, 305 U.S. 134, 59 S. Ct. 121 (1938).

Appellant also argues there has been a discriminatory denial of equal protection and uniform taxation against shareholders in out-of-state businesses. Had Intertec conducted its business in Minnesota rather than Colorado, it would have been able to elect small business corporation treatment pursuant to Section 290.971. This would have given decedent the benefit of net operating losses for Minnesota income tax purposes and her basis in Intertec shares would have been the same for both Minnesota and federal income tax purposes.

However, the Intertec net operating losses could not flow through to a Minnesota shareholder because the corporation conducted all of its activities in Colorado and could not qualify for Minnesota small business corporation tax treatment. Moreover, because its net operating losses constituted out-of-state losses, decedent was also precluded from obtaining any current deduction for Intertec's net operating losses.

Treating decedent as though she had deducted Intertec's losses when, in fact, she was prohibited from doing so places a discriminatory tax burden upon her by reason of her ownership of stock in an out-of-state business. *Sebrechts v. Commissioner of Taxation*, 308 Minn. 274 (1976). Under these circumstances we agree that imposition of the minimum tax upon the decedent would be so arbitrary and unreasonable that the statute, as applied, would deny her right to equal protection of the law and to uniform taxation. Minnesota Constitution, Article I, Section 2; Article X, Section 1; United States Constitution, Fourteenth Amendment. We are not suggesting the statute is unconstitutionally discriminatory on its face but only as applied by the Commissioner to Appellants as owners of out-of-state businesses during the period in question.

We have discussed these constitutional issues in the event an appellate court disagrees with our principal holding on statutory interpretation and would then have at hand our rulings on these additional issues which could be affirmed, modified, or corrected in the same appeal proceeding.

E.B.G.

STATE CONTRACTS

Pursuant to the provisions of Minn. Stat. § 16.098, subd. 3, an agency must make reasonable effort to publicize the availability of any consultant services contract or professional and technical services contract which has an estimated cost of over $2,000.

Department of Administration procedures require that notice of any consultant services contract or professional and technical services contract which has an estimated cost of over $10,000 be printed in the *State Register*. These procedures also require that the following information be included in the notice: name of contact person, agency name and address, description of project and tasks, cost estimate, and final submission date of completed contract proposal.

Energy Agency
Publications and Media Services

Notice of Availability of Contracts for Professional and Technical Services in the Graphic Arts

The Minnesota Energy Agency is seeking to identify contractors to provide the following graphic design services:

—graphic design and illustrations for brochures, newsletters, posters slides, transparencies, etc.

—page layout,

—keylining.

The $15,000 contract may be divided among several contractors. Contract services must be available upon request through June 30, 1982.

Proposals should be submitted by August 31, 1981 stating services offered, hourly rate for those services and any minimum requirements. Samples of work must also be included.

Contractors with the Minnesota Energy Agency must apply for a Certificate of Compliance from the Minnesota Department of Human Rights. Applications can be obtained by written request from the Minnesota Department of Human Rights, 500 Bremer Tower, 7th Place and Minnesota St., St. Paul, MN. 55101. All contract bids must include a statement indicating that the bidder has applied for the certificate.

All questions related to this notice and all proposals should be directed to:

Joan Hummel
Minnesota Energy Agency
Publications and Media Services
980 American Center Building
150 E. Kellogg Boulevard
St. Paul, Minnesota 55101
(612) 297-2321

Minnesota Zoological Garden

Notice of Request for Proposal for Ski Concession Contract

Background: The Minnesota Zoo provides up to 10 miles of cross-country ski trails for free use by its visitors. The first year the trails were in operation, close to 15,000 skiers used this program. Last year the Zoo had only a few days of operation due to the lack of snow. The Zoo has its own groomer and maintains the trails on a daily basis. The Zoo has also built a new ski lodge which will serve as a focal point for our program. The Zoo also uses this program as its major attendance generator and focuses most of its winter advertising campaign on this feature.

Objective: To help the Zoo in implementing this program, the Zoo is requesting bids from interested parties to run a ski rental concession. The concessionaire would also help manage the ski program and be responsible for its operation on a day-to-day basis.

Zoo Responsibilities: The Zoo will provide concessionaire with:

- An indoor location in the new ski lodge for ski storage and rental.
- All necessary utilities.
- Access to the Zoo.
- Advertising and promotional support for the program.

