extent by business groups. The Center provides several meeting rooms, including a large auditorium for these groups to use. It also offers outdoor recreational opportunities. The Center provides overnight use of the facilities for a fixed fee, including a room, linens, three meals, two coffee breaks, and facility use. It also provides, again for a fixed fee, daytime facility use, including lunch and coffee breaks, and evening facility use, including dinner and one coffee break. Based on their own experience, they often charge a smaller fee to religious organizations.

The day starts with common prayer to which guests are invited to participate, followed by breakfast. At 11:45 a.m., a prayer service open to all is held and followed by the noon meal. Vespers are at 5:15 p.m., followed by supper. Participation by guests in the religious services is purely voluntary.

The food which the Sisters prepare was described by one of them as "simple", and normally includes vegetables grown in the Center's garden. There is no menu. The rooms and their furnishings provided for overnight stay were also described as simple and rather spartan. Guests are expected to make up their own beds when they arrive. In accordance with the Rule of St. Benedict, if a guest arrives who cannot afford to pay for food or lodging, he/she is not turned away but is asked to do some work around the Center in exchange for the Sisters' hospitality. Even those guests who pay are invited to help with the dishes. Guests at the Center are given a short orientation lecture on the Center and are invited to attend the daily prayer services if they wish to do so. The Sisters join the guests at their meals and converse with them. They generally do not discuss religion during the meals with guests unless the guests bring the subject up.

The action for declaratory judgment was precipitated when the Sisters' attorney received a letter dated January 10, 1974, from a representative of the department which stated that it would be necessary to have St. Benedict Center register for sales tax, obtain a permit, and make records for sale of meals available from September 1, 1969 to date. He also received a letter dated February 8, 1974, stating that the Sisters fell within the definition of "retailer" provided in s. 77.51(7)(a), Wis. Stats., and that gross receipts from their sale of meals were subject to taxation. Section 77.52(12), Wis. Stats., provides that any person who operates as a seller in the State of Wisconsin without a permit is guilty of a misdemeanor.

The Sisters brought the action for a declaratory judgment that they were not liable for the sales tax and also asked that the department be enjoined from attempting to penalize them for failure to obtain a sales tax permit and from requiring them to pay a tax on meals they furnished to guests. In its answer, the department requested a judgment declaring that the Sisters are required to obtain a sales tax permit for the sale of meals, and to pay tax on non-exempt sales. The trial court granted judgment for the department on the ground that the provision of meals by the Sisters was not "an exercise of religion" and was taxable under s. 77.51, *et.seq.*, Wis. Stats. (1977). The Court of Appeals held that the meals were furnished pursuant to an exercise of religion, but that they were taxable nonetheless.

Two issues were raised for the Supreme Court's consideration on appeal:

1. Are the Sisters "retailers" as defined by s. 77.51(7), Wis. Stats., who are liable for the sales tax imposed by s. 77.52, Wis. Stats.? The Supreme Court held they are not.

2. If the sales tax does apply, does imposition of liability for collection of the sales tax on the Sisters violate their right to the free exercise of their religion? (In view of the answer to question #1 above, the Supreme Court did not decide this issue.)

The Court indicated it is clear from the record that the Sisters are engaged in a religious vocation, and are not "engaged in the business of making sales". Therefore, they are not s. 77.51(7)(b), Wis. Stats., "retailers". Because the word "retailer" is so central to the applicability of the sales tax, and because the various definitions of the term set forth in s. 77.51(7), Wis Stats., obscure rather than clarify the term, recourse to dictionary definitions is an appropriate means of discerning legislative intent. Webster's Third International Dictionary, (unab. 1976), defines "retailer" as "one that retails something . . . specif(ically): a merchant middleman who sells goods mainly to ultimate consumers". The same source defines "merchant" as "a buyer and seller of commodities for profit; . . . the operator of a retail business".

