period applies to income, corporation franchise/income, withholding, sales/use, and gift taxes and homestead and farmland preservation credits.

2. **Deposit Amounts While Appeal is Pending in Appellate Bureau** (Chapter 221, Laws of 1979, Assembly Bill 1180, effective for appeals (petitions for redetermination) filed on or after November 1, 1980.)

   The Department of Revenue will notify any person who files a petition for redetermination that the person may deposit the amount of an additional assessment, including any interest and penalty, with the Department of Revenue at the time an appeal is filed, or at any time before the department makes its redetermination. Any deposited amount which is later refunded will bear interest at the rate of 9% per year.

   A person may also pay any portion of the assessment which he or she admits to be correct. Such payment shall then be considered an admission of the correctness of that portion of the assessment and may not be recovered in an appeal or any other action or proceeding.

   The new provisions in s. 20.855 (4) (a), 71.12 (1) (b) and 77.59 (6) (c) apply to appeals relating to income, corporation franchise/income, withholding, sales/use, and gift taxes and homestead and farmland preservation credit.

3. **Clarify Confidentiality Provisions** (Chapter 221, Laws of 1979, Assembly Bill 1180, effective April 30, 1980.)

   The confidentiality provisions are clarified relating to income, corporation, franchise/income, withholding, sales/use, gift, inheritance and estate taxes and homestead and farmland preservation credits.

   The new s. 71.11 (44) (c) 8 provides that a member of the board of arbitration established under s. 71.03 (3) or a consultant under joint contract with Minnesota and Wisconsin for the purpose of determining the reciprocity loss to which either state is entitled, may examine tax returns and related tax information under s. 71.11 (44).

   (NOTE: Chapter 221, Laws of 1979 also creates s. 72.06, effective April 30, 1980 to provide that any information the Department of Revenue receives on inheritance or estate tax returns, reports, schedules, exhibits or other documents or from an audit report is subject to the confidentiality provisions of s. 71.11 (44) (a) and (c) to (h). This provision in s. 72.06 is an exact duplication of Chapter 139, Laws of 1979 which became effective March 29, 1980.)

4. **Correct Erroneous Warrants Filed With Clerk of Court** (Chapter 221, Laws of 1979, Assembly Bill 1180, effective April 30, 1980.)

   If the Department of Revenue filed an erroneous warrant, the department will issue to the clerk of circuit court for the county in which the warrant was filed, a notice of withdrawal of the warrant. The clerk will then void the warrant and any liens attached by it.

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 following decisions are included:

Income and Franchise Taxes

Paul William Bandow vs. Wisconsin Department of Revenue

Kansas City Star Company vs. Department of Revenue

Kurz & Root Company vs. Wisconsin Department of Revenue

Milwaukee Mutual Insurance Co. vs. Wisconsin Department of Revenue

Anna K. Rees vs. Wisconsin Department of Revenue

Colin A. Regan vs. Wisconsin Department of Revenue

Erwin J. Thoenes vs. Wisconsin Department of Revenue

Wausau Homes Inc. vs. Wisconsin Department of Revenue

Sales/Use Taxes

Metalplate and Products Inc. vs. Department of Revenue

Wisconsin Department of Revenue vs. Trudell Trailer Sales, Inc.

Excise Taxes

Reinhart Institutional Foods Inc. vs. Dennis J. Conta, In His Capacity As Secretary of the Wisconsin Department of Revenue, and J.K. Leidiger, In His Capacity As Director of the Excise Tax Bureau of the Wisconsin Department of Revenue

APPEAL WITHDRAWN

In issue number 18 of the WTB it was reported that the Circuit Court (Branch 1) of Milwaukee County decision in the case of "Wisconsin Department of Revenue vs. Hide Service Corporation" had been appealed by the Department to the Court of Appeals. That appeal has now been withdrawn.

INCOME AND FRANCHISE TAXES

Paul William Bandow vs. Wisconsin Department Of Revenue, (Wisconsin Tax Appeals Commission, January 25, 1980.) During 1975 and 1976, taxpayer, Paul William Bandow, was a resident of Oshkosh, Wisconsin. The sole issue for the Commission to determine was whether the taxpayer should be allowed in the years 1975 and 1976 an exclusion for a scholarship or fellowship grant received from the Wisconsin Department of Health and Social Services.

