the 4% tax would not apply to the following transfers:

(1) The transfer of property to a corporation upon its organization solely in consideration for the issuance of its stock; and

(2) The transfer of property to a corporation, solely in consideration for the issuance of its stock, pursuant to a merger or consolidation.

Example 1 — Exchange of Assets and Related Liabilities Solely for Stock.

Transfers of property to a corporation solely in exchange for the first issue of stock in a newly organized corporation are not taxable, even though the transferor holds a Seller's Permit. For example, assume that Corporation A which has several separate operating divisions, each of which is engaged in an unrelated business, transfers all of the property and the related liabilities of one of its operating divisions to a newly formed Corporation B (at the time it is organized) solely in exchange for its capital stock. This transfer is exempt under s. 77.51 (4g) (a).

Example 2 — Exchange of Assets and Related Liabilities for Stock and Other Consideration.

If the factual conditions are the same as example 1 except that Corporation A receives Corporation B's capital stock plus other consideration (such as cash or bonds), sales tax is due on the other consideration based on the following formula:

$$\frac{\text{Other Consideration}}{\text{Total Consideration}} \times \text{Sales Price of Taxable Personalty Transferred}$$

For example, assume that A transfers the following assets to B, a new corporation, with B assuming all of A's liabilities:

Assets Transferred:			Consideration Received:	
Land and Buildings	$110,000		Cash	$75,000
Less: Mortgage	30,000	$80,000	Capital Stock	75,000
Inventory (For Sale)	60,000			
Less: Accounts Payable	20,000	40,000		
Furniture and Fixtures (Personalty)	30,000	30,000		
Net Assets Transferred		$150,000	Total Consideration	$150,000

Sales Tax Computation:

$$\frac{\text{Cash}}{\text{Total Consideration}} \times \text{Taxable Personalty} = \text{Taxable Measure}$$

$$\frac{\$75{,}000}{\$150{,}000}\ (50\%) \times \$30{,}000 \text{ (furniture and fixtures)} = \$15{,}000 \text{ Taxable}$$

Example 3 — Merger or Consolidation.

The transfer of assets and related liabilities to a corporation solely in exchange for its capital stock pursuant to a merger or consolidation are nontaxable transfers, even though the transferor holds a Seller's Permit. If consideration other than capital stock (e.g., cash or notes) is issued to the transferor the transaction is subject to the tax, to the extent taxable personal property is involved in the transaction. The formula used in example 2 to determine the taxable measure should also be used in a merger or consolidation, if consideration other than capital stock is issued.

NOTES: (1) These examples and formulas do not apply whenever the liabilities transferred exceed the basis of the property transferred by the transferor. If a tax applies to motor vehicles transferred, the purchaser must pay the tax due when the vehicle is registered with the Wisconsin Department of Transportation.

(2) This tax release replaces the tax release entitled "New Corporations" on page 7 of the January 1978 *Wisconsin Tax Bulletin.* The policies set forth in this release apply to all periods open to adjustment under the statute of limitations in s. 77.59, Wis. Stats.

REPORT ON LITIGATION

(This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. In cases which decisions adverse to the Department's position are rendered, it will be noted whether or not the Department acquiesces or will appeal.)

Midcontinent Broadcasting Company of Wisconsin, Inc. v. Department of Revenue (Wisconsin Court of Appeals, District IV, August 28, 1979) The taxpayer, who operated two television broadcasting stations, obtained a seller's permit to sell phonograph records advertised on its television stations. The phonograph records were advertised on the television stations as a service to viewers. During the 4 year period after obtaining a seller's permit (1967-1970), the taxpayer reported taxable receipts from record sales of about $27,000, compared to nontaxable radio and television broadcasting receipts of almost $8 million.

In October 1970, while it had a seller's permit, the taxpayer sold all the tangible and intangible business assets used in the operation of its television broadcasting stations. The tangible personal property included in the transaction amounted to about $775,000, and the asserted sales tax on this amount approximated $31,000.

Among taxpayer's contentions was that the sale of its broadcasting assets was an exempt "occcasional sale." This phrase is defined in s. 71.51 (10) (a) as an isolated and sporadic sale of tangible personal property or taxable services where the infrequency, in relation to other circumstances, including the sales price and gross profit, support the inference that the seller is not pursuing a full-time or part-time vocation, occupation or business. Taxpayer contended that it held the seller's permit to sell records, not broadcasting equipment, and that the record sales for which it held a seller's permit were not made as part of its main business.