The common conception of a retailer, as shown by the dictionary definition, is one who transacts business with a consumer in hopes of making a profit on the transaction. Because of the statutory ambiguity it is unclear whether this was the meaning intended by the Legislature in the sales tax statute.

It is clear that non-profit groups are not, solely by virtue of their not-for-profit nature, exempt from tax upon all sales which they make. This is evidenced by the occasional sales exemption contained in ss. 77.51(10)(c) and 77.54(7), Wis. Stats., applying to those groups. A non-profit group, to finance its generally eleemosynary activities, may enter into specific transactions or undertakings with the hope of deriving a profit therefrom. These non-profit groups may be "retailers" for the purpose of those profit seeking transactions and therefore liable for the sales tax on receipts derived therefrom unless they can claim some specific exemption from the tax. However, concluding that non-profit groups are not exempt from the sales tax on gross receipts derived from *all* transactions which they enter into does not *ipso facto* require that such groups are liable for tax on receipts derived from *every* transaction in which they engage.

Non-profit organizations may engage in transactions from which no profit is sought. Provision of meals on "skid row" by missions is an example of such an activity. The fact that the organization is recompensed somewhat by the beneficiaries of such activities does not change the fundamentally non-mercantile nature of the transaction. The Supreme Court concluded that the concept of "retailer" embodied in the sales tax statute does not encompass such fundamentally non-mercantile transactions as were engaged in by the Sisters on the facts in this case, and that any receipts

derived therefrom are outside of the scope of the sales tax statute.

The construction which the Supreme Court gave to "retailer" applies the s. 77.51(7)(b), Wis. Stats., definition to all persons "engaged in the business of making sales". Those persons are, by statute, required to pay a tax on the gross receipts of all retail sales which they enter into unless they can point to a specific exemption from the tax. Section 77.51(7), Wis. Stats., requires persons who are not in the business of making sales to pay the sales tax *if* they are sellers—i.e., engaging in a transaction for which the gross receipts are subject to the sales tax pursuant to s. 77.52(1), Wis. Stats. The type of transactions which make one a s. 77.51(7)(a), Wis. Stats., retailer are mercantile ones.

The Sisters presented extensive evidence in support of their position that the meals which they served and ate with their guests were in furtherance of their religious beliefs. Preparing, serving and sharing the meals here in question is as much a religious act as praying and equally untaxable. The complete lack of mercantilism in the activities shown in this record separates the Sisters from any definition of "retailer" contemplated by the sales tax statute. What the record makes clear is that serving meals is not a means of *supporting* their ministry; it *is* an integral part of their ministry. This is in contrast to meal service as a mere fund raiser to support other charitable or religious activities that everyone is familiar with.

The Supreme Court concluded the meals served by the Sisters under the circumstances shown in this case are not subject to the sales tax.

Milwaukee County vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 29, 1982). The department imposed a sales tax on Milwaukee County for meals furnished by the Milwaukee County Sheriff's Department to "Huber Law" prisoners for January 1, 1974 through August 31, 1978. On September 4, 1969, the Milwaukee County Park Commission applied for a seller's permit, and on September 29, 1969, Seller's Permit No. 140818 was issued by the department in response to said application. The Milwaukee County Sheriff's Department, for its activities, never sought or utilized a separate seller's permit.

During the period involved, the County (taxpayer) through its Sheriff, was in charge of the Milwaukee County jail, which provided meals to its "Huber Law" prisoners. Under the "Huber Law" program, the taxpayer was required to provide meals which included a sit-down breakfast and supper, and a take-out bag lunch. The meals were prepared in-home, by its own employees. The "Huber Law" prisoners paid for said meals at the rate of $1.50 per meal, deducted by the County from payroll checks it received from "Huber Law" employers. During the period involved, the County did not collect, or remit to the department, a sales tax on its "Huber Law" meals.

The County argued that because it is required by law to provide the meals in question, it is not a "retailer" subject to tax under the provisions of s. 77.52(1), Wis. Stats.

