The publication Dimensions is used by and is helpful to agents of the taxpayer in marketing taxpayer's line of services to its customers who receive the publication. Taxpayer competes with many major insurance companies for sales of services to credit unions but the taxpayer is the only organization which deals exclusively with credit unions and their members.

The taxpayer contended that the purpose in its distribution of Dimensions is to identify the taxpayer as a corporation sensitive to the needs of the credit union movement and as one with products and services uniquely designed to serve the needs of credit unions and credit union members.

The taxpayer's vice-president of public relations testified that "Public Relations" constitutes an attempt by a corporation to communicate policies, programs and positive image to the general public, special interest groups, to customers, etc. He further defined "advertising" as a "part of" public relations involving the use of media or other similar vehicles. The same officer defined "institutional advertising" as an effort seeking to create a positive impression of a company with respect to any particular product with the objective to precondition the market place.

The Commission held that the publication, Dimensions, while including what could be characterized as advertising to promote the taxpayer's services and products, does not when taken as a whole constitute advertising or institutional advertising so as to qualify for the exemption under s. 77.54 (25), Wis Stats. Dimensions publication does not constitute advertising or institutional advertising, when taken as a whole, under the ordinary and accepted meaning of those terms, and therefore does not constitute printed material designed to advertise and promote the sale of taxpayer's merchandise or services.

The Commission also held that the issues of Dimensions which are purchased and stored solely for the purpose of transportation and use outside of the state are not exempt from the use tax imposed by s. 77.53, Wis. Stats., by virtue of the definition of the terms of "storage" and "use" under s. 77.51 (16), Wis. Stats.

The taxpayer has appealed this decision to Circuit Court.

Robert E. Curtis vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, September 8, 1981). Robert E. Curtis is a Wisconsin resident, doing business as Oshkosh Leasing Company in Oshkosh, Wisconsin. Curtis paid timely sales tax of $1,012.49 in 1973, $1,236.58 in 1974, $1,268.86 in 1975 and $312.85 in 1976.

On April 8, 1977, taxpayer filed amended sales tax returns requesting a refund of all sales taxes paid for 1973 through 1976. The taxpayer contended the sales tax had been paid in error. On May 11, 1977 the department issued a second Notice of Refund Determination refunding the full amount of the sales tax requested by the taxpayer for the years 1973 through 1976, stating that the earlier Notice had been superseded. The refund totaled $4,699.70 and included interest at 9% through May 11, 1977. Said Notices stated that the refund was based on an office audit determination.

On October 1, 1979 the department issued an office audit assessment notice for $5,686.64 for sales tax. Said amount was based on the amount of tax refunded on May 11, 1977 plus interest. The notice of assessment stated that the prior refund was made in error. Taxpayer filed a letter with the department, dated October 9, 1979, asserting that the assessment was blocked by section 77.59 (6), Wis. Stats.

The department, in an action letter dated December 17, 1979, conceded that the years 1973 and 1974 were closed to adjustment under s. 77.59 (3), Wis. Stats., but maintained that the years 1975 and 1976 were not closed to adjustment by sections 77.59 (2) and 77.59 (6), Wis. Stats. The department has never conducted a field audit of the taxpayer's 1975 and 1976 sales tax returns.

The only issue in this case is whether sections 77.59 (2) and 77.59 (6), Wis. Stats., prohibit the department from assessing sales tax to the taxpayer for the years 1975 and 1976 under these circumstances. The Commission concluded that the assessment for the years 1975 and 1976 was made within the 4 year period allowed in section 77.59 (3), Wis. Stats. There were no facts in the record to support taxpayer's contention that the department's assessment is barred by the doctrine of equitable estoppel.

The taxpayer has not appealed this decision.

Servomation Corporation, Successor to Servomation of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Court of Appeals, District IV, July 28, 1981). The issues before the Court were as follows:

1. Whether the taxpayer's expenditures for the purchase and repair of hot and cold drink vending machines qualify for the "manufacturing and equipment" exemption provided by s. 77.54 (6) (a), Wis. Stats.

2. Whether sales of beverages through such machines located in schools and hospitals are exempt from sales taxation under ss. 77.54 (4), 77.54 (9a) and 77.54 (20) (c) 4, Wis. Stats.

3. Whether the taxpayer's purchases of plastic eating utensils furnished for use by customers of these machines are subject to use tax under s. 77.54 (1), Wis. Stats.

The taxpayer owned and serviced coin-operated hot and cold drink vending machines installed in various locations in Wisconsin. Each machine is activated when a customer inserts a coin and depresses a selector button designating the beverage desired. Upon activation the cold drink machines prepare carbonated beverages by combining pre-formulated drink syrup, water, and carbon dioxide which is delivered to the customer, with or without ice, in a paper cup. These machines utilize the same type of syrup used in soda water bottling plants and follow manufacturer's recommended mixing proportions to produce a final product substantially identical to the brands produced by such plants. The hot drink machines similarly produce coffee, tea, chocolate, or soup by mixing predetermined measures of dry ingredients and water in the machine's brewer and dispensing them in a paper container.

