acquiescence in regard to this decision.

Mining Equipment Mfg. Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). This is an appeal of the department's assessment of a sales and use tax deficiency against Mining Equipment Mfg. Corp. for the period of September 1, 1969 to August 30, 1976, in the amount of $73,041.88. During this period, Mining Equipment Mfg. Corp. was a Wisconsin corporation, subject to the sales and use tax provisions of Chapter 77 of the Wisconsin Statutes. Mining Equipment Mfg. Corp. held a Wisconsin Seller's Permit No. 140078, issued by the department.

Mining Equipment Mfg. Corp. was engaged in the business of manufacturing, installing, maintaining, and repairing tunneling machines and equipment. The tunnel shield is a machine used to provide a protective cover over miners excavating a tunnel, cut a uniform size tunnel, assist in putting in place steel ribs to hold back the earth and provide a work platform and blast protection for the miners. It consists of the shield proper and tail, a hydraulic system, push jacks, poling plate jacks, breasting jacks, and expander jacks, poling plates, an expander and jack shoes. The power which drives the shield forward comes from an electric motor that operates a hydraulic pump, which through a hydraulic manifold transmits power to the hydraulic jacks.

During the period involved, the taxpayer sold its product ex-tax to various construction contractors and accepted from those contractors exemption certificates containing the following exemption claims:

1. That said equipment was left in the ground and became a structural part of the real estate;
2. That said equipment was purchased for resale (Michels Pipe Line Const., Inc.);
3. That said equipment was purchased for waste treatment or pollution abatement plant and equipment (W. J. Lazynski, Inc.).

The resale exemption certificate (Michels Pipe Line Const., Inc.) did not contain a general description of the kind of property involved.

The issues for the Commission to determine were as follows:

1. Were the tunnel shields sold by the taxpayer subject to the sales tax, or were they exempt under s. 77.54 (18) or (26), Wis. Stats.?
2. Were labor charges assessed subject to the sales tax?
3. Did the taxpayer take exemption certificates in good faith from the purchasers of the property and services?
4. If the taxpayer did, is it relieved of any liability for the sales tax on such sales?
5. If the sales were subject to the sales tax and the taxpayer is liable for the tax, is the assessment barred by equitable considerations under the circumstances of the case?

The Commission held that the taxpayer accepted the exemption certificates in good faith as that term is used in s. 77.52 (14), Wis. Stats. The exemption certificate received by the taxpayer from Michels Pipe Line Const., Inc. was invalid on its face as it did not contain a general description of the kind of property being purchased for resale as is required by s. 77.52 (14), Wis. Stats. The taxpayer's good faith acceptance of exemption certificates for its sale of its product to construction contractors claiming said equipment would be left in the the ground and become a structural part of the real estate and to construction contractors alleging that said equipment was purchased for waste treatment or pollution abatement plant and equipment purposes relieved it from payment of sales tax within the intent and meaning of s. 77.52 (14), Wis. Stats. However, the taxpayer's acceptance of an exemption certificate from Michels Pipe Line Const., Inc., which was invalid on its face, did not relieve it from payment of sales tax on said purchase.

The department has appealed this decision to the Circuit Court.

Mushel & Mushel vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 22, 1982). Taxpayer, Mushel & Mushel, is a Wisconsin partnership, consisting of Richard A. Mushel and Gerald E. Mushel. On March 9, 1977, the department issued to the taxpayer Seller's Permit No. 256744 to operate a hotel, known as Hotel Howard, in Manitowoc, Wisconsin. On August 24, 1979, the taxpayer sold the hotel premises and the furniture and fixtures therein to the LDTZ Corporation. Under date of April 4, 1980, the department issued a sales and use tax assessment against the taxpayer in which it imposed a tax on the sale of the personal property of the Hotel Howard on August 24, 1979.

