. . . at the rate of 4% of the sales price of the property . . . . " Several words and phrases require definition; the first being the word "use", which is defined in s. 77.51 (15) and (16), and the phrase "sales price" defined in s. 77.51 (12), especially paragraph (a) (intro).

In looking at s. 77.53 (1), the use tax is imposed upon use in this state of tangible personal property measured by the sales price. The phrase "in this state" is important and would favor the taxpayer's argument, the Tax Appeals Commission indicated.

Interpreting the phrase "sales price" in s. 77.53 (1) is also a problem. Applying the rule of interpretation that tax cannot be imposed without clear and express language for that purpose, it appeared to the Commission that the phrase "sales price" as defined in s. 77.51 (12) can apply to the purchase by the taxpayer of the tangible personal property which it acquired in Illinois. This is very general language and under the very unique circumstances of this case and different circumstances, this very general language of s. 77.51 (12) (a) can be interpreted to apply to the purchase by the taxpayer of its raw materials.

The Commission was concerned that the department's interpretation allowing a credit for scrap sold against the measure of the tax is not supported by clear statutory language. The Commission referred to the Wisconsin Supreme Court's decision in the Moebius case, which had been discussed and cited by the taxpayer. The language in that case reads "Although the use and sales taxes are complementary and supplementary, the scope of the use tax is not merely a function of the scope of the sales tax. The two are separate taxes." The Supreme Court also said in this case that, "If tangible property . . . is not stored, used or otherwise consumed in this state within the statutory meaning of those words, then no event taxable under the use tax provisions has occurred, even if the sale of that property or service in Wisconsin would be taxable under Section 77.52 . . .", which the Commission said "we all know to be the imposition of the sales tax".

The Commission also was concerned that a holding in favor of the department might appear to result in an interpretation of the use tax whereby Wisconsin's use tax could possibly be perceived as applying to uses and transactions occurring outside the State of Wisconsin. In this very unique factual situation this use took place in Illinois.

The Commission found that the proper way for the taxpayer to determine its use tax liability is based on the price it paid for tangible personal property which it actually incorporated into the finished items which it sold to Wisconsin users. Therefore, the measure of the use tax is based on the average cost of the materials becoming a component part of the tanks and vessels shipped into Wisconsin times the weight of the items actually shipped into Wisconsin.

The department has not appealed this decision.

H. Derksen & Sons Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 8, 1980). In September 1976 the taxpayer purchased cigarette and candy vending machines and a one dollar changing machine from Winchester Vending Corp. at the time Winchester went out of business. It also purchased the Winchester name and put the name "Winchester Vending Corp., a division of H. Derksen & Sons, Inc." on a calendar it distributed.

The department assessed sales tax against the daxpayer as a successor to Winchester and the assessment consisted of two elements: (1) additional sales tax in the amount of $734.66 for the period December 1973 through September 1976 based on amended returns filed by Winchester subsequent to the sale of its vending machines to the taxpayer; and (2) sales tax in an amount of $1,453.60 assessed on the sale of Winchester's assets to the taxpayer because Winchester held a seller's permit at the time of the sale.

The department obtained a judgment against Winchester for the $734.66 liability but was unable to collect this amount. The department also entered into an installment agreement with an officer of Winchester and he made payments of $350 to reduce the liability.

The Commission concluded that as a successor of Winchester the taxpayer was liable for the additional sales tax of $734.66 from business operations during the period December 1973 through September 1976. However, the taxpayer was not liable as a successor for the $1,453.60 due from Winchester's sale of its assets to the taxpayer because Winchester could have surrendered its seller's permit at any time on the day of the sale.

The department has appealed this decision to Circuit Court.

Midcontinent Broadcasting Company of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, Docket 78-203, September 30, 1980). This was an appeal from a decision of the Court of Appeals holding that a sale of broadcasting equipment by the taxpayer who held a seller's permit was an exempt "occasional sale" under ss. 77.54 (7) and 77.51 (10) (a), Wis. Stats. (A report of the Court of Appeals decision is found in Wisconsin Tax Bulletin, Number 16.) The Supreme Court reversed the Court of Appeals decision and found the sale was taxable.