In 1974, taxpayer entered into an employe training contract with the State of Wisconsin, Department of Health and Social Services for the primary purpose of training him in the field of psychiatry and attaining a certificate from the American Board of Psychiatry and Neurology, Inc. The contract contained the following provision:

"6. The Appointing Authority agrees to provide a Fellowship Grant of $42,726.00. The resident will be processed for payroll purposes as a limited term employe and will be paid on a bi-weekly basis as follows: First year, $13,714; second year, $14,242; third year, $14,770, divided into 26 bi-weekly paychecks."

During 1975 and 1976, taxpayer, a graduate of the medical school of the University of Georgia, was performing medical services for the State of Wisconsin under the Employee Trainee Contract for the State of Wisconsin at the Winnebago Mental Health Institute located near Oshkosh, Wisconsin. Taxpayer received limited benefits under the Employee Trainee Contract and was eligible for worker's compensation and unemployment compensation from the State of Wisconsin and further received 26 bi-weekly paychecks each year. He received vacation time and holiday time while under said contract. Taxpayer prescribed and administered drugs to patients at the Winnebago Mental Health Institute and performed other medical services for the State of Wisconsin while employed at the Institute.

The Commission concluded that the payments received by the taxpayer did not constitute income from a "fellowship grant" but were compensation for taxpayer's services.

Taxpayer has appealed this decision to Circuit Court.

Kansas City Star Company vs. Department of Revenue (Wisconsin Court of Appeals, March 4, 1980.) Taxpayer owned and operated the Flambeau Paper Mill in Park Falls, Wisconsin as a separate division from its only other division which published a daily newspaper in Kansas City, Missouri. The only business carried on in Wisconsin by taxpayer was its paper mill. The newspaper division and the paper mill division were entirely separate with separate operations, management, employes and properties. The books, records and accounts were entirely separate both for financial accounting and for Wisconsin tax purposes.

During the years just prior to 1969, taxpayer's management decided to expand its paper mill operations. Taxpayer decided that it could provide the necessary financing within the corporation at lower cost than borrowing from outside sources. The Wisconsin division provided about $2 million and the Missouri division transferred $7,842,000 of its funds in Missouri to the Wisconsin division's Wisconsin bank. The transferred funds were secured by bona fide notes signed by the Wisconsin division's management which bore interest at 5½% per year.

During the years 1969 through 1973, the Wisconsin division sent interest checks to the Kansas City Star Company in Missouri. In reporting its income from its Wisconsin division on a separate accounting basis, taxpayer claimed the interest payments as deductions from gross income under s. 71.04 (2), Wis. Stats. The Department disallowed the interest payments as deductions.

The Court of Appeals affirmed the Tax Appeals Commission and Circuit Court decisions which concluded that the taxpayer's intra-company payment of interest constitutes interest paid which is deductible under s. 71.04 (2), Wis. Stats. The interest expenses were properly allocable as expenses relating to Wisconsin operations under the separate accounting method used by taxpayer in reporting for Wisconsin franchise tax purposes.

The Department of Revenue has not appealed this decision.

Kurz & Root Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 3, 1980.) The taxpayer, Kurz & Root Company, is a corporation organized under the laws of the State of Wisconsin with its principal offices located in Appleton, Wisconsin.

Until 1966, the taxpayer's organization consisted of 3 divisions: one headquartered in Appleton, Wisconsin, one in Cedarburg, Wisconsin and one in California (hereafter, "Pacific Division"). The Pacific Division terminated its operations during the corporation's 1966 fiscal year.

During the years 1961 through 1964, the Pacific Division was engaged in manufacturing equipment for the U.S. Air Force under a contract entered into in 1960 with the federal government. Taxpayer and the U.S. government encountered differences of opinion concerning the government's requirements and the taxpayer's performance under the contract. These differences resulted in taxpayer's appeal to the Armed Services Board of Contract Appeals.