Contract Term: The contract will be for one year with a one year renewal option, with the concessionaire being on site from December 1 through March 15. Service will be based on ski conditions.

Requirements for those submitting proposals:

Concessionaire must:

1. Have background or work expertise in the cross-country field.
2. Be able to provide at least 200 sets of ski equipment.
3. Be able to provide service during Zoo hours 7 days a week, 9–5, from December 1 through March 15.
4. Be service oriented with trained staff.
5. Have competitive rental rates including 2 hour and 4 hour rates.
6. Provide skis and accessories of good quality—no wax ski is preferable.
7. Provide overall direction to the program (consultation).
8. Monitor and direct ski visitors on a daily basis.
9. Submit financial P & L to Zoo at the end of the ski season.
10. Provide major promotional events or significant advertising.
11. Solicit group business during week days and provide group lessons.
12. Provide any shop fixtures or modifications.
13. Carry appropriate insurance.
14. Provide first aid assistance when needed.
15. Responder may propose additional tasks or activities if they will improve the results of the projects.

Proposal Contents: Brief reference of company or individual background. Reference to type of program to be run including:

- Services provided the Zoo.
- Rental rates.
- General scope of program including type and quantity of equipment.
- Detailed promotion and advertising program.
- Compensation to the Zoo based on a percentage of gross sales.

Review: The Zoo will review all proposals and interview those parties with most appropriate or attractive proposal. Award will be based on, but not limited to: Meeting the basic requirements listed above; management skills; quality of staff; promotional or advertising funds; ability to relate to the Zoo's philosophy and financial backing.

Deadlines: All proposals might be submitted to Ladd Conrad at the Minnesota Zoological Garden by September 7, 1981. For further information contact:

Ladd Conrad
Minnesota Zoo
12101 Johnny Cake Ridge Road
Apple Valley, MN. 55124
Telephone: 432-9010, Ext. 257

OFFICIAL NOTICES

Pursuant to the provisions of Minn. Stat. § 15.0412, subd. 6, an agency, in preparing proposed rules, may seek information or opinion from sources outside the agency. Notices of intent to solicit outside opinion must be published in the *State Register* and all interested persons afforded the opportunity to submit data or views on the subject, either orally or in writing.

The *State Register* also publishes other official notices of state agencies, notices of meetings, and matters of public interest.

Administration Department

Request for Office Space Proposal

The Department of Administration desires proposals for the rental of 6,000 square feet of office and classroom space for the East Central Community College Service Center in the Cambridge, Minnesota area.

For information contact:

Department of Administration
Real Estate Management Division
50 Sherburne Avenue, Room G-22
St. Paul, Minnesota 55155
Telephone: (612) 296-6674

Metropolitan Council

Notice of Public Hearing for Interstate Hwy. 35E from Hwy. 110 in Dakota County to Hwy. I-94 near downtown St. Paul, Ramsey County

The Minnesota Department of Transportation and the Twin Cities Metropolitan Council will hold a Hwy. I-35E Location and Design Public Hearing on September 9, 1981, 6:30 p.m., at Highland Park Junior High School, 975 Snelling Ave. S., St. Paul, Minnesota. The hearing is in accordance with Title 23, United States Code, Section 128, and Minnesota Statutes 116D-01 et seq. Beginning at 5:30 p.m. that day, people may review a draft Environmental Impact Statement (EIS) and related engineering and environmental studies. To be discussed are: state and federal relocation and assistance programs for displaced persons and schedules of right-of-way acquisition and construction.

The highway project proposes construction of Hwy. I-35E from Hwy. 110 in Dakota County to Hwy. I-94 near downtown St. Paul. Twelve design and routing alternatives are considered. Options include: a six-lane freeway along Shepard Rd.; a "no-build" alternative; and 10 variations along the Pleasant Ave. corridor, two of which involve a Shepard Rd. truck routing and a by-pass east of downtown St. Paul. Three of the alternatives would encroach significantly on the Mississippi River floodplain, (as defined in Executive Order 11988-Floodplain Management). All alternatives would affect properties protected by Section 4(f) of the U.S. Department of Transportation Act.

The hearing will provide an opportunity to discuss the location, design and construction of the proposed project. Interested governmental agencies, and public interest groups will have an opportunity to present their views on the proposed highway improvement. Exhibits and written statements relative to the hearing and received by the Metropolitan Council, postmarked no later than September 30, 1981, will also be considered in the preparation of the final EIS. Statements should be sent to: Ghaleb Abdul-Rahman, Project Manager, Metropolitan Council, 300 Metro Square Building, 7th and Robert Sts., St. Paul, Minnesota 55101.

