REPORT ON LITIGATION

This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.

The last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: 1) "the department appealed", 2) "the department has not appealed but has filed a notice of nonacquiescence" or 3) "the department has not appealed" (In this case the department has acquiesced to Commission's decision).

The following decisions are included:

Income and Franchise Taxes

Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue
Carol Candee vs. Wisconsin Department of Revenue
Domain International Sales Corp. vs. Wisconsin Department of Revenue
Wisconsin Department of Revenue vs. Eugene Dowty
Andrew F. Fallon vs. Wisconsin Department of Revenue
Frederick R. Hardt vs. Wisconsin Department of Revenue
Thomas E. Hildebrandt vs. Wisconsin Department of Revenue
Gerald R. Hoeppner vs. Wisconsin Department of Revenue
Koenig & Lundin, S.C. vs. Wisconsin Department of Revenue
Madison Gas and Electric Company vs. Wisconsin Department of Revenue
NCR Corporation vs. Wisconsin Department of Revenue
Howard U. Taylor, Margaret T. Taylor, Wayne Thomas Feyereisen, Frances C. Feyereisen, James W. McCarville, Karen Beth McCarville, Michael E. Fairfield and Donna J. Fairfield vs. Dennis J. Conta, Individually and as Former Secretary of the Wisconsin Department of Revenue, and Mark E. Musolf, Individually and as Secretary of the Wisconsin Department of Revenue

Sales/Use Taxes

Boggis-Johnson Electric Company vs. Wisconsin Department of Revenue
Feedmobile, Inc. vs. Wisconsin Department of Revenue
A. F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue
Marquette University vs. Wisconsin Department of Revenue
Mining Equipment Mfg. Corp. vs. Wisconsin Department of Revenue
Mushel & Mushel vs. Wisconsin Department of Revenue
The Mylrea Company, Inc. vs. Wisconsin Department of Revenue
Servomation Corporation, Successor to Servomation of Wisconsin, Inc. vs. Wisconsin Department of Revenue

Withholding

William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, et. al.

Gift Tax

Anna Gerovac and Peter Gerovac vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

Business and Institutional Furniture, Inc, vs. Wisconsin Department of Revenue (Circuit Court of Milwaukee County, May 29, 1981). This is an appeal of a decision of the Tax Appeals Commission (see WTB #20) which imposed franchise taxes on Business and Institutional Furniture, Inc. for the years 1973, 1974 and 1975, based on s. 71.07, Wis. Stats., and Wisconsin Adm. Code Section 2.39.

The taxpayer's principal place of business was in Wisconsin. Business and Institutional Furniture, Inc. was engaged in the business of mail order sales to various institutions and businesses.

During the taxable years 1973, 1974 and 1975, taxpayer did not own any factories and manufactured no goods. All goods sold were purchased from suppliers. Taxpayer had offices in Milwaukee, Atlanta and Los Angeles. Each of the three offices handled sales to purchasers located in designated states. Sales were made to purchasers in every state in the nation. Except for small amounts of shipments from a Milwaukee warehouse and a California warehouse, all goods sold were shipped directly from suppliers to purchasers.

In filing Wisconsin income/franchise tax returns for the years 1973, 1974 and 1975, taxpayer did not include in the Wisconsin sales allocation factor those sales handled by its Milwaukee office which were shipped from third parties located outside Wisconsin to purchasers located outside Wisconsin. These orders came into taxpayer's Milwaukee office by mail or telephone. The orders were written up by taxpayer's employes and sent to the appropriate supplier. When the goods were shipped by the supplier to the purchaser, taxpayer received an invoice from the supplier. Taxpayer then billed its customers. If an order was received in Milwaukee from the purchaser located in a state which was handled by taxpayer's Atlanta or Los Angeles office, the order was referred to the office handling that state.

The issue in this case is whether s. 71.07 (2) (c) 5, Wis. Stats., authorized the creation of Wisconsin Adm. Code Section 2.39 (5) (c) (7).

Wisconsin Statute 71.07 (2) (c) 5 reads as follows:

> "If the income of any such person properly assignable to the state of Wisconsin *cannot be ascertained with reasonable certainty by either of the foregoing methods,* then the same shall be apportioned and allocated under such rules and regulations as the department of revenue may prescribe." (Emphasis supplied)

The Circuit Court found that income in this case can be ascertained with reasonable certainty and there is no need for a rule governing this situation and in fact no statutory authority for such rule. The Court held that the "gap" created by the statute should be closed by legislation rather than by rule.