Under the settlement reached, the taxpayer received $404,745 in full settlement of its claim. The amount was received during taxpayer's fiscal year ending September 30, 1967. This was after the Pacific Division had terminated its operations. The amount was received by the taxpayer at its Appleton, Wisconsin office.

Taxpayer contended that the contract settlement amount was not subject to Wisconsin's franchise tax.

The Department contended that $309,479.23 of the settlement (82.1% per apportionment ratio for 1967) was taxable to Wisconsin in fiscal year 1967.

The Commission ruled that the settlement which was received at the Wisconsin office in its fiscal year 1967 (after taxpayer's Pacific Division had terminated its operations) is subject to Wisconsin's franchise tax law.

The taxpayer has appealed this decision to Circuit Court.

Milwaukee Mutual Insurance Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 19, 1980.) The taxpayer, Milwaukee Mutual Insurance Co., is a mutual insurance corporation organized under the laws of Wisconsin. Taxpayer timely filed a Wisconsin franchise tax return for the calendar year 1974.

For calendar years beginning after December 31, 1962, taxpayer has been subject to the Federal income tax on mutual insurance companies computed under Sections 821-825 of the Internal Revenue Code. Taxpayer has filed the required Federal income tax return for each of the calendar years 1963 through 1974. On its Federal income tax returns for each of the years 1963 through 1974, taxpayer established and maintained the Pro-

ɔction Against Loss (PAL) account ,rescribed by Section 824 (b). On the returns for such years taxpayer deducted from underwriting income and added to the PAL account the amounts required by Section 824 (a) and Section 824 (c) and subtracted from the PAL account and included in taxable income the amounts required by Section 824 (d). For 1963 through 1971, the amounts added to the PAL account exceeded the amounts subtracted therefrom so that there was a balance in the PAL account as of December 31, 1971 of $359,708.34.

For the years 1972, 1973, and 1974, $697,219.70 was deducted from underwriting income and added to the PAL account, thus increasing the balance in the PAL account to $1,056,928.04. For 1974, $1,056,928.04 was deducted from the PAL account and included in taxpayer's mutual insurance company taxable income for Federal income tax purposes, thus reducing the balance in the PAL account as of December 31, 1974 to zero. Such amount of $1,056,928.04 subtracted from the PAL account and included in axpayer's mutual insurance company taxable income for Federal income tax purposes for 1974 included the balance as of December 31, 1971 of $359,708.34. The only item in dispute was whether the $359,708.34 was includable in Wisconsin income.

The Commission held that (1) the $359,708.34 in question was earned prior to 1972, (2) the statutes operate prospectively only, unless a contrary intention is expressly stated or necessarily implied; there is no express or necessarily implied retroactivity in s. 71.01 (4) (a), and the Department of Revenue's application of s. 71.01 (4) (a) in this case improperly imposed retroactive taxation on the monies involved herein, and (3) the taxpayer is entitled to exclude the $359,708.34 added to its PAL account prior to 1972 and subtracted from said account in 1974 from its "Adjusted Federal Taxable Income" for the purposes of calculating its 1974 Wisconsin franchise tax liability under s. 71.01 (4) (a).

The Department of Revenue has appealed this decision to Circuit Court.

Anna K. Rees vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 25, 1980.) During the period involved in this case, Anna K. Rees was a resident of Wisconsin. The sole issue for the Commission to determine was whether the capital gains portion of a lump-sum distribution made to the taxpayer as the beneficiary under a profit sharing and savings plan was includable in Wisconsin taxable income for 1977.

Taxpayer's husband, Robert W. Rees, died on May 18, 1977 and the taxpayer was named as beneficiary under a profit sharing and savings plan of Western Electric Company, Inc., the decedent's employer. Of the lump-sum distribution, taxpayer received $45,345.19 representing the capital gain portion of the distribution and $14,273.87 representing the ordinary income portion of the distribution.

Pursuant to Section 402 (e) (4) (L), Internal Revenue Code, taxpayer elected to treat pre-1974 participation as post-1973 participation, thereby electing to have the capital gains portion of the lump-sum distribution be treated as ordinary income so that taxpayer could use the special 10-year averaging method of reporting for federal tax purposes. The above election was made on Internal Revenue Service Form 4972, attached to taxpayer's 1977 federal tax return.