In addition to the public hearing, an open house will be held from 11 a.m. to 7 p.m. on Tuesday, September 8, at the University Club, 420 Summit Ave., St. Paul. Participants in the study will be available to respond to questions. Plans, design layouts, and supporting studies will be available for review at the open house.

A draft EIS has been prepared by a consulting firm to the Metropolitan Council and circulated by the Council. Copies are available for public review and copying at the following libraries:

St. Paul Public Library
Central Library
90 W. Fourth St.
St. Paul, MN 55101

St. Paul Public Library
Merriam Park Branch
1831 Marshall Ave.
St. Paul, MN 55104

St. Paul Public Library
Highland Park Branch
1974 Ford Pkwy.
St. Paul, MN 55116

St. Paul Public Library
Lexington Branch
1080 University Ave.
St. Paul, MN 55104

Dakota County Library
1101 West County Rd. 42
Burnsville, MN 55337

Metropolitan Council Library
Suite 300 Metro Square Bldg.
7th and Robert Sts.
St. Paul, MN 55101

Maps, right-of-way information and other data are available for public review at the Road Plans Information Office, Room 609, State Transportation Building, St. Paul. Draft EIS summaries are available by calling the Metropolitan Council's Public Information Office at 291-6464.

Charles Weaver, Chairman
Metropolitan Council

Public Welfare Department

Public Notice Regarding Changes in Minnesota's Medical Assistance Program

Notice is hereby given by the Minnesota Department of Public Welfare (DPW) to all hospitals that participate in Minnesota's Medical Assistance program, and to the public, of changes to be made in the statewide methods of inpatient hospital rate determinations for the reimbursement of services provided to Medical Assistance recipients. The provisions set forth in this notice are subject to change. The effective date of the changes will be October 1, 1981 for providers whose fiscal year begins on or after this date.

This notice presents the changes.

Written comments on the changes and suggestions for implementation may be sent to:

Health Care Programs Professional Services Section
Minnesota Department of Public Welfare
P.O. Box 43170
St. Paul, Minnesota 55164

Comments and suggestions received from the public may be reviewed during normal business hours at:

Health Care Programs Professional Services Section
Minnesota Department of Public Welfare
First Floor, Space Center
444 Lafayette Road
St. Paul, Minnesota

These changes are being published pursuant to federal regulations which govern administration of the Medical Assistance Program, 42 C.F.R. 447.205 (1980).

A. Description of the Minnesota Prospective Hospital Reimbursement System

1. Criteria set by federal regulation.

The Minnesota prospective hospital reimbursement system is designed to promote the objectives of prospective reimbursements and to meet the criteria for alternative reimbursement systems contained in Title 42 C.F.R. 447.261 (d) (1) thru (7). These regulations implement Title XIX of the Social Security Act ("Title XIX" or "Medical Assistance"), 42 U.S.C. § 1396 et seq.

The Federal regulations require that such a system should include:

a. Incentives for efficiency and economy;

b. Reimbursement on a reasonable cost basis;

c. Reimbursement not to exceed that which would be produced through the application of the standards of reimbursement used for Title XVIII of the Social Security Act ("Title XVIII" or "Medicare"), 42, U.S.C. § 1395 et seq.

d. Assurance of adequate availability of hospital services of high quality to Title XIX recipients;

e. Adequate documentation for evaluation of experience under the approved reimbursement plan; and,

f. An appeals mechanism that guarantees providers an opportunity to submit evidence and obtain prompt administrative review of payment rates set for them if: (i) costs of capital improvements were approved by the local Health Systems Agency after the payment rates were set, and those costs were not considered in the rate calculation; (ii) costs of capital improvements were incurred because of certification or licensing requirements established after payment rates were set,

and those costs were not considered in the rate calculation; or (iii) incorrect data were used or an error was made in the rate calculation.