The department has not appealed this decision.

Carol Candee vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March

10, 1982). The issue in the case is whether Carol Candee realized a taxable gain as a result of the transfer of appreciated real property to her former husband pursuant to a stipulated divorce property settlement.

Carol Candee (formerly Carol Gregory) was divorced from George Gregory on a judgment that was entered on October 9, 1973, in the Circuit Court for Fond du Lac County.

The parties entered into a written stipulation whereby the plaintiff (Carol Candee) and defendant (George Gregory) were both denied alimony; the homestead was awarded to Carol together with household furniture, furnishings and equipment; George was awarded all right and title and interest to the Butler Apartments in Fond du Lac; Carol shall be responsible for payments of all mortgage insurance and taxes on the homestead at 295 East 19 Street; George shall be responsible for payment of all mortgage and other indebtedness in connection with the Butler Apartments; George was awarded property at 65-67 South Main Street, Fond du Lac, Wisconsin, and shall hold Carol harmless in connection with any and all mortgage, interest and taxes and other expenses; George was awarded all equity, interest and assets in and to Terry Hearing Aid Service at 45 Sheboygan Street, Fond du Lac, Wisconsin, and shall hold Carol harmless in connection with any and all indebtedness in connection therewith.

At the time of the divorce the Butler Apartments were valued at $235,000 subject to mortgage of $200,000; the residence was valued at $28,400 subject to a mortgage of approximately $15,000; George Gregory had no equity in his one-half interest in rental property on South Main Street, Fond du Lac, Wisconsin; and the parties own various items of household furniture and furnishings, a 1972 Corvette and 1969 Oldsmobile, plus equity from the sale of their prior residence at 827 Ellen Lane, Fond du Lac, Wisconsin.

Did taxpayer's transfer to her former husband of appreciated real property jointly held with him, pursuant to a stipulated divorce property settlement, in excess of 50% of the aggregate net fair market value of the real property jointly held by the parties, together with her being removed as an obligor under the mortgage covering a parcel which she transferred, result in a 1973 taxable gain to her for Wisconsin income tax purposes?

The Commission held that the taxpayer's transfer to her former husband of appreciated real property jointly held with him, and her being removed as an obligor under the mortgage covering that property, pursuant to a stipulated divorce property settlement, in excess of 50% of the aggregate net fair market value of the real property jointly held by the parties, resulted in a 1973 taxable gain to her for Wisconsin income tax purposes.

The taxpayer has not appealed this decision.

Domain International Sales Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). During the years 1973 through 1975, the taxpayer, Domain International Sales Corp., a Minnesota corporation, was a wholly-owned subsidiary of Domain Industries, Inc., a Wisconsin corporation located in New Richmond, Wisconsin. The issue for the Commission to determine was whether the taxpayer, Domain International Sales Corp., was subject to the Wisconsin franchise tax provision as assessed for the years under review or if the income at issue be taxed to Domain Industries, Inc. and not Domain International Sales Corp.

The taxpayer qualified as a domestic international sales corporation (DISC) under Sections 991 et seq, of the Internal Revenue Code of 1954. Domain Industries, Inc. was a Wisconsin corporation engaged in the business of manufacturing and selling packaging machinery and animal feed and growing, raising and processing turkeys. The main offices of Domain Industries, Inc. are located in New Richmond, Wisconsin. Two if its packaging machinery plants, a feed mill and farmland property are located in New Richmond, Wisconsin. It also owns facilities in Menomonee, Wisconsin, and in the states of Iowa and Minnesota and in Hamburg, Germany and Tokyo, Japan. The officers of the taxpayer were also officers of the parent corporation, and such officers were residents of Wisconsin.

On April 26, 1972, taxpayer entered into a written agreement with its parent company whereby taxpayer would act as a commission agent for export sales. Taxpayer maintained its own bank account and separate books and records. It had no employees on its payroll. Instead it used employees of its parent manufacturing company based in Wisconsin to handle its transactions.