Taxpayer also contended that if the statute is not read as exempting the sale of its broadcasting station equipment, the statute violates (a) the federal constitution's interstate commerce clause and (b) the equal protection and due process clauses. The Department contended that under s. 77.51 (10) (a), Wis. Stats., this sale was taxable. The statute's last sentence reads, in part, "No sale of any tangible personal property or taxable service may be deemed an occasional sale if at the time of such sale the seller holds or is required to hold a seller's permit. . . ."

The Tax Appeals Commission denied taxpayer's petition for redetermination and ruled in favor of the Department. The Circuit Court affirmed the Commission's decision.

The Court of Appeals held in favor of the taxpayer. The Court stated that where a taxpayer is in a business (ex., television broadcasting) whose primary sales (ex., broadcast time) are exempt from sales tax requirements, and sells the assets of that business when it holds a seller's permit for reasons having no connection or only a remote connection to the business whose assets are being sold, the taxpayer is not a "seller" who "holds" a permit within the meaning of s. 77.51 (10) (a) defining "occasional sale". The Court concluded that the circuit court's holding was contrary to the legislative purpose to impose a sales tax on the sale of the business assets solely because the taxpayer held a seller's permit in connection with another activity only remotely connected to its business.

The Department has appealed this decision.

Sister Mary Joanne Kollasch, et. al. and Sisters of St. Benedict, of Madison, Wisconsin vs. David W. Adamany, Secretary of Revenue (Circuit Court of Dane County, Case No. 142-256, September 7, 1979). The Sisters of St. Benedict ("taxpayer") is a religious corporation organized exclusively for religious and charitable purposes. Taxpayer commenced this judicial proceeding seeking a declaratory judgment declaring that it is not required to obtain a seller's permit and report sales tax based on its gross receipts for the activities it engages in. Primarily, this permit would be required to account for the sales tax on meals served to members of organizations which are not exempt from paying sales tax.

Taxpayer owns a building at which it rents out its facilities. These facilities include board and room, meeting rooms, and the availability of projectors, screens and tape recorders; space is provided for business and professional conferences, training sessions, weekend seminars, and other meetings which are both religious and non-religious in nature. The conferences and meetings are held under agreements made in advance by which the sponsor of the meeting promises that agreed rates will be paid for the services and facilities used.

Taxpayer contended that none of its work is done for gain or profit, but that its activities essentially are religious in nature. The Sisters eat with the participants in a common dining room where meals are served, and their work is essentially prayerful and ecumenical in nature.

Taxpayer also contends that serving meals at the center is both religious and secular, and that the purpose of the center is for study and religious meetings, without commercial taint. Evidence in the record indicates that several of the business groups which use the center are not involved in any religious activities of the Sisters. The sharing of the meals did provide opportunity for spiritual dialogue, but there was no testimony by any non-religious participant that such dialogue actually occurred.

The court upheld the Department's position that taxpayer's meal sales were subject to the sales tax. The sales tax imposition statute (s. 77.52 (1), Wis. Stats.) was held applicable to the sale of meals by taxpayer to groups not exempt from paying the tax. The court further held that the sale of meals in question did not constitute an exercise of religion protecting these sales from the sales tax through the freedom of religion provision of the first amendment to the U.S. Constitution.

The taxpayer has appealed this decision.

Gerhard Van Beck vs. Department of Revenue (Wisconsin Tax Appeals Commission, September 14, 1979). Taxpayer was a sole proprietor who operated a vending machine business and held a seller's permit. On July 1, 1978, taxpayer sold his business to his son who began operating under a new seller's permit the same date.

Taxpayer's wife acted as bookkeeper and secretary for taxpayer's business. On May 18, 1978, she notified the Department by ordinary mail that taxpayer's seller's permit, identifying the number, was to be cancelled and surrendered as of June 30, 1978. Included with that letter was the son's application for a seller's permit. The Tax Appeals Commission's findings of fact do no indicate whether or not taxpayer's seller's permit was, in fact, ever surrendered to the Department.

The Department assessed sales and use taxes on the gross receipts from the sale of taxpayer's business assets. The Department contended that taxpayer had not properly surrendered his seller's permit by that date and that because he held it at the time of the sale, the sale did not qualify as an occasional sale.