2. Additional criteria for Minnesota's system.

In addition to meeting the criteria above, the objectives of the system are:

a. To promote hospital cost containment while maintaining or improving the quality of care.

b. To establish a system in which hospitals are held to prospectively determined rates in a 12-month period, except when a hospital can demonstrate (extenuating circumstances).

c. To encourage efficiency in hospital service delivery by relating payment to Health Systems Agency approval of new programs, services, and facilities and to consider Health Systems Agency findings based on periodic reviews of institutional services.

d. To establish a mechanism assuring greater predictability of hospital cost per unit of service.

e. To develop an administrative process which provides fair review of hospital costs and an independent appeals process.

f. To develop a uniform reporting system for prospective payment.

g. To encourage appropriate utilization of services and facilities and discourage inefficient utilization.

h. To foster innovative health care delivery patterns and mechanisms.

i. To provide for a system which insures hospital financial visibility and, at the same time, equity among payors.

j. To engage in such other activities related to the cost of health care, including studies, etc., as may be in the interest of the public to be served.

To meet the criteria and objectives, DPW will set a prospective interim payment rate or unit of payment on the basis of the most recently concluded MEDICARE fiscal year for the hospital.

Incentives for efficiency and economy will derive from the prospective rate being set for a twelve month period with no retroactive adjustments [excepting extenuating circumstances]. (The Medicare upper limit requirement will be met since the Medicaid prospective rates will be based upon Medicare allowable cost principles of reimbursement. Medicare rates will not be similarly reduced; thus the Medicaid rates will be no greater than Medicare and additional incentives for economy and efficiency will derive from the comparisons and the standards.)

Payment will be based on the Medicare reasonable cost principles. Such principles insure the reasonableness of the rates and the relative comparability of the rates among facilities. DPW will not conduct separate evaluation of the rates and rate standards prospectively. Evaluations will be conducted retrospectively as described in the section titled "evaluation."

All existing hospital rates will be recomputed, as of the effective date of this plan. This recomputation will establish a base level which reflects allowable costs. The Minnesota Department of Public Welfare ("DPW") will establish a schedule for the recomputation; hospitals shall submit budgetary and other information as specified in the section titled "Rate Review Process", according to this timetable.

B. Definitions

1. Base Year—The hospitals' 1980 fiscal year.

2. Prior Year—The hospitals' fiscal year immediately preceding the year for which final settlement is calculated.

3. Final Settlement Year—The hospitals' fiscal year for which final settlement is calculated.

4. Allowable Costs—The hospitals' allowable Medical Assistance cost permitted by applicable Medicare standards and principles of reimbursement. Allowable costs shall include all routine and ancillary expenses incurred by a hospital that are necessary to comply with all state and federal regulations pertinent to providing patient care. Routine and ancillary expenses are defined in accordance with HIM-15, of The Title XVIII provider reimbursement manual and 42 CFR Part 405.

5. Reimbursable Cost—The lesser of each hospital's customary charges, allowable cost, or all-inclusive rate per discharge multiplied by the number of Medical Assistance discharges.

6. Rate Per Discharge—The hospital-specific, all-inclusive rate per Medical Assistance discharge which, when multiplied by the number of Medical Assistance discharges (including deaths) in the hospital's accounting year, determines the total dollar limit on reimbursable cost for that accounting year.

7. Pass-Through Categories—Those hospital cost categories which, for purposes of final settlement, are not subject to the hospital cost index. Pass-through categories are limited to:

a. Depreciation.

b. Rents and leases.

c. Property taxes and license fees.

d. Interest.

e. Hospital malpractice insurance.

C. Setting the Base Rate

The base rate shall be computed by dividing the number of Medical Assistance Discharges (including deaths) in the hospital's designated account year (1980) into the total adjusted Medical Assistance payments for the hospital's same accounting year.

1. Rate Review Process

The following procedures shall be used to determine the adjusted Medical Assistance payments:

a. All hospitals participating in Title XIX will submit an initial cost report as required by DPW based on the hospitals' most recently completed fiscal year.

(1) The hospital shall report expenses by revenue-producing departments.

(2) DPW shall use the most recent Medicare cost reports to allocate costs from non-revenue producing departments.

(3) The hospital shall include, in the cost report, salaries for hospital based physicians according to their revenue-producing departments. (Hospital-based physicians will not receive duplicative reimbursement from the rate and from separate billings.)

b. DPW may reduce reported costs to reflect unapproved projects, programs or services.

c. DPW shall apply appropriate Medicare reimbursement principles to determine the available Medical Assistance costs. The present nursing home differential will be maintained.

d. The hospital shall submit the following documentation:

Budgets—Capital equipment budget; Capital budget for acquisition of land, Other capital improvement budgets including replacement and modernization of buildings, expansion of plant and resulting indebtedness, payment schedules, etc., if applicable; and Operating budget; *Interim Financial Statements* for period immediately preceding request (non-audited); *Audited and Certified Annual Financial Statements* if not already on file, and if more than 120 days have elapsed since the close of the hospital's preceding year; and, rationale for most recent Title XVIII cost reports, Title XIX cost reports and a prospectively prepared Title XIX cost report; *Standardized Reporting Forms*—as may be developed and requested by the state agency (DPW).