Taxpayer included the amount of $14,273.87, representing the ordinary income portion of the lump-sum distribution, as an add modification on her 1977 Wisconsin income tax return but did not include the amount of $45,345.19 representing the capital gain portion of the distribution in her 1977 Wisconsin taxable income.

The instructions on federal Form 4972 state that if a taxpayer chooses to make the election to treat the capital gain portion of a distribution as ordinary income, the capital gain portion should not be separately stated on line 1 of Form 4972, labeled "capital gain portion" but that amount should be added to the amount to be entered on line 2 labeled "ordinary income".

The Commission concluded that in making the election under Sec. 402 (e) (4) (L), Internal Revenue Code, the "capital gain" portion of the lump-sum distribution became a part of the "ordinary income" portion of the distribution and as such should have been added to federal adjusted gross income as a modification under s. 71.05 (1) (a) 8, Wis. Stats., in arriving at 1977 Wisconsin adjusted gross income. Amounts properly reported on line 1, of the Internal Revenue Service Form 4972, should have been included on Schedule D of taxpayer's 1977 federal income tax return and thus were includable in 1977 Wisconsin taxable income as part of her 1977 federal adjusted gross income under s. 71.02 (2) (e), Wis. Stats., in conjunction with the modification prescribed in s. 71.05 (1) (a) 2, Wis. Stats. The entire amount of the lump-sum distribution made to taxpayer in 1977 under Western Electric Co., Inc.'s profit sharing and savings plan should have been included in her 1977 Wisconsin taxable income.

Taxpayer has appealed this decision to Circuit Court.

Colin A. Regan vs. Wisconsin Department of Revenue (Circuit Court of Dane County, March 20, 1980.) During the calendar year 1974, taxpayer was a resident of Wisconsin. Taxpayer was one of six joint venturers in the Ginger Creek Office Venture, a general partnership, and during 1974 he owned a 10% interest in said venture. The Ginger Creek Office Venture acquired land located in Illinois and constructed a building thereon. Taxpayer was also one of five joint venturers in Parcel 2 Schaumburg Venture and during 1974 he owned a 10% interest in said venture.

On his 1974 Wisconsin income tax return, taxpayer declared a $114,150 loss relating to the Ginger Creek Office Venture and a $10,874 loss relating to the Parcel 2 Schaumburg Venture.

The sole issue before the Commission involved taxpayer's interest in the two Illinois general partnerships. The Department of Revenue contended that an interest in a foreign general partnership is business interest having a situs outside of Wisconsin and not, therefore, included in determining net Wisconsin income. The taxpayer contended that an interest in a foreign

general partnership is an interest in intangible personal property includable in Wisconsin taxable income in the category of "All Other Income or Loss" under Section 71.07 (1), Wis. Statutes (1973).

The Circuit Court upheld the decision of the Wisconsin Tax Appeals Commission by concluding that the operating losses constituted a loss from business. Therefore, under s. 71.07 (1), Wis. Stats., 1973, the losses followed the situs of the businesses and the taxpayer was not permitted to deduct such losses in reporting his income for Wisconsin income tax purposes.

Taxpayer has not appealed this decision.

Erwin J. Thoenes vs. Wisconsin Department of Revenue (Circuit Court of Milwaukee County, April 28, 1980.) The taxpayer, a resident of the State of Wisconsin, created a "Family Trust", also known as an equity or constitutional trust, and conveyed to it various items of his real and/or personal property and the right to all income he received. In return, he received all the beneficial ownership of his family trust, including the right to designate all owners of beneficial interest.

All income he received was attributed by him to the trust, which used same to pay the personal deductible and non-deductible living expenses of the taxpayer and his family.

Taxpayer also served as manager of his family trust, and any monies left over after the allocations specified above were paid to him for services he allegedly rendered in said capacity or to his designate. He retained complete control over his income and/or assets after the creation of the family trust involved.

The Department determined that the family trust could not be recognized for Wisconsin income tax purposes and recomputed the taxpayer's Wisconsin income tax liability accordingly. The taxpayer appealed that determination to the Wisconsin Tax Appeals Commission.