The Tax Appeals Commission stated that on the date of the sales tax assessment (July 1, 1978), taxpayer did not hold and was not required to hold a seller's permit. Therefore, the Commission concluded, any sale on that date of taxpayer's business equipment qualifies as an occasional sale and is not subject to the sales tax.

The Department has appealed this decision.

Bergliot G. Bonneville Estate vs. Department of Revenue (91 Wis. 2d 726, Wisconsin Supreme Court, October 9, 1979). Decedent suffered a stroke on November 18, 1974 and died on January 6, 1975. Her son was appointed personal representative of her estate in February 1975. On April 15, 1975, the personal representative filed a homestead credit claim for the year 1974 on behalf of the deceased.

The Department denied the claim on the ground that s. 71.09 (7) (b), Wis. Stats. requires a claim to be filed during the lifetime of the claimant and that death extinguishes the right to file for homestead credit. The Tax Appeals Commission sustained the Department's interpretation. The personal representative contended that the statute limiting filing of the credit to a claimant during the claimant's lifetime constitutes an unreasonable and arbitrary classification which violates the constitutional guarantee of equal protection of the laws.

The Supreme Court held in favor of the Department. The Court recognized that the issue was whether there is a rational basis for the classification and concluded that there was. The reasonable interpretation of the statute is that the Legislature intended the homestead credit law to grant relief to the claimant herself and accordingly required that the claimant must be alive during the year following the tax year for which the credit is claimed.

The Court stated that it is a policy decision for the Legislature to determine how long a claimant must live beyond the tax year during which the expenses qualifying for homestead credit were incurred in order to qualify for relief. There is no simple, precise, mathematical or logical way to determine the appropriate period of survival, wrote the Court. It stated that the Legislature probably chose the date of filing the claim as the date on which the claimant must be alive because the date of filing is a convenient one for purposes of administering the law. The Court concluded that this was reasonable.

Kearney & Trecker Corp. vs. Department of Revenue (91 Wis. 2d 746, Wisconsin Supreme Court, October 9, 1979). During the taxable years in issue (fiscal years ended September 27, 1964 to October 1, 1967), taxpayer was a Wisconsin corporation engaged in the business of manufacturing, selling and leasing precision machine tools. Taxpayer manufactured its machine tools in Wisconsin, the place of its general offices and principal place of business, and sold and leased its machine tools throughout the United States. Taxpayer's Wisconsin operations constituted an integral part of a unitary, multistate business.

During the years involved, rental income (less depreciation and commissions) from leased machine tools and profits and losses from the disposal of leased machine tools were treated by taxpayer as income or loss which followed the situs of the property from which they were derived. Taxpayer excluded these amounts from income subject to apportionment.

The statute involved was s. 71.07 (1), 1967 Wis. Stats., which read in part: "For the purposes of taxation income or loss from business, not requiring apportionment . . . shall follow the situs of the business from which derived. Income or loss derived from rentals . . . or from the sale of . . . tangible personal property shall follow the situs of the property from which derived. . . ."

The sole issue in the case is the tax treatment of the income which taxpayer received from the rental and subsequent sale of machines located outside Wisconsin. The question was: when a taxpayer is in the business of renting, manufacturing and selling tangible personal property, should income or loss derived from such rentals and from sales of the property previously rented be treated for tax purposes as business income subject to apportionment under s. 71.07 (2), 1967 Wis. Stats., or should it be treated as nonapportionable income which follows the situs of the property under s. 71.07 (1), 1967 Wis. Stats.?

The Department contended that taxpayer's reading of the statutes produced an absurd result. The Department's theory was that business income, which follows the situs of the business, includes such rental and sale income if the taxpayer is in the rental business, notwithstanding the out-of-state location of the rental property. The Department contended that if this interpretation were not followed, Wisconsin would not be able to tax income derived from products leased outside Wisconsin but manufactured in Wisconsin.

The Tax Appeals Commission and the Circuit Court of Dane County ruled in favor of the Department. The Wisconsin Supreme Court ruled in favor of the taxpayer.

The Supreme Court stated that the first 2 sentences of s. 71.07 (1), 1967 Wis. Stats., are clear and unambiguous. Income derived from the lease and subsequent sale of machine tools which have a situs other than in Wisconsin is income derived from the rental and sale of tangible personal property and follows the situs of the property from which derived. Such income is not income from business as defined in s. 71.07 (1), 1967 Wis. Stats.