The taxpayer obtained a seller's permit to sell phonograph records advertised on its two television stations. While it held the seller's permit, the taxpayer sold its tangible and intangible business assets used in operating its television broadcasting stations. The Supreme Court found the sale of the taxpayer's business assets was taxable because it held a seller's permit at the time of the sale.

Milwaukee Brewers Baseball Club vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 27, 1980). The issues in this case are whether a person who has taxable admissions is able to purchase tickets used to conduct the business, and promotional items transferred to certain customers, without the imposition of a sales or use tax.

The taxpayer is engaged in the ownership and operation of a professional baseball franchise known as the Milwaukee Brewers, with the principal office located at Milwaukee County Stadium. The Milwaukee Brewers are a member team of the American League and play a home and away schedule consisting of ap-

proximately 162 games during the baseball season. The baseball games played in Wisconsin at Milwaukee County Stadium are referred to as "home games" and the remaining games played outside Wisconsin are "road games". During the regular professional season the taxpayer has 81 scheduled home games and 81 scheduled road games. In connection with its home games, taxpayer sells admission tickets on both a season ticket and individual game basis.

For the audit period, the Department of Revenue increased the taxpayer's use tax base by $95,274 which represented amounts paid by the taxpayer to an out-of-state vendor for the purchase of admission tickets. The use tax base was also increased by the amount of $172,331 representing amounts paid by the taxpayer to out-of-state vendors for purchases of baseball bats, jackets, seat cushions, baseball helmets and other promotional items. The promotional items are transferred only to customers in connection with the purchase of paid admission tickets to one of the taxpayer's home games.

The Commission concluded that the admission tickets do not constitute taxable retail sales within the meaning of s. 77.51 (4), Wis. Stats., as the cost of the admission tickets are already charged sales tax in its price of admission. The promotional items, such as baseball helmets, seat cushions and jackets, which are acquired by taxpayer for transfer to its customers by buying an admission ticket for certain home games, are acquired in transactions and do not constitute separate retail sales within the meaning of s. 77.51 (4), Wis. Stats.

The department has appealed this decision to Circuit Court.

William A. Mitchell vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 21, 1980). The taxpayer was doing business as Mitchell Vending Company, a sole proprietorship, with its principal office in Menomonie Falls, Wisconsin.

The taxpayer was in the business of providing coin-operated amusement devices (for example, juke boxes, pinball machines, pool tables, bowling games and other coin-operated amusement devices) to business establishments, such as bowling alleys, bars and restaurants. The taxpayer agreed with the owners of the business establishments that in exchange for the privilege of locating its equipment on their premises, the owners would receive a percentage of the gross receipts from the equipment. The percentages varied between owners and types of business premises and did not appear to have an established pattern. There was no testimony or evidence that any of the gross receipts splitting arrangements were done by written agreement; testimony implied that the arrangements were verbally agreed to. The company collected the receipts from its equipment, divided the receipts with the owners of the business premises, and was responsible for the equipment's maintenance and repair.

For taxable year 1974, the taxpayer filed sales tax returns, declaring $80,468.50 as his measure of tax and $3,218.74 as his gross sales tax, all resulting from receipts from the coin-operated amusement equipment. The taxpayer credited against the gross tax from receipts the amount of sales or use tax he paid on his purchase of equipment. The department disallowed this credit.

The taxpayer did not file a timely sales or use tax return for 1975. The department determined that the taxpayer's taxable gross receipts from his equipment were $68,698.11 in 1975, resulting in $2,747.92 gross tax. Taxpayer claimed as a credit against this gross tax the sales or use tax which he paid when he purchased coin-operated equipment for the business. The department disallowed the credit and asserted the negligence penalty under s. 77.60 (4), Wis. Stats., for the taxpayer's negligent failure to file timely.

On September 10, 1976, the taxpayer terminated his business and sold all his coin-operated amusement devices for $104,200 while he held a seller's permit, and he did not collect or report sales tax on the sale. The department assessed gross tax of $4,168 on this sale, plus interest. The taxpayer claimed the transaction constituted an exempt occasional sale under s. 77.54 (7), Wis. Stats.