The taxpayer contended that it is a "manufacturer" within the meaning

of the statutory exemption and that the mechanical operation of its machines falls within the statutory definition of "manufacturing". Taxpayer relied on a Technical Information Memorandum which indicated that the department considered brewing, distilling, and soda water bottling plants as being manufacturers for purposes of the exemption while considering restaurants, for example, as non-manufacturers.

The department contended that the Servomation Corporation is not a manufacturer but a retail supplier of vending services, that the operations of its machines do not involve a "process popularly regarded as manufacturing" and that it does not qualify for the exemption in any event because the machines are not used "exclusively" for manufacturing as required by s. 77.54 (6) (a), Wis. Stats.

The Court of Appeals held that Servomation's machines do not qualify for the exemption because they are not exclusively used in the manufacture of tangible personal property.

Servomation Corporation also contended that its gross receipts from sales of food and beverages through vending machines located in schools and hospitals pursuant to written or oral contracts with those institutions are exempt under s. 77.54, Wis. Stats. Exemptions from the sales tax are provided to hospitals and educational institutions under this statute. Each institution gave the taxpayer an exemption certificate stating that sales through the machines were made on its behalf and were therefore exempt from taxation. Each institution set the prices at which the products would be sold, and received a percentage of the gross receipts as a commission. The institution was responsible for any damage to the machines or their contents and controlled access to the areas in which they were located. The taxpayer retained ownership, however, and its personnel had the only keys to the machines which it serviced and repaired and from which it regularly collected the gross receipts. The net profit received by the taxpayer from sales at the schools and hospitals was the same as that received from sales at nonexempt locations. The schools and hospitals, however, generally received a higher commission than Servomation paid to others based upon the understanding that no sales tax would be due on the gross receipts.

The department did not impose a tax on the receipts from machines located at six schools under agreements where the schools' employees or students loaded and unloaded the merchandise from the machines, turned over the receipts to the taxpayer, and received a subsequent accounting and commission. It did not impose a tax on food sold by a hospital cafeteria but did impose a tax on food sold from the taxpayer's vending machines in that hospital, despite testimony from a hospital administrator that the purpose of the machines was to supplement cafeteria service for its employees.

Servomation claimed that the sales in question are exempt either as sales to exempt institutions or as sales by those institutions.

The Court ruled that the vending machine owner, and not the hospitals, was the retail seller, noting that the responsibility for installation, servicing, and removal remained with the owner, despite the fact that some hospital employees had keys to the machines.

The third issue involved the department's assessment of use tax on Servomation's purchase of plastic eating utensils which it furnished to vending machine customers by placing them on condiment counters near the machines. The definition of a taxable retail sale set forth in s. 77.51 (4), Wis. Stats., excludes property purchased "for resale". The Tax Appeals Commission determined that the taxpayer's purchases of the utensils were not for resale because no separate charge was made to the ultimate consumer for their use.

The Court of Appeals reversed this decision and held that the final use of the utensils does not occur when the taxpayer places them on the condiment counter, but rather when the customer employs them to consume food. In this case, as in Milwaukee Refining, the final use of the personal property which is the subject of the tax sought to be imposed is by the ultimate customer. The purpose of taxpayer's purchase of the utensils is for use by its customers, even though it has no way of preventing other persons from taking the utensils without purchasing a product from the machines. The cost of the utensils is indirectly included in the price to the customer of the food product dispensed in the machines.

The Court ruled that purchases of plastic utensils were for resale, and not for the taxpayer's use or consumption within the meaning of s. 77.51 (4), Wis. Stats., and that they were consequently not taxable pursuant to s. 77.53 (1), Wis. Stats.

The department and the taxpayer have appealed this decision to the Supreme Court.

Trudell Trailer Sales, Inc. vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, October 6, 1981). The issue in this case is whether sales of semitrailers to be used outside the state are exempt from Wisconsin sales tax under s. 77.54 (5) (a), Wis. Stats.

Taxpayer was engaged in the sale of semitrailers. The department's assessment was based on sales made by the taxpayer to nonresidents for use solely outside of Wisconsin. Delivery was taken by these buyers within Wisconsin, but the semitrailers were immediately removed from the state and registered and operated elsewhere. The taxpayer accepted from each nonresident customer a certificate to the effect that the sale was exempt from payment of the Wisconsin sales tax.

Under s. 77.54 (5) (a), Wis. Stats., "motor vehicle 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" are exempt from the sales and use tax. The Court of Appeals held that a semitrailer is not considered a self-propelled vehicle (except when it is used with a tractor) and that the taxpayer's sales were not exempt under s. 77.54 (5) (a), Wis. Stats. (See Newsletter #14 for a summary of the Court of Appeals decision.)