The commission income received by taxpayer pursuant to the written agreement was reported for federal income tax purposes on Form 1120-DISC in the following amounts for years in questions:

	Fiscal Year Ended January 31,		
	1973	1974	1975
Commission income	$60,585	95,456	160,893

Domain International Sales Corp. reported the same amounts as net income for Minnesota income tax purposes for the fiscal years ended January 31, 1973 and 1974, however no tax liability resulted therefrom. The commissions received by the taxpayer from its parent company were deducted from gross income on the Wisconsin tax return filed by the parent company. During these years the transactions of the taxpayer were conducted in Wisconsin.

The Commission held in favor of the department. The Commission held that during the fiscal years ended January 31, 1973 through January 31, 1975, the taxpayer was a business corporation "exercising its franchise or doing business in this state in a corporate capacity" within the meaning of s. 71.01 (2), Wis. Stats. The Wisconsin franchise and income tax law makes no provision for exempting from taxation the net incomes of domestic international sales corporations (DISCs) during this period.

The taxpayer has appealed this decision to the Circuit Court.

Wisconsin Department of Revenue vs. Eugene Dowty (Circuit Court of Sheboygan County, February 24, 1982). For the tax year 1975, Eugene T. Dowty itemized his deductions for state income tax purposes (having taken the federal standard deduction for federal income tax purposes), and received a refund from Wisconsin of $356, which he

did not report as income in tax year 1976. For 1976, Mr. Dowty again itemized his deductions for state income tax purposes only, and received a $589 refund from Wisconsin, which he again did not report as income in tax year 1977. The department issued a notice of additional tax due for the two unreported state refunds.

The Tax Appeals Commission held in favor of the taxpayer on this issue (see WTB #20). The Commission held that since Wisconsin has no add back modification for such refunds, the refunds were not taxable income for Wisconsin purposes.

Sec. 71.02 (2) (a), Wis. Stats., provides that as used in ch. 71, . . . "federal adjusted gross income" (means) taxable income or adjusted gross income as determined under the internal revenue code or, if redetermined by the department as determined by the department under the internal revenue code . . ."

The Circuit Court held in favor of the department. Section 71.02 (2) (a), Wis. Stats., does not bind the department to the amount of federal adjusted gross income reported by the taxpayer on his federal return, rather, it allows the department to recompute or redetermine a taxpayer's federal adjusted gross income, using the Internal Revenue Code. Having received the benefit of the state income tax deductions for Wisconsin purposes, he was required to report the state tax refunds as income in 1976 and 1977 on the state income tax returns. Section 71.02 (2) (a), Wis. Stats., allows the department to redetermine, for state purposes, taxpayer's federal adjusted gross income, considering that, just as the Internal Revenue Code would have required taxpayer to report the state refunds on his federal return if he had itemized for federal tax purposes, the taxpayer must report for state tax purposes the refund of state taxes received as a result of his claiming an itemized deduction of state income taxes on his state return. When taxpayer enjoys the benefit of a tax deduction, he is required to report that benefit as income in the year it is recovered or refunded.

With the tax benefit rule being a part of the Internal Revenue Code, it was properly used by the department in redetermining Mr. Dowty's federal adjusted gross income in order to reach his Wisconsin adjusted gross income, as defined by s. 71.02 (2) (e), Wis. Stats. The modifications in ss. 71.05 (1) and (4), Wis. Stats., are specifically listed because they have no counterpart in the Internal Revenue Code, and therefore, are not all inclusive. These modifications are not all inclusive, because the department is allowed to use the Internal Revenue Code to redetermine the federal adjusted gross income.

The taxpayer has not appealed this decision.

Andrew F. Fallon vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 16, 1982). Andrew Fallon filed a 1975 resident Wisconsin income tax return with the department. On Fallon's Wisconsin income tax return he subtracted in computing his Wisconsin total income, $46,379 reported on his 1975 federal income tax return as the taxable gain from the sale of Illinois real estate subject to Illinois income tax. On January 7, 1980 the department issued an office audit determination and worksheet, assessing additional income tax to the taxpayer based on his gain on the sale of the Illinois real estate.