The taxpayer testified that he merely ran his business and left all tax accounting, preparation and filing up to his accountant; that he signed any tax documents prepared by his accountant; and that he did not recall whether or not he signed or filed returns for taxable year 1975. The accountant testified that he believed he filed sales tax returns for 1975, but he really was not certain that he did.

(a) Issue: Did the taxpayer prove that his failure to file a timely 1975 sales tax return "was due to reasonable cause and not due to neglect" under s. 77.60 (4), Wis. Stats.? Decision: No. The taxpayer did not prove that his failure to file a timely 1975 sales tax return "was due to reasonable cause and not due to neglect" under s. 77.60 (4), Wis. Stats. Both the taxpayer and his practitioner did not demonstrate failure due to reasonable cause. Negligence of a practitioner is imputed to a taxpayer and, in this case, the taxpayer's reliance on his practitioner and the practitioner's negligence in not filing does not excuse the taxpayer.

(b) Issue: Was the taxpayer's September 10, 1976 sale of his coin-operated amusement devices while he held a valid seller's permit an occasional sale and exempt under s. 77.54 (7), Wis. Stats.? Decision: No. The taxpayer's September 10, 1976 sale of the coin-operated amusement devices which he used in his business, while he held a seller's permit for that business, is not an exempt occasional sale.

(c) Issue: Was the taxpayer a lessor of the coin-operated amusement devices so that he would be eligible for a credit for sales taxes paid on equipment purchases under s. 77.51 (11) (c) 5, Wis. Stats.? Decision: No, taxpayer was not a lessor of coin-operated amusement devices and, therefore, was not entitled to the credit. Taxpayer purchased tangible personal property (the devices) then used the property to provide a taxable service. The Commission cited ss. 77.51 (24) and 77.52 (2) (a) 2, Wis. Stats., as authority for this decision.

The taxpayer has appealed this decision to Circuit Court.

Gordon Obermann vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission Oral Decision of October 28, 1980). The issue in this case was whether a per-

son with 2 seller's permits for 2 businesses can surrender both permits, and then sell one business as an exempt occasional sale, when he knows the other business will be reopened in several days.

The taxpayer operated 2 separate businesses, the Rest Well Resort and the Eagle River Appliance Center. Each business had a seller's permit. On April 26, 1979 the taxpayer ceased business operations all day at both locations, and at 5:45 p.m. the taxpayer surrendered both his seller's permits to a representative of the department. On April 27 the business assets of the Rest Well Resort were sold. Then on May 1 the department reactivated the seller's permit of the Eagle River Appliance Center, and on May 3, 1979 the Appliance Center again opened its doors for the sale of appliances.

The department's position was that the sale of the resort was not an exempt occasional sale, because during this entire period the taxpayer was required to hold a seller's permit for the operation of its appliance business. However, the Commission ruled in favor of the taxpayer and found that the sale of the resort was an exempt occasional sale under s. 77.51(10) (a) and s. 77.54(7), Wis. Stats.

The department has appealed the decision.

Dennis R. Olkwitz vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 13, 1980). Taxpayer, Dennis R. Olkwitz, was the president of Comunicon Corp., from 1973 to 1975 when the corporation filed for bankruptcy. During that period, Comunicon incurred a sales tax delinquency in the total amount of $978.78 plus interest. On July 31, 1978, the Department of Revenue issued an assessment against taxpayer, as an officer of Comunicon Corp., under s. 77.60(9), Wis. Stats., providing for personal liability of any officer or employee meeting requirements of that section.

Taxpayer did not dispute his liability as an officer of Comunicon for the sales tax at issue but challenged the imposition of interest on said assessment. Taxpayer contended that the department was aware in 1975 of Comunicon's sales tax liability and bankruptcy but failed to assess him personally at that time, waiting until August 10, 1978, nearly three years later, to issue an assessment. Taxpayer contends that the department by this delay, unnecessarily ran up interest on the assessment at issue.

Prior to filing bankruptcy, taxpayer, as officer of Comunicon, had filed sales tax returns timely but didn't always pay on time, and taxpayer and the department had worked out a payment plan whereby a representative of department collected delinquent taxes at regular intervals.