The Commission held that the charges for meals to "Huber Law" prisoners collected by the Milwaukee County were subject to Wisconsin sales tax, under the provisions of s. 77.52(1), Wis. Stats., and Wisconsin Administrative Code rule Tax 11.05. The fact that the County is required by law to provide the meals in question does not exempt it from the imposition of the tax mandated by s. 77.52(1), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

William A. Mitchell vs. Wisconsin Department of Revenue (Circuit Court of Dane County, November 16, 1981). This is an appeal of a Wisconsin Tax Appeals Commission decision which affirmed the disallowance of a retailer's discount claimed by taxpayer for the tax years 1974 and 1975 and the disallowance of a claim by taxpayer that the sale of his business in 1976 constituted an occasional sale which is not subject to sales tax. (A summary of the Wisconsin Tax Appeals Commission's decision is in WTB #21.)

Until September of 1976, taxpayer's business constituted placing coin-operated amusement machines (such as juke boxes, pinball machines, pool tables, bowling games) in various commercial establishments under agreements with the proprietors that the proprietors received a certain percentage of the gross receipts from the machines. Taxpayer collected the receipts from the machines, divided the receipts with the proprietors, and was responsible for the maintenance and repair of the machines. Taxpayer sold the business and all the machines in September of 1976 for $104,200.

According to taxpayer, when he purchased a machine, he paid a sales tax upon the purchase price. Subsequent to such purchase, he claimed a credit for the tax so paid as an offset against the sales tax otherwise due upon receipts from the machine. The credit was claimed with respect to the receipts from the machines until such time as the entire sales tax paid upon the purchase thereof was recovered. The assessments for 1974 and 1975 constitute a disallowance of such credits, and the assessment for 1976 constitutes an assessment of sales tax upon the sales price of the business.

With respect to the assessments for 1974 and 1975, it is taxpayer's contention that the receipts from the machines constituted rental payments for the use thereof by the general public, and, because the machines were purchased for resale via rentals, no sales tax was due upon the purchase thereof. Accordingly, taxpayer was entitled to the credits which he claimed. It is the department's contention that the receipts from the machines constituted payment for services rendered by taxpayer which are subject to sales tax and, therefore, taxpayer's purchases of the machines were subject to sales tax.

With respect to the assessment for 1976, it is taxpayer's contention that the purchaser of the machines purchased same for rental and, therefore, no sales tax was due upon the sale thereof. It is the department's contention that the purchaser bought the machines to render a taxable service and, therefore, the sale thereof was subject to sales tax.

The issue in this case is not whether the gross receipts from taxpayer's coin-operated amusement devices are subject to Wisconsin sales tax — the parties agree that sales tax is due on the gross receipts. Rather, the issue is whether that tax is prop-

erly imposed under s. 77.52 (1), Wis. Stats., as rental receipts for the use of tangible personal property, or under s. 77.52 (2) (a) 2, Wis. Stats., as receipts for providing one of the services which is subject to a selective tax on specified services provided in this state.

The significance of the distinction is the following: If the tax on the gross receipts is imposed under s. 77.52 (1), Wis. Stats., for rental of tangible personal property, then the tax on those gross receipts can be offset against the sales tax paid on the purchase for the machine under s. 77.51 (11) (c) 5, Wis. Stats., (as claimed by taxpayer). However, if the gross receipts are taxed as a "service" under s. 77.52 (2) (a) 2, Wis. Stats., then such tax pursuant to s. 77.51 (24), Wis. Stats., may not be offset against that sales tax paid at the time of the purchase of the machines (as determined by the Commission).