The Court added that the power of Wisconsin to tax the income of the taxpayer was not in issue. The parties conceded that Wisconsin can constitutionally tax the income of taxpayer, a Wisconsin corporation domiciled in Wisconsin, regardless of its source. The issue in dispute was the proper interpretation of the then existing statute, and the Court held for taxpayer.

Jack McManus vs. Department of Revenue (91 Wis. 2d 682, Wisconsin Supreme Court, October 9, 1979). Taxpayer and his wife owned and lived on farmland in Dane County. Title to the land was held in joint tenancy. Taxpayer contributed all the money used to purchase the farmland. The gross income from the farm, except less than 5% from a beef cattle operation, came from cash rentals and federal payments designed to keep land out of production. Farm losses during the period 1969 to 1972 exceeded income.

Taxpayer claimed all the farm losses on his own income tax return. The Department contended that when gross income is derived from land ownership, as contrasted to the active operation and management of the land, the allocation of income and the right to take losses for income tax purposes must follow in proportion to the ownership of the joint tenants.

Both the Tax Appeals Commission and the Circuit Court for Dane County held for the Department. The Supreme Court also sustained the Department's position. It concluded that, as an incident of joint tenancy, rents and income in the nature of rents, as well as losses must be attributed to the joint tenants in equal amounts. Taxpayer was entitled to his proportionate (half) share of whatever income accrued from rents, and the losses he could take were limited to his proportionate (half) ownership.

Department of Revenue vs. Sterling Custom Homes Corp. (91 Wis. 2d 675, Wisconsin Supreme Court, October 9, 1979). Taxpayer prefabricated custom-built homes, ranging in price from $20,000 to $200,000, in Wisconsin. Taxpayer marketed the homes through 15 regional sales managers who worked with local builders, contractors and realtors. Customers purchased homes from a local builder, contractor or realtor and the building permit was normally issued in the name of the builder or contractor. Taxpayer's contracts were with the local builders and not the ultimate homeowners. The builders executed separate agreements with the homeowner and determined the eventual price to be paid for the home.

Taxpayer generally did not deal directly with the homeowner. The builder forwarded each customer's plans and specifications to taxpayer, which prefabricated the home in its manufacturing plant. Once a design was satisfactory, the builder and sometimes the homeowner specified in detail the materials to be incorporated in the house.

The builder prepared the house's foundation. Taxpayer prefabricated each house at its Wisconsin plant in a regular sequence. It first built the wall sections, then the deck and floor sections, the roof, and finally the interior and trim. The house packages fabricated by taxpayer did not include "mechanicals," such as plumbing, wiring, heating, and drywall. The builders hired subcontractors to perform that work.

When the foundation was completed and the builder was ready to erect the house, the taxpayer loaded the components in the sequence that conformed to the order that the components would be used at the job site. The components were delivered to the job site by the taxpayer's trucks and drivers. At the job site, the larger components were unloaded by crane.

The crane operators were hired by the builder, but were usually selected by one of the taxpayer's salespersons. The smaller components, such as trim, were unloaded by the taxpayer's employes and were placed in the portion of the house where they would be installed. Although the drivers' only defined on-site responsibility was to keep a report in respect to the erection, they often helped or supervised, because they were very familiar with the process.

The issue on appeal was whether taxpayer was (1) a contractor engaged in real property construction activities whose purchases of materials to incorporate into its homes was subject to the sales or use tax or (2) a retailer of parts of houses whose sales of such parts were subject to the sales tax.

Taxpayer contended that it was a contractor engaged in real property construction activities. The Department contended that taxpayer was not engaged in real property construction activities, but rather was a seller of tangible personal property in the form of building materials to builders and contractors.

The Tax Appeals Commission, the Circuit Court of Dane County and the Wisconsin Supreme Court held in favor of taxpayer. The Supreme Court affirmed the conclusion that taxpayer was a contractor and consumer of tangible personal property. Taxpayer was, in all respects but one, engaged in real property construction activities. The lone exception was that taxpayer conducted its activities at a factory, rather than at the building site. This single factor was not sufficient to alter the conclusion. Additionally, the taxpayer was substantially involved in the on-site erection process. Therefore, taxpayer was required to pay sales and use taxes on its purchases of tangible personal property and not required to pay sales tax on the sales of its product.