The Commission concluded that s. 77.60(9), Wis. Stats., expressly provides that statutory time limitations imposed for sales tax assessments do not apply in cases of officer liability. Therefore, the department was within its statutory authority in making the assessment. Also, the imposition of interest is mandatory under s. 77.60, Wis. Stats., and the Commission stated it lacked authority to overrule the department's imposition of interest.

The taxpayer has not appealed this decision.

Peck Meat Packing Corporation vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, August 13, 1980). Taxpayer was a Wisconsin corporation with its principal place of business in Milwaukee, Wisconsin. The Department of Revenue maintained that taxpayer's activities did not constitute "manufacturing" under s. 77.51(27), Wis. Stats. Taxpayer contended that its activities consisted of "manufacturing" under this statute's definition for purposes of the sales and use tax exemption under s. 77.54(6) (a) for machines, specific processing equipment and replacement parts therefor.

During the period involved herein, taxpayer's principal business activity was "deboning" cow beef carcasses by separating the carcasses into several boneless cuts of beef, all according to customer specifications. The beef was removed from carcasses and had bones, muscles and fat removed to make it suitable for further processing by other manufacturers, such as sausage makers, hamburger makers, chili makers, chopped, molded, and frozen steak makers, and large restaurant commissaries. Sales were made to wholesalers, not retailers, at locations throughout the United States and abroad. The bones were sold for further processing, either to renderers or soup makers. The inedible product was sold to renderers or to others to make chemicals.

A substantial portion of the cow carcasses was furnished to taxpayer's Milwaukee boning plant by either wholly-owned slaughterhouse subsidiaries or by taxpayer itself which purchased the cows and slaughtered them at its Michigan slaughterhouse facility.

The deboning process conducted at the Milwaukee facility involved the following steps: slaughtered cow carcasses, which had no commercial use at that time, were delivered to the facility; the carcasses came into the facility under the supervision of federal inspectors where they were cut into quarters and placed in coolers; quarters of like kind and physical quality required to fill special orders were assembled and sent down a moving table top where boners deboned the meat; front quarters were then broken down into primal cuts (such as chuck, rib, naval and shank) which are then deboned and trimmed to meet a customer's specifications; as bones and other nonedible materials are removed from meat, they are placed on a separate conveyor system for removal; the physical content of boneless meat is regulated during the boning and trimming process and an in-plant laboratory chemically analyzes each load sold; boneless meat is sorted and trimmed by people according to orders and packed to customer specification; some boneless meat is sold fresh and some stored in taxpayer's freezers or outside freezers; boneless beef is boxed in containers ranging from 5 lb. boxes to 2,000 lb. containers; taxpayer's refrigerated trucks often ship boneless beef to customers.

Taxpayer's factory personnel who work in meat deboning are referred to as "boners" and "trimmers". They are highly skilled, require a training period varying from 2 months for trimmers to one year for some boners, and are highly compensated for their work.

The entire operation is under the supervision of the U.S. Department of Agriculture ("USDA"), which monitors and regulates every aspect of the operation. For example, the USDA inspects the carcasses which

enter the facility, inspects the meat at various stages of processing, and approves and stamps the finished product that leaves the facility according to U.S. government specifications. Taxpayer can only use machinery and equipment which is USDA approved. Taxpayer uses machinery in its processes, including electric band saws, conveyor systems and a skinning machine.

Taxpayer's processes produce a new article with a different form, different use and different name. The live cattle and carcasses which taxpayer starts with are broken down into boneless beef of various sizes, qualities and physical characteristics, many of which are prescribed by taxpayer's customers. The use of the boneless beef is entirely different from the use of the carcasses (ex., carcasses have no use in their original form other than to be subjected to taxpayer's processes; boneless beef has many uses). Before a carcass goes through taxpayer's processes, it is a "carcass"; afterward, each end product has its own trade name, such as chuck, rib, navel, shank, boneless rib, spencer roll, rib-eye, inside muscle, clods, and knuckles. Each finished product is traded and priced in commerce under its own name and trade specification.

Taxpayer's processes are popularly regarded as manufacturing by persons familiar with the processes, with manufacturing in general, and with the industry in which taxpayer is engaged. Expert witnesses testified to this effect.