The Circuit Court upheld the decision of the Wisconsin Tax Appeals Commission. The Circuit Court concluded that based on the Findings of Fact of the Commission that taxpayer was providing at retail to the patrons of the establishments, into which he was able to place his machines, the privilege of the use of entertainment devices (s. 77.52 (2) (a) 2, Wis. Stats.). It further concluded that since taxpayer held a seller's permit at the time he sold the business in 1976 and since the business was apparently to be continued in the same fashion by the new owner, that the transaction did not qualify as an occasional sale under s. 77.51 (10) (a), Wis. Stats.

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

HOMESTEAD CREDIT

Louis N. Schara vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 19, 1981). Louis Schara has one-seventh ownership interest in a home located at 3451 Halder Drive, Mosinee, Wisconsin as a tenant in common and taxpayer's six brothers and sisters own the other six-sevenths interest in the home at that address as tenants in common. Taxpayer resided at the home for all of 1979. Louis Schara paid the total amount of property taxes due on the property in 1979, amounting to $403.77. Taxpayer paid no rent to his brothers and sisters for the Mosinee property in 1979.

The department adjusted taxpayer's 1979 homestead credit claim by allowing taxpayer one-seventh of the property taxes paid and allowing one-fourth of the remainder of property taxes as rent constituting property taxes accrued in calculating the April 15, 1980 notice of refund. Taxpayer appealed this adjustment, claiming he was entitled to the total amount of property taxes paid in determining "property taxes accrued".

The following Wisconsin statute is involved in this case:

> Section 71.09" (7) (a) 8 . . . If a homestead is owned by 2 or more persons or entities as joint tenants or tenants in common and one or more such persons or entities is not a member of claimant's household, 'property taxes accrued' is that part of property taxes levied on such homestead (reduced by the tax credit under ss. 79.10 (3) and 79.25 (5) *as reflects the ownership percentage of the claimant* and the claimant's household. . ." (Emphasis added).

The Commission held that because taxpayer and his six brothers and sisters held record title to his homestead in 1979 and taxpayer paid all of the property taxes, one-seventh of the taxes claimed are allowable under s. 71.09 (7) (a) 8, Wis. Stats., as property taxes accrued which are attributable to his ownership percentage in the homestead in 1979.

The remaining six-sevenths of the taxes claimed by Schara which are attributable to his six brothers' and sisters' ownership percentage of the homestead is allowable, in computing taxpayer's claim, as "gross rent" as defined in s. 71.09 (7) (a) 7, Wis. Stats., for 1979.

The taxpayer has not appealed this decision.

WITHHOLDING

Harry Federwitz vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 19, 1981). On May 24, 1979, the department issued to Harry Federwitz an assessment for $4,303.23 of withholding tax penalty, asserted under ss. 71.20 (5) and (21), Wis. Stats., for taxpayer allegedly being an officer or employee of a corporation responsible for intentionally failing to withhold, account or pay withholding taxes to the department for the periods September through December 1977, and January, February, April, June, October, November and December 1978. By stipulation of the parties, the months of October, November and December of 1978 were eliminated for purposes of the assessment of additional taxes, thereby reducing the amount in dispute to $2,617.07.

During the period involved, taxpayer was a director and shareholder, and employed as full-time general manager and president, of a Wisconsin domestic corporation, Northern Coach, Inc., located in Marshfield, Wisconsin.

The sole issue is whether the taxpayer was an officer or employee who was under a duty to withhold employees' taxes of Northern Coach, Inc., and account and pay over said taxes to the department within the intent and meaning of s. 71.20 (5) (a), Wis. Stats. During the period involved, Northern Coach, Inc. failed to account and pay over withholding taxes of its employees. Federwitz was a shareholder, officer, director and general manager of Northern Coach, Inc.; was authorized to determine creditors to be paid; and to issue and sign checks on behalf of Northern Coach, Inc.; and did, in fact, sign substantially all of the corporation's checks, including those to himself.