Other information required in the rate-setting process shall be submitted by hospitals as specified by the Department.

D. Annual Adjustments

1. DPW will annually set a prospective rate per discharge which will be the base rate plus or minus prospectively determined percentage change based on the indicators below, and any limit set by state statute. The hospital will be informed of the limit per discharge at the start of the year.

During the year, prior to the final cost settlement, the hospital will be paid at an interim rate, on the basis of charges billed, modified or edited to conform to the medical assistance approved percentage for the base year (up to the maximum established as available to a given hospital).

The following economic charge indicators will be used to establish the percentage change in rate:

Expense Category	Economic Change Indicator
a. Salaries	Index of United Labor Costs—Nonfarm Business Sector
b. Employee Benefits	Other Labor Income/Total Employment
c. Consultant Fees and Purchase of Service	Consumer Price Index—All Services
d. Raw Food	(WPI—Farm Products + WPI—Processed Foods and Feeds)/2

e. Nursing Supplies	(WPI—Textile products and Apparel + WPI—Chemicals and Allied Products + WPI—Rubber and Plastic Products + WPI—Pulp, Paper, and Allied Products)/2
f. Other Supplies	Wholesale Price Index
g. Utilities	(WPI—Fuels and Related Products and Power—CPI—All Services)/2
h. Repairs and Maintenance	Consumer Price Index—All Services
i. Insurance	Consumer Price Index
j. Other Expenses	Consumer Price Index

2. Expense Categories Weights.

Each of the expense categories will carry the proportionate weight found in each individual hospital and applied in that manner.

3. Exceptions to the rate.

a. Hospitals are limited to one rate increase per fiscal year for extenuating circumstances defined as those rare situations which would affect the rate paid and which are beyond the control of the hospital. Exceptions may be made which are consistent with the goals and objectives of the program which may include:

(1) delayed approval of capital expansion pending at the time of normal approval of a rate, or

(2) changes in licensing requirements or certification regulations.

b. In evaluating requests for exceptions, DPW shall consider:

(1) the hospital's actual experience versus its budget for the same year.

(2) the hospital's budget and actual experience for prior years'.

(3) any variance between (1) and (2).

(4) costs of other hospitals within the State's geographic area. Any significant variance will be subject to indepth review.

4. Final Settlement

a. Method of Calculation

For purposes of final settlement, an all-inclusive rate per discharge will be retrospectively established for each hospital. The rate per discharge will apply to all covered inpatient services provided by the hospital during its final settlement year, regardless of the location or method used to deliver the services—(out-patient department or satellite location for example).

b. Volume Adjustment:

If the number of total hospital discharges in the hospital's final settlement year differs from the number of discharges in its prior year, an adjustment may be made to the hospital's rate per discharge for the final settlement year. This adjustment, which is necessary to reflect the difference between the variable and total cost of treating patients, will be calculated using the formula in the appended table. The formula is designed to adjust the rate per discharge for estimated changes in average costs resulting from changes in volume.

Each hospital's total cost will be divided into the fixed and variable components shown in Table II appended. Data from the hospital's financial statements or other direct report of expenses will be used to estimate the percentage of a hospital's cost which varies with volume. Whenever sufficient data from the hospital is not available, a fixed to variable cost ration of 50:50 will be used.

TABLE I

VOLUME ADJUSTMENT FORMULA

$$ACR = HCI \frac{DIS + VC (DIS - DIS)}{DIS}$$

ACR = Allowable change in the rate per discharge after volume adjustment, expressed as a proportion of the prior year rate per discharge. (e.g., 5% = 1.05).

HCI = Hospital Cost Index before any volume adjustments, expressed as a proportion of the prior year rate. (e.g., 5% = 1.05).

DIS = Total hospital discharges in the prior year.
P

VC = Variable cost as a proportion of total cost.