During the year 1960, the taxpayer inherited 36 acres of farmland and during the year 1969 he inherited 35 acres of farmland. Both properties were located in Illinois. On December 11, 1974 Fallon and others entered into a sales agreement for purposes of selling such property, possession of which was given to the buyer on March 1 and the transaction was closed on October 1, 1975, for a sales price of $133,740. Fallon's total cost basis in said properties for 1975 federal income tax purposes was $40,983, and his net gain for 1975 federal income tax purposes under Section 1231 of the Internal Revenue Code was $92,757, fifty percent of which, or $46,379 of which, was federally taxable. Fallon filed a 1975 nonresident Illinois income tax return which reflected a payment of $1,419 income tax to Illinois based on his gain on the sale of the property, which payment was duly credited by the department in its assessment.

The issue in this case is whether the taxpayer's basis in the Illinois property sold was, for purposes of s. 71.07 (1), Wis. Stats., as the department contended, that determinable under the Internal Revenue Code ($40,983), or, as the taxpayer contended, the fair market value of the property as of January 1, 1975 ($133,740), when the amendment to s.71.07 (1), Wis. Stats., rendering the transaction taxable became effective. Section 471m of Chapter 39 of the Laws of 1975 amended s. 71.07 (1), Wis. Stats., to read, in part, as follows:

> "All income or loss of resident individuals. . . shall follow the residence of the individual. . . ."

Section 735 (6) of Chapter 39 provided in part as follows:

> " (n) Situs of Income. The treatment of sections. . . 71.07 (1). . . of the statutes by this act shall be applicable only to the reporting of income for the calendar year 1975 and corresponding fiscal year and thereafter."

The Commission held that the basis of Fallon's Illinois real property which he sold in tax year 1975 for purposes of s.71.07 (1), Wis. Stats., is the basis under the Internal Revenue Code incorporated into Wisconsin's individual income tax for the tax year by s. 71.02 (2) (b) 1, 1975 Wis. Stats.

The taxpayer has not appealed this decision.

Frederick R. Hardt vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 22, 1982). This is an appeal of the department's determination that the taxpayer, Frederick R. Hardt, was domiciled in Wisconsin during the period April 12, 1973 to October 16, 1975. Taxpayer lived in Wisconsin with his parents and attended high school in Lake Geneva, Wisconsin. Hardt later attended the University of Wisconsin as both an undergraduate and law student. In June of 1972, the taxpayer graduated from the University of Wisconsin law school and was admitted to the practice of law in Wisconsin under the diploma privilege. On June 18, 1972 Hardt entered the United States Navy, and was assigned to the Judge Advocates Corps at Newport, Rhode Island

where he remained during the entire period in dispute.

On April 12, 1973, while visiting his brother in Florida on a two week leave, Hardt:

1. registered to vote in Florida,
2. surrendered his Wisconsin driver's license, and obtained a Florida driver's license, and
3. transferred his Wisconsin auto registration to Florida.

Upon leaving Wisconsin in 1972, the taxpayer had closed out his Wisconsin bank account and opened one in Newport, Rhode Island. Taxpayer did not open a bank account in Florida.

Upon arriving in Rhode Island, taxpayer resided in furnished bachelor quarters provided by the Navy until his marriage in April, 1973, when he and his wife moved into an apartment. During the entire period involved, taxpayer's address of record with the U.S. Navy was Rt. 4, Lake Geneva, WI.

Hardt retained his membership in the Wisconsin Bar Association during his entire tour of duty. He was not a member of any other State Bar Association, and did not apply for admission to practice law in Florida.

During the entire period in dispute the taxpayer traveled to Florida on only two occasions, spending a total of three weeks there, residing with his brother. During this period, Hardt also returned to Wisconsin twice. Upon discharge from the U.S. Navy (on or about October 15, 1975) the taxpayer returned to Wisconsin and accepted a position with a Lake Geneva law firm.

Taxpayer alleged that in April, 1973 he relinquished his Wisconsin domicile and established a new one in Florida, and, thus is not subject to Wisconsin income taxation during the years in dispute.

The Commission held in favor of the department. During the period involved the taxpayer did not successfully establish a new domicile in Florida, or any other state. A taxpayer cannot abandon his Wisconsin domicile until he has re-established a new domicile in another state.

The taxpayer has appealed this decision to the Circuit Court.

Thomas E. Hildebrandt vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). The issue in this case is whether a transfer by a husband to a wife of full title in an appreciated parcel of real estate held in joint tenancy during the marriage, such transfer being made pursuant to a court-imposed divorce judgment making a final division of the marriage estate, creates taxable income to the husband.