The Hotel Howard is a 40-unit hotel renting rooms to transient guests residing there for various periods of time. Donna Mushel handled the books, records and tax accounting for the taxpayer during the relevant periods involved herein. She testified that during the negotiations for the sale of the Hotel Howard, she was advised by realtor, Jerome J. Weyenberg, that if the taxpayer surrendered its seller's permit to the department, prior to the sale, it would not be required to pay a sales tax on said transaction.

Donna Mushel testified before the Commission that on August 22, 1979, she placed the taxpayer's seller's permit in the United States mail, along with a cover letter, addressed to the Wisconsin Department of Revenue, with the intent of surrendering it to the department. The taxpayer's office at the Hotel Howard was closed permanently at midnight on August 22, 1979 and the actual sale of the premises was concluded on August 24, 1979 with the new owner, LDTZ Corporation, taking possession of the premises on that same date. She further testified that the rentals for tenants in the hotel at the time of closing were prorated to the date of closing.

Jerome J. Weyenberg and Gerald Mushel both testified that they saw Donna Mushel mail the taxpayer's seller's permit to the department on August 22, 1979. James Haugen, an employee of the department, testified that the Wisconsin Department of Revenue had no record of receiving the taxpayer's seller's permit in late August of 1979.

The issue involved in this case was whether the taxpayer's sale of the business assets of the business known as Hotel Howard was exempt from the sales tax as an occasional sale under the provisions of ss. 77.54 (7) and 77.51 (10) (a), Wis. Stats.

The Commission ruled that on August 24, 1979, when the taxpayer sold its hotel assets, including tangible personal property, the taxpayer was required to hold a seller's permit. Because the taxpayer was required to hold a seller's permit on August 24, 1979, its sale of tangible personal property was subject to the sales tax under s. 77.52 (1), Wis. Stats., and not exempt as an occasional sale under ss. 77.54 (7) and 77.52 (10) (a), Wis. Stats.

The taxpayer has not appealed this decision.

The Mylrea Company, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 16, 1982). This is an appeal of the department's assessment against the Mylrea Company, Inc. for sales and use tax for the years 1974 through 1979. The department contended that the taxpayer did not qualify for the farming exemptions specified in ss. 77.53, 77.54 (2), (3), (3m) and (7) and 77.52 (2), (12), (13) and (14), Wis. Stats. During the years 1974 through 1979 the taxpayer did not hold a seller's permit for the State of Wisconsin.

The Mylrea Co., Inc. was a Wisconsin farming corporation with one of its principal businesses being the production of American ginseng. The taxpayer purchased saw logs in large loads, due to the economics of the farming community, in which a number of other ginseng farmers shared in the log load and reimbursed Mylrea for a percentage of said load that they purchased. The large load was necessary because the saw logs could not be delivered unless it met a certain weight and size, and a single farming operation was unable to buy said lot but a number of ginseng farmers in the community were able to avail themselves of this farming system.

The lumber taken from the loads by the taxpayer was made into slats, lath sheds and poles, and a number of other wooden items that were used exclusively in the ginseng operation of said farm. The wood poles and lath sheds are essential to the production and growing of ginseng. Also, the harvested crop must be enclosed by wooden sheds for the drying process.

The Mylrea Co., Inc. was strictly a farming operation and was not engaged or involved in any manufacturing process. Besides other farming operations the taxpayer produced at a high profit and a high market risk to itself, a ginseng root which was mainly used in exporting to foreign countries. The saw logs that the taxpayer used were used exclusively in the taxpayer's farming operation and were not sold by it in a commercial manner. The use tax imposed on the saw logs was for the purchase of the wood products, and the sales and use tax assessment made by the department was for the sale of the saw logs from the taxpayer to other ginseng farmers in the community.

The Commission held that Mylrea's entire operation was exclusively a farming operation and the farming exemptions in ss. 77.54 (3) and (3m), Wis. Stats., applied to the taxpayer.

The department has appealed this decision to the Circuit Court.