The Supreme Court reversed the Court of Appeals decision and held that the taxpayer is entitled to the sales tax exemption. The Supreme Court held that "truck body", as used in the statute, includes a semitrailer and that is consistent with legislative intent. A semitrailer is built to

and does carry the cargo. Without it or some other unit to carry the load, a tractor, which is the power unit, serves little or no purpose. When the two pieces of equipment are joined, the semitrailer is the "truck body", and it fits that definition and purpose when constructed and sold. No basis exists for distinguishing that type of truck body from one with a self-contained motor.

The fact that "semitrailer" is listed in another section of the sales tax statute at s. 77.54 (5) (b), Wis. Stats., does not interfere with the Supreme Court's analysis of legislative meaning. "Truck body" is nowhere defined in the statute and thus must be defined. The Supreme Court defined that term to include semitrailers as that term is commonly understood and used. The general rule is that in the absence of applicable statutory definition, it is the common usage of nontechnical words and phrases which is presumed meant by the legislature. (See State v. Ehlenfeldt, 94 Wis. 2d 347, 356, 288 N.W. 2d 786 (1980).)

GIFT TAX

Estate of John F. Stratton Et. Al. vs. Wisconsin Department of Revenue (Court of Appeals, October 23, 1981). The Wisconsin Tax Appeals Commission had previously concluded that within the meaning of ss. 72.75 (3) and 232.09 (2), Wis. Stats., (1967), John F. Stratton made a taxable gift as a result of his alleged release of a power of appointment granted under a trust. The Circuit Court in November, 1980 reversed the Commission. (See WTB #22 for a summary of the Circuit Court decision.) The Department of Revenue appealed the Circuit Court decision to the Court of Appeals.

The Court of Appeals disagreed with the trial court's conclusion that John only held a contingent power of appointment. The Court of Appeals stated that John had a vested power of appointment.

The Court of Appeals concluded that although John F. Stratton possessed a power of appointment, he neither exercised nor released it within the meaning of s. 72.75 (3) and 232.09 (2), Wis. Stats., and therefore there was no taxable gift. The Court of Appeals stated that although John possessed a power of appointment, it was subject to defeasance by the disinterested trustee, Brady. Once Brady exercised his discretion in distributing the trust assets, John no longer could exercise or release his power of appointment. Accordingly, the Court of Appeals affirmed the Circuit Court's decision.

The department has not appealed this decision.

HOMESTEAD CREDIT

Helen M. Raschik vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, October 9, 1981). Helen M. Raschik, a Wisconsin resident, filed a 1978 Wisconsin Homestead Credit claim with the department on November 3, 1979 for $278. The department adjusted this claim to $10.

In computing her 1978 Homestead Credit claim, taxpayer included as "property taxes accrued" the property taxes for 2 parcels in Burnett County, Wisconsin: (a) an approximately one acre parcel on which her dwelling was located, and (b) a group of parcels comprised of 36.92 acres, part of which contained mature woodland. The 36.92 acre parcel was located at least 500 yards at the closest point from the taxpayer's residential parcel, had its own access from public highways and was situated across and down such highways from the homestead. Utility rights-of-way and land privately owned by third parties were also located between the residential and other parcels.

The 36.92 acre parcel was acquired separately from the residential parcel. The 2 parcels were not by nature or by operation functionally integrated, although Raschik utilized dead wood from the larger parcel as fuel in her dwelling. The dwelling was heated by both an oil burner and a wood furnace, with wood for the furnace coming from the 36.92 acre parcel. Taxpayer could live in, utilize and enjoy the residential parcel without owning or having access to the 36.92 acre parcel. Likewise, the larger parcel could be utilized without ownership or access to the residential parcel. The large supply of wood on the 36.92 acre parcel made heating the dwelling far less expensive; however, without the wood, the dwelling could be heated.

The department audited Helen Raschik's 1978 Homestead Credit claim and determined the amount claimed as "property taxes accrued" and the claim based on it to be incorrect. The amount of the credit was lowered on the basis of not permitting the taxes paid on the 36.92 acre parcel to be included in the calculations. The notice of assessment stated: "Taxes on the secondary parcel (s) are not allowed because that land is not adjacent to your homestead parcel, or is not a necessary part of your homestead." Taxes accrued upon the one acre dwelling parcel were allowed.

The Commission held that the taxpayer's "homestead" was the one acre parcel including her dwelling for purposes of her 1978 Homestead Credit claim under s. 71.09 (7) (a) 4, 1977 Wis. Stats. Raschik's homestead was not "an integral part of a larger unit" which included the 36.92 acre property under s. 71.09 (7) (a) 8, 1977 Wis. Stats. Also, the 36.92 acre parcel was not "necessary for the use of the dwelling as a home" under s. 71.09 (7) (a) 4, 1977 Wis. Stats. (Also see Section Tax 14.03 (10), Wis Adm. Code.) Therefore, the taxpayer was not entitled to claim as Wisconsin "property taxes accrued" 1978 real estate taxes upon the 36.92 acre parcel in computing her 1978 Homestead Credit claim.

The taxpayer has appealed this decision.