Thomas and Kathleen Hildebrandt were divorced in June of 1978. Pursuant to the divorce decree, Mr. Hildebrandt was ordered to quitclaim his interest in the residence of the parties to Kathleen Hildebrandt, which he did. The basis of the tax assessment was the fair market value of $41,000 for the residence as of the date of quitclaiming. There was an adjusted basis of $21,650 in the residence, resulting in a total gain of $19,650, of which the department assessed $9,675 against Mr. Hildebrandt as his one-half interest. The property had been owned in joint tenancy with right of survivorship until it was terminated by quitclaim deed in 1978.

By the terms of the divorce judgment, jointly owned property of the parties was divided unequally with taxpayer's spouse receiving, in lieu of alimony, all household furniture, furnishings, and appliances, a 1974 Mercury Comet automobile, and full title to the family residence. Taxpayer received a 1971 Chevelle Malibu automobile and all recreational equipment and tools.

Mr. Hildebrandt did not dispute the amount of gain assessed by the department, or the related calculations, but instead limited his appeal to the department's authority under the law to assess additional income based upon the Wisconsin Supreme Court Decision in Department of Taxation v. Siegman, 24 Wis. 2d 92 (1964).

The Commission held that the taxpayer realized a gain as a result of the transfer of his interest as a joint tenant in the family residence to his former wife, pursuant to a divorce judgment which ordered the taxpayer to quitclaim his interest in the family residence of the parties to his former wife.

The taxpayer has not appealed this decision.

Gerald R. Hoeppner vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 22, 1982). The issue in this case is whether the taxpayer's 1978 mileage expense for traveling from his home in Milwaukee to a construction site in Port Washington, Wisconsin is a nondeductible commuting expense or a deductible transportation expense. During the year 1978, Hoeppner was employed by the Crichton Corporation, a Milwaukee based construction company. During the year 1978, Hoeppner resided in the city of Milwaukee.

The services performed by the taxpayer for the Crichton Corporation related in large part to relining boilers at electric power generating plants. The services were performed at various construction sites, not on the premises of the Crichton Corporation in Milwaukee. He worked at a number of job sites during 1978, including Port Washington, Oak Creek, A.O. Smith, Sheboygan, the Amp Company, and Milwaukee Drop Forge Company. He usually received his work assignments over the telephone, but could be "pulled off" a job at any time to go to another job site. Hoeppner was a member of a labor union, and the union contract with construction companies, including the Crichton Corporation, provided for payment of travel expenses by the construction company when union members traveled to job sites beyond a five-county area. Milwaukee and Ozaukee counties are within the five-county area where the construction firms did not pay travel expenses. For work beyond the five-county area, construction companies were obligated to pay travel expenses.

Hoeppner drove his own car at his own expense from his home in the city of Milwaukee to various job sites, including the Port Washington power plant located in Ozaukee county. Taxpayer worked at the Port Washington construction site for 130 days during 1978. On his 1978 income tax return he claimed mileage expenses for traveling from the Milwaukee county line to Port Washington at the rate of 12 miles one way, in other words, 24 miles per day for 130 days.

The Commission held that the taxpayer's travel expenses were nondeductible personal expenses in-

curred by the taxpayer in commuting from his home to his place of employment. Commuting expenses are not allowable as deductions under the provisions of Section 212 IRC (1954) as interpreted by Internal Revenue Regulation 1.212-1 (f).

The taxpayer has appealed this decision to the Circuit Court.

Koenig & Lundin, S.C. vs. Wisconsin Department of Revenue (Circuit Court of Marathon County, February 23, 1982). Koenig & Lundin, S.C. appealed a decision of the Wisconsin Tax Appeals Commission in which the Commission ruled that the taxpayer was not entitled to a depreciation allowance for tax files it received when it purchased a Wausau accounting practice.

Fred Lundin, the sole stockholder of Koenig & Lundin, S.C., purchased the accounting practice in December, 1975. When Lundin become owner, he acquired among other items, 1,211 individual tax files and 546 corporate tax files. Each file contained one year's records for one client, and consisted of information which could be useful if, for instance, there were any tax audits or disputes, amendments of tax returns, carrybacks of losses, etc.