The Commission concluded that taxpayer was engaged in "manufacturing" as the term is defined in s. 77.51 (27), Wis. Stats., and is entitled to the sales and use tax exemption under s. 77.54 (6) (a), Wis. Stats.

The department has not appealed this decision.

J. C. Penney Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 6, 1980). The appeal to the Commission related to the Department of Revenue's action on the taxpayer's two petitions for redetermination of two assessments of sales and use taxes for the periods February 1, 1970 through January 31, 1975 and September 1, 1969 through January 31, 1970. During this period J. C. Penney Co., Inc., was a Delaware corporation, and had its principal place of business in New York, New York, and was qualified to conduct business in Wisconsin and therefore was subject to the sales and use tax provisions of Chapter 77, Wis. Stats.

Taxpayer, J. C. Penney Co., Inc., has a large chain of department stores in Wisconsin and is principally engaged in the general merchandising business. Taxpayer conducts a state-wide mail order business and has J.C. Penney catalogs mailed from Indiana to prospective customers throughout Wisconsin. Taxpayer's catalogs are produced outside of Wisconsin by R.R. Donnelley Company in Warsaw, Indiana. The catalogs in question are shipped from Indiana to designated addresses, free of charge, throughout Wisconsin in accordance with address labels prepared in advance and placed on said catalogs in Indiana. Taxpayer uses additional methods of distributing its catalogs to residents of Wisconsin by distributing said catalogs to independent contractors or through its department stores located in Wisconsin.

J. C. Penney Co., Inc., by the use of its catalog system, transacts business with nonresidents who direct Penney's to ship purchased goods to a designated address in Wisconsin. Taxpayer will collect a use tax from the out-of-state purchaser when the Wisconsin user has the same last name as the purchaser and will remit the tax to Wisconsin. But taxpayer considers an out-of-state nonresident purchaser whose last name is different from the person receiving the purchased merchandise in Wisconsin to be making a gift and does not impose a sales tax on said merchandise.

Taxpayer, in order to promote sales in its general merchandising stores throughout the United States, advertises through various media including newspapers. Taxpayer had printed for its use various advertising supplements for insertion in various newspapers located in Wisconsin. Said supplements were produced by an independent contractor, R. A. Ramberg, located in Minnesota. The printer, R. A. Ramberg, arranged for shipment of these "advertising supplements" to be included in certain Wisconsin newspapers, as an advertising supplement, with a small amount of supplements being sent to the taxpayer's department stores in Wisconsin.

The Department of Revenue contended that the catalogs, out-of-state purchases and advertising supplements were taxable. The taxpayer contended that Wisconsin cannot tax these items.

The Commission concluded that J. C. Penney Co., Inc. catalogs shipped from Indiana to its prospective customers in Wisconsin are not taxable within the intent and meaning of the sales and use tax provisions of s. 77.53 (1), Wis.Stats. The Commission also concluded that the sales and use tax provisions of s. 77.52 (1) do not contemplate the imposition of a sales tax on merchandise purchased through the taxpayer's catalog by nonresident out-of-state customers for shipment to Wisconsin residents. Finally, the Commission concluded that the advertising supplements printed on behalf of the taxpayer for insertion into designated Wisconsin newspapers are exempt under s. 77.54 (15).

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

James Peterson Sons, Inc., Et. Al. vs. Wisconsin Department of Revenue (Circuit Court of Taylor County, July 25, 1980). This was an appeal from the January 18, 1979 decision of the Wisconsin Tax Appeals Commission. The question in this case is whether the furnishing of trucks by a partnership and sole proprietor to James Peterson Sons, Inc. and others were taxable leases of trucks or nontaxable hauling operations.

The stipulated facts essential to the appeal are found in paragraphs 10, 11, 12 and 13 of the Stipulation, as follows:

> "10. The partnership and sole proprietorship both own trucks, and both have LC authorities to haul certain products within a specified area. The corporation is a contractor and its principal business is in road construction."
>
> "11. Quite often the corporation is in need of the use of a vehicle for the hauling of products used in their road construction activity. The corporation would then make arrangements for the utilization of the partnership's trucks, as well