The Commission held that the taxpayer's conveyance of his lifetime services and the income earned through the performance of those services to the "Family Trust" was simply an assignment of income and ineffective to shift the tax burden from the taxpayer to the trust. It stated that amounts taxpayer received in return for his services and income from real or personal property he conveyed to the trust were income to him and should have been reported that way.

The taxpayer appealed that decision to the Circuit Court of Milwaukee County stating that it violated his rights under Article 1, Section 10 of the Wisconsin Constitution; Section 701.02 of the Wisconsin Statutes; and his rights under the Fifth and Fourteenth Amendments.

The Circuit Court upheld the Commission's decision. It did not find that the taxpayer's rights had been violated as he alleged.

The taxpayer has appealed this decision to the Court of Appeals.

Wausau Homes, Incorporated vs. Wisconsin Department of Revenue (Circuit Court of Marathon County, March 10, 1980.) The Department appealed a decision of the Wisconsin Tax Appeals Commission that Wausau Homes owed less income tax for the period March 1, 1968 through February 28, 1973 than the Department originally assessed. The Department challenged the Commission's application and interpretation of the statutory apportionment formula for the company's sales in s. 71.07 (2), Wis. Stats., 1969.

The Department's objection to the Commission's decision centered on s. 71.07 (2) (c), Wis. Stats., 1969 which explains how the Department is to consider one of three ratios in determining a corporation's income tax.

The Department argued that there was no substantial evidence to support the Commission's findings regarding the situs of sales that 1) Wausau Homes dealers throughout the country completed their sales contracts at their offices or the buyer's residence, 2) the dealers had the power to bind the company on sales and 3) each sale occurred when the dealer executed a contract. The Department also objected to the conclusion that sales of Wausau homes must be allocated under s. 71.07 (2) (c) among the states where the sales contracts were signed, instead of all being allocated to Wisconsin or Iowa where the company's two plants are located. The Department argued that all sales originate and take place in Wausau and Ottumwa, Iowa where the homes are manufactured even though dealers act as intermediaries for the company in some 14 states. It alleged that the evidence demonstrates that the Wausau office exercises complete control over each step of the sales process through guidelines and franchise agreements given to the dealers.

The court rejected the Department's position and found that there was substantial evidence to support the Commission's findings that sales took place in the various states where dealers contracted with buyers for homes.

Wausau Homes challenged the Commission's finding that the Department properly computed the apportionment formula by determining that the property that Wausau Homes leases in Iowa for its plant is not "owned and used" by it and is not includable in the denominator of the ratio under s. 71.07 (2) (a).

The court rejected this argument by Wausau Homes.

Wausau Homes also contended that there was no substantial evidence in the record to support the Commission's conclusion that all engineering and drafting services were allocable to Wisconsin. This argument was directed at the way the Department and Commission calculated the manufacturing ratio under s. 71.07 (2) (b). Wausau Homes contended that the costs of the engineering services done at the Wausau plant for the Iowa plant should be allocated to Iowa. The Department argued that there is substantial evidence to support the Commission's conclusions that the cost of all engineering services done in Wausau must be allocated to Wisconsin.

The Circuit Court found that there was no substantial evidence to sup-

ort that conclusion by the ommission.

The court therefore reversed the Commission and held that the cost of drafting work done for the Ottumwa plant could have been allocated to Iowa, not Wisconsin.

The Department has appealed this decision to the Court of Appeals.

SALES/USE TAXES

Metalplate and Products, Inc. vs. Department of Revenue (Wisconsin Tax Appeals Commission, April 3, 1980.) The question in this case was whether the corporation was engaged in manufacturing as defined in 77.51 (27), Wis. Statutes, and therefore its machinery was exempt from the sales and use tax under the exemption provided in s. 77.54 (6) (a). The Commission concluded that under these statutes, and based on the facts presented, the machinery used by the taxpayer was exempt from the sales and use tax.