Servomation Corporation, Successor to Servomation of Wisconsin, Inc. vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, March 30, 1982). The issue in this case is whether sales of beverages through hot and cold drink coin vending machines located in schools and hospitals are exempt from sales taxation under ss. 77.54 (4), (9a) and (20) (c) 4, Wis. Stats. (See Wisconsin Tax Bulletin #26 for a summary of the Court of Appeals' decision.)

Servomation entered into agreements with several secondary schools and hospitals to place its vending machines in their facilities. In return, it agreed to pay to the institutions a fixed percentage of the gross receipts from the products sold through the vending machines. The prices charged for the products in the machines were set by the owner or administrator of the institution where the machines were located. The institution was also responsible for any damage to the machines and had control over the ultimate consumer's access to the machine. The taxpayer retained ownership and control of the machines. Its personnel possessed the only keys to the machines and performed the loading and unloading of them. They also removed the gross receipts from the machines and took them to Servomation's office where they were counted. After the receipts were counted, Servomation gave the schools and hospitals an accounting of the receipts and paid them the agreed commission.

The taxpayer received the same net proceeds from sales made from its machines at schools and hospitals as it did from machines located in other locations which were not exempt from taxes. The schools and hospitals generally received a larger share of the receipts based on the understanding that no sales tax would be due on the gross receipts.

The department issued a determination that Servomation was liable for taxes on sales for the period of June 28, 1970 through June 30, 1974 made from its machines located in schools and hospitals. The Tax Appeals Commission affirmed the department's finding that additional taxes were due. The Circuit Court issued a judgment affirming the decision of the Commission. This judgment was then appealed to the Court of Appeals. The Court of Appeals affirmed the Circuit Court's decision on the sales tax issue. The Supreme Court then granted Servomation's petition for review of this single issue.

The issue before the Supreme Court was who is the "seller" of products from the vending machines. If Servomation is the seller, then it is liable for the taxes, while if the hospitals and schools are deemed to be the sellers, then the sales would be exempt from sales tax. Section 77.52 (1), Wis. Stats. 1969, imposes a sales tax on all "retailers" for "the privilege of selling, leasing, or renting tangible personal property...." Section 77.51 (4), Wis. Stats., defines "sales" as "the transfer of the ownership of, title to, possession of, or enjoyment of tangible personal property or services...." Sales by hospitals and schools are exempt from these taxes by virtue of ss. 77.54 (4), (9a), and (20) (c) 4, Wis. Stats.

Servomation contended that the sales were made by the schools and hospitals. Despite the fact that it owned the vending machines, it argued that the schools and hospitals were the sellers because they arranged for the sale of the products by procuring the purchasers. It relied on a case from the Dane County Circuit Court, Hargarten d/b/a Chattel Changers v. Department of

Revenue, Wis. Cir. Ct., Dane County (Case No. 156-180, Oct. 10, 1977). That case involved a party engaged in the business of selling property for others. The taxpayer in Hargarten was held to be a seller because, even though it never owned the property, it acted as the owner's agent in negotiating and arranging for sales and procuring purchasers. The Court found the reasoning of Hargarten does not lend support to Servomation's position in this case.

The Wisconsin Supreme Court agreed with the Court of Appeals that Servomation was clearly the seller of these products. It retained ownership and control of the machines and possessed the only keys to them. The money from the machines was unloaded by its employees and was never seen by the schools and hospitals. They were sent records of the receipts by Servomation and received a commission on the sales. Additionally, it was revealed at oral argument that Servomation bears the costs of spoiled or defective products. Selling products through vending machines is the taxpayer's business. The schools and hospitals are not involved in these sales. They did not own nor lease the machines, nor any of the merchandise offered for sale in the machines. Nor did they control or handle the proceeds. They only received a commission calculated by Servomation because they permitted the machines to be placed in their institutions. In affirming the Court of Appeals' decision, the Supreme Court indicated that the sales of beverages through coin operated vending machines located in schools and hospitals are subject to the sales tax.