Taxpayer did prefer creditors other than the department by paying suppliers of supplies and raw materials, paying net wages to employees, and paying himself a net wage as an employee of Northern Coach, Inc. Federwitz was aware of the withholding tax arrears, commencing with his full-time employment with Northern Coach, Inc., in April of 1977, prior to the period under review; consciously preferred creditors other than the department during the period under review; and had authority to remit to the department the arrears of withholding taxes if he had so chosen. Taxpayer was an officer or employee of Northern Coach, Inc., who had authority to account for and pay over to the department withholding taxes; and as

its employee, willfully and intentionally failed to do so, and preferred other creditors.

During the periods September 1977 through February 1978, and April and June of 1978, was taxpayer an officer or employee of Northern Coach, Inc., who was required to withhold, account for, or pay over to department withholding taxes on behalf of Northern Coach, Inc. and who intentionally did not withhold, account or pay as he was required?

The Commission held that September 1977 through February 1978, and April and June of 1978, Federwitz as an officer or employee of Northern Coach, Inc., was required to withhold, account for or pay over to the department taxes on behalf of Northern Coach, Inc. During this period, taxpayer knew or should have known the Wisconsin withholding tax requirements. Taxpayer intentionally and willfully failed to remit the withholding taxes within the intent and meaning of s. 71.20 (5) (a), Wis. Stats. The fact that one or more other officers or employees may also be held responsible does not preclude the department from proceeding against the taxpayer for the penalty under s. 71.20 (5), Wis. Stats.

The taxpayer has not appealed this decision.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INCOME TAXES

1. Exceptions 1 and 2 to the Addition to Tax Penalty

Facts and Question: Husband and wife both under 65 years of age filed a combined 1979 individual income tax return by the original due date, even though they were not required to file because their gross income was less than $5,200. The only income reported on the 1979 return was a $500 profit on the sale of stock owned by the husband (the selling price of the stock was $1,000). There was no taxable income after applying the standard deduction. The taxpayers filed their 1980 return reporting a $40,000 gain on the sale of jointly held property. The net tax of each spouse, which was remitted with the 1980 return, was $1,219.

Question 1:

May either the husband or wife claim exception number 1 to the addition to tax penalty (s. 71.21 (14) (a), Wis. Stats.) for failure to make declaration of estimated tax installment payments for 1980?

Answer:

No. Exception number 1 may not be claimed by either husband or wife since there was no tax liability on the 1979 return.

Question 2:

Can the husband or wife qualify for exception 2 (s. 71.21 (14) (b), Wis. Stats.) to the addition to tax penalty on the basis of a return filed for the preceding taxable year where there was no requirement for filing such return?

Answer:

Yes. In the above example, both spouses qualify for exception number 2. This exception provides that a taxpayer must make declaration payments which equal or exceed an amount computed based on the facts shown on the tax return of the preceding taxable year (except for personal exemptions) using the current year's tax rates and personal exemptions from the current year's return. Unlike federal law, Wisconsin law does not provide that the prior year's return must have been required to have been filed for purposes of applying this exception.

SALES/USE TAXES

1. Recreational Receipts and Recreational Facilities

Section 77.52 (2) (a) 2, Wis. Stats., imposes the 4% tax of the gross receipts from the sale of admissions to amusement, athletic, entertainment or recreational events or places, and the furnishing, for dues, fees or other considerations the privilege of having access to or the use of amusement, entertainment, athletic or recreational devices or facilities.

A. One type of admission is where there is a presentation of some item or activity which is intended to entertain or amuse the persons paying the admission. The person attending does not participate in the activity, but is amused or entertained by the efforts of others. Examples of these admissions would be admission to movies, plays, operas, concerts, ballet, football, hockey, baseball and basketball games, boxing and wrestling matches, professional golf matches, ice shows, circuses, carnivals and track meets.

   Admissions to this type activity are taxable under s. 77.52 (2) (a) 2, Wis. Stats.

B. In another situation there is an amount paid for the use of amusement, entertainment, athletic or recreational facilities, in the sense that the person involved participates in the activity. In this situation