The company's principal business activity was electroplating metal stampings, forgings, castings, machine parts and similar metal items with zinc or cadmium. In addition to putting metallic coatings on metallic items, 5% or less of the company's business consisted of cleaning metallic parts and putting an oil surface on them to prevent rust. Customers provide the parts on which the company applies its processes.

The procedure used by the taxpayer involves the use of heavy machinery which lifts cylinders ("plating barrels") full of metallic items and lowers them into a series of tanks containing several types of liquid solutions which results in the electroplating of the items. Each tank used is approximately 2½ feet deep, 5½ to 6 feet long and 4 feet wide. The solution in the first tank cleans the items and the next tank rinses the items. The next tank contains acid pickle where the items are etched to allow creation of a surface that will accept plating; next are 2 more rinsing tanks. The following tanks are electroplating tanks containing chemicals and liquid metal in which the plated items remain for 30 to 45 minutes while electricity is applied. The plated item is then rinsed and run through final solutions which cure the dried finish. Some of the electroplated items are then baked. The taxpayer uses lifting devices, such as electric hoists, rectifiers, tanks, a spin dryer and a fork lift truck to perform this process.

This process produces a new article with a different form, use and name according to the Commission. One item was called a "Grade 2 hex-head cap screw plain" prior to the process and a "Grade 2 hex-head cap screw plated" after the process. Two expert witnesses familiar with this process testified the company was engaged in manufacturing.

The Department has not appealed this decision.

Wisconsin Department of Revenue vs. Trudell Trailer Sales, Inc. (Circuit Court of Dane County, Branch #1, January 29, 1980.) Taxpayer was engaged in the business of selling semitrailers both inside and outside Wisconsin. Some semitrailers were sold to customers located outside Wisconsin and these semitrailers were to be used outside the state. The issue before the Court was whether semitrailers come within the language of s. 77.54 (5) (a), Wis. Stats., exempting from the sales and use tax "motor vehicles or truck bodies sold to persons who are not residents of this state and who will not use such . . . motor vehicles or trucks for which the truck bodies were made in this state otherwise than in the removal of such . . . motor vehicles or trucks from this state".

The Court concluded that the semitrailers involved are within the exemption provided in s. 77.54 (5) (a), Wis. Stats., and sales of such semitrailers to nonresidents are exempt from sales and use tax.

The Department has appealed this decision to the Court of Appeals.

EXCISE TAXES

Reinhart Institutional Foods, Inc. vs. Dennis J. Conta, in his Capacity as Secretary of the Wisconsin Department of Revenue, and J. K. Leidiger, in his Capacity as Director of the Excise Tax Bureau of the Wisconsin Department of Revenue (Circuit Court of Dane County, September 14, 1979.) Reinhart Institutional Foods brought an action in mandamus to compel the Department to issue a wholesale liquor permit which had been applied for under Sec. 176.05 (1a), Wis. Stats.

Taxpayer is a Wisconsin corporation engaged in the distribution and wholesale marketing of institutional food products. Mr. D. B. Reinhart owns 90% of its stock and Mr. D. P. Zeitlow owns the other 10%.

Kwik-Trip, Inc. is another Wisconsin corporation. It has seven wholly-owned subsidiaries, four of which have two retail liquor licenses each. Mr. Reinhart and Mr. Zeitlow each own ⅓ of the stock of Kwik-Trip, Inc., while the remaining ⅓ is owned by Mr. John Hansen.

Reinhart Institutional Foods applied for a wholesale liquor permit which was denied on the basis of its interest in a retail establishment, which is prohibited by s. 176.05 (1a) (a). The purpose of the statute, referred to as the "tied-house" law, is to prevent any interest other than normal purchase and sale relationship between the liquor wholesaler and retailer.

Taxpayer contended its stockholders, not Reinhart Institutional Foods, had an interest in Kwik-Trip. However, the court held that Reinhart and Zeitlow are in essence the Reinhart Institutional Foods corporation. They also own two-thirds of the stock of a corporation that has four subsidiaries who have eight retail licenses. This shows a significant unity of interest between Reinhart Institutional Foods and the retailers.

Accordingly the court found the Department of Revenue acted within its authority in denying the wholesale liquor permit to Reinhart Institutional Foods.

The taxpayer has not appealed this decision.