The issue in this case is whether these client files can be depreciated for corporate income tax purposes. In the purchase agreement no specific value was placed on the files, nor were the files even described as an asset. Nonetheless, the taxpayer contended that a very substantial portion of the purchase price should be held attributable to the aqcuisition of the files. The taxpayer contended that both the cost and the useful life can be estimated with reasonable accuracy and, therefore, a depreciation allowance should be allowed.

Section 167 (a) of the Internal Revenue Code provides that generally a reasonable deduction can be taken for the exhaustion, wear and tear of property held for the production of income. However, Tax Regulation 1.167 (a) -3 does not permit the depreciation of goodwill. Also, in Rev. Rul. 69-311 the Internal Revenue Service ruled that the purchaser of an accounting firm was not entitled to a deduction for amortization or depreciation of the client accounts it acquired, but which were subsequently terminated because of a client's death or other reasons.

The Circuit Court held that the Commission was correct in concluding that the client files do not have an ascertainable cost basis over and above their value as goodwill and that the files do not have an ascertainable limited useful life. Although the taxpayer did make a persuasive showing that the files would have little value after five years, the Court concluded that the customers might continue to use the taxpayer's services after the five years expired, and therefore the useful life of the files could not be accurately estimated.

The taxpayer has not appealed this decision.

Madison Gas and Electric Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 23, 1982). The issue in this case is (1) whether, as the taxpayer claims, ss. 71.04 (2b) and 71.02 (1) (c) of the 1969 Wisconsin Statutes do not require that the the Kewaunee Nuclear Power Plant (for which the waste treatment or pollution abatement plant and equipment was purchased or constructed) be completed and in operation in the year for which the deduction under these sections is claimed or (2) whether, as the department claims, the taxpayer would not be entitled to the deduction for the pollution abatement plant and equipment purchased or constructed for the plant until 1973 since the plant must be operating and in service and thus qualify for depreciation deductions before the deduction under ss. 71.04 (2b) and 71.02 (1) (c) of the Wisconsin Statutes of 1969 may be allowed.

Taxpayer filed an amended Wisconsin Form 4 (Corporation Franchise or Income Tax Return) for the calendar year 1970 and elected to deduct the cost of pollution abatement or waste treatment plant or equipment which it purchased or constructed and accrued during the year 1970 in the amount of $571,423. The department informed Madison Gas and Electric Company that its amended 1970 Form 4 had been treated as a claim for a refund and that such refund in the amount of $38,730.34 had been denied. On October 28, 1976 the department notified the taxpayer that its application for a redetermination of its claim for refund for the calendar year 1970 was denied.

Taxpayer has maintained its books and records on an accrual basis and has reported its income on the basis of the calendar year. In pursuance of its obligation to provide adequate electrical power to people living in the vicinity of Madison, Wisconsin, the taxpayer, along with Wisconsin Power and Light Company and the Wisconsin Public Service Corporation acquired real estate and commenced the construction of the Kewaunee Nuclear Power Plant. Taxpayer has a 17.8 percent undivided interest in the Kewaunee Nuclear Power Plant which it held with Wisconsin Power and Light and Wisconsin Public Service Corporation as tenants in common.

During the calendar year 1970, the companies purchased or constructed waste treatment or pollution abatement plant and equipment in connection with the plant. The share of the cost of such plant and equipment incurred on behalf of the taxpayer in calendar year 1970 was $567,064. In addition, Madison Gas and Electric Company also incurred expenses in the amount of $4,359 for waste treatment or pollution abatement plant and equipment purchased or constructed in 1970 in connection with other plants which were operating in 1970. The department agreed that said $4,359 is deductible for the taxable year 1970.

In accordance with its accrual method of accounting, the taxpayer accrued the amount of $571,423 as its cost of waste treatment or pollution abatement plant and equipment purchased or constructed by it in the calendar year 1970. In the calendar year 1970, a cash disbursement was made by the taxpayer, either directly or through its agent, in the amounts accrued by it. Such disbursements were in satisfaction for its liability for the cost of waste treatment or pollution abatement plant and equipment. Madison Gas and Electric Company elected, in its amended return, to deduct in the calendar year 1970 the cost of all of the waste treatment or pollution abatement plant and equipment purchased or constructed by or on its behalf in calendar year 1970. The amount of the deduction so claimed was the amount accrued by the tax-