DIS = Total hospital discharges in the final settlement year.
F

The ACR, multiplied by the maximum allowable rate per discharge in the prior year, will determine the maximum allowable rate per discharge for the final settlement year. The maximum allowable rate per discharge for final settlement year will be multiplied by the number of Medicaid discharges in the final settlement year to determine the total maximum allowable reimbursement. The ACR will apply to the prior year's maximum allowable rate per discharge rather than the actual cost per discharge as determined using Medicare standards and principles of reimbursement.

Algebraically:

TMAR + (ACR) (PYMARD) (MADISF)

WHERE:

TMAR = Total maximum allowable reimbursement.

PYMARD = Prior year maximum allowable rate per discharge.

MADISF = Medicaid discharges in final settlement year.

TABLE II

CLASSIFICATION OF FIXED AND VARIABLE COSTS

Fixed Cost	Variable Costs
SALARIES AND WAGES:	SALARIES AND WAGES
Management and supervision	Registered nurses
Technician and specialist	Licensed vocational nurses
Clerical and other administrative	Aides and orderlies
Physicians	Environmental and food services
Nonphysician medical practitioners	Other salaries and wages
EMPLOYEE BENEFITS:	EMPLOYEE BENEFITS:
(Distributed proportionately accordingly to salaries and wages)	(Distributed proportionately according to salaries and wages)
FICA:	FICA:
Unemployment insurance	Unemployment insurance
Vacation, holiday and sick leave	Vacation, holiday and sick leave
Group insurance	Group insurance
Pension and retirement	Pension and retirement
Workers' compensation	Workers' compensation
Other employee benefits	Other employee benefits
OTHER DIRECT EXPENSES:	PROFESSIONAL FEES:
Depreciation and amortization	Medical
Utilities	Consulting and management
Insurance	Legal
Licenses and taxes (Other than income)	Audit
Other direct expenses	Other professional fees

Fixed Cost	Variable Costs
	SUPPLIES:
	Food
	Surgical supplies
	Pharmaceuticals
	Medical care materials
	Minor equipment
	Nonmedical supplies
	PURCHASED SERVICES:
	Medical
	Repairs and maintenance
	Management services
	Other purchased services

E. Relationship to Comprehensive Health Planning

This plan is committed to adherence with federal provisions contained in Public Law 93-641 (National Health Planning and Resources Development Act of 1974) and section 1122 of the Social Security Act, as well Minnesota Statutes Chapter 145 sections 71 thru 831 (certificate of need).

For any capital expenditure project reviewable under Section 1122 of the Social Security Act or State certificate of need law, approval from the State Health Planning Agency must be obtained. If this approval is not obtained, the Department of Public Welfare will withhold depreciation, interest, and all other operating expenses, that is, *All* financial requirements associated with that project or service.

F. Public Accountability

The Minnesota Data Practices Act guarantees providers and the public access to full and complete information regarding DPW's analyses of rate increase requests and the basis for the Department of Public Welfare decisions.

G. Appeals Mechanism

The hospital may appeal a decision of the Department of Public Welfare relating to alleged violation of due process and relating to questions of fact pursuant to Minnesota Statute 15.0418.

The hospital's rate must be reviewed in accordance with the process and principles established under the rate review system as herein described.

The hearing examiner shall make recommendations to the Commissioner who shall issue a final decision. Appeal of the Commissioner's order may be pursuant to Minnesota Statutes, Section 15.0424. The appellant hospital shall file a notice of "intent to appeal" within ten calendar days after the Department of Public Welfare has rendered its decision in writing to the hospital.

Rate decisions of the Department of Public Welfare shall be operative during the time that such decisions are being contested through the appeals mechanism. However, the hospital's rates shall be adjusted retroactively if the appeal is successful.

H. Evaluation

Methods of evaluation derive from the Department's staff monitoring role, the opportunity for program audit of rate review records by the State of Minnesota or by the United States Department of Health and Human Services. Sample hospitals may be analyzed for comparison of amounts of prospective versus retrospective payments if requested by the Department of Health and Human Services. These hospitals shall prepare a cost report after year end, which DPW shall audit. An aggregate comparison of the payment amounts under the two mechanisms shall be made, and if necessary, used as a basis for improving the determination of prospectively determined rates.

I. Provider participation

Assurance of participation is based on the commitment of the program to assure that hospital services of high quality are available to Medical Assistance recipients. All of Minnesota's hospitals participate in this program, and the prospective rate determination program will include *all* of these hospitals unless a facility elects to withdraw from the Medical Assistance Program.

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