Note: The department also appealed the Court of Appeals' decision that Servomation's purchase of plastic eating utensils furnished for use by the customers of the taxpayer's vending machines were exempt from the use tax under s. 77.53 (1), Wis. Stats. The Supreme Court denied certiorari on this issue, therefore the Court of Appeal's decision on this issue is final and binding upon the department.

WITHHOLDING

William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, et. al. (Court of Appeals, District IV, March 2, 1982). On March 6, 1981 William A. Mitchell filed Form WT-4 with his employer claiming exemption from withholding taxes. The department voided the form as incorrect and sent notice of this fact to Mitchell and to his employer. The employer beganwithholding on the basis of five exemptions, which was the number indicated on Mitchell's last filed form deemed correct by the department. Mitchell sought a declaratory judgment and permanent injunctive relief contenting that he was exempt from the withholding tax and that it is unconstitutional for the department to assess and collect the withholding tax prior to determining his administrative petition for redetermination. The action was dismissed by the Circuit Court because Mitchell had failed to exhaust his administrative remedies (see WTB #25).

The exceptions to the rule requiring exhaustion of administrative remedies are set forth in Nodell Inv. Corp. v. Glendale, 78 Wis.2d 416, 425, 254 N.W.2d 310 (1977). Mitchell could bypass the statutorily prescribed administrative review procedures only if his complaint raised a substantial constitutional claim. Mitchell's constitutional claim is that it is a denial of due process to allow the department to assess and collect a tax prior to the resolution of his administrative petition for redetermination.

The Court of Appeals upheld the Circuit Court's decision and dismissed the taxpayer's request for a declaratory judgment.

The taxpayer has not appealed this decision.

GIFT TAX

Anna Gerovac and Peter Gerovac vs. Wisconsin Department of Revenue (Circuit Court of Racine County, March 9, 1982). On April 10, 1980 the Wisconsin Department of Revenue sent notice of gift tax assessment to Peter Gerovac and Anna Gerovac. These assessments arose out of conveyances made several years earlier to those persons by Josephine Gerovac Hribar. Taxpayers claimed that the transfers were to avoid creditors and were not gifts.

Josephine Gerovac Hribar conveyed lands to Peter Gerovac and Anna Gerovac and received no consideration in return for these conveyances. Josephine, Peter and Anna all agreed and acknowledged that the conveyances were made to secure loans Peter and Anna had made to Josephine, and also for the purpose of removing Josephine's real estate from the reach of her creditors. In addition to the conveyances, Josephine, Peter and Anna entered into an agreement which provided that when Josephine had repaid all loans and obligations to Peter and Anna, they would transfer the property back to Josephine. At all times after the conveyances, Josephine maintained physical control of the properties, lived in a home on the properties, and operated the business of mining gravel from two of the properties that were conveyed. She paid real estate tax on all of the properties, and held herself out to law enforcement officers as owner of the property.

The department contended that because Peter and Anna had legal title, it followed they had control over the deeded property as to constitute a gift under the statute.

The Tax Appeals Commission determined that the transfer of these properties to Peter Gerovac and Anna Gerovac by deed were gifts as the word "gift" is defined in s. 72.76 (7), Wis. Stats., as there was no consideration given for them, and the documents recorded did not reflect any incumbrance on title such as a mortgage as claimed by the taxpayers. The Commission went on to state that earlier decisions of the Commission and the Wisconsin Supreme Court had ruled that by transferring a deed, a grantor divested herself of all beneficial interest in the property transferred, and had no power to revest any such interest in herself, or in her estate by her own actions. The Commission held that although Josephine may have had rights under the agreement requiring reconveyance when the debts were paid which could be enforced by action under real property law, this was of no consequence under the gift tax law and could not stand to negate the imposition of gift tax.

The Circuit Court held in favor of the taxpayer. Josephine had an agreement requiring reconveyance upon payment of the loans to Peter and Anna, which all parties acknowledged was binding upon them. She then could require reconveyance of

the property by repaying the loans and enforcing this agreement. The Circuit Court held that Josephine retained the beneficial interest in the properties which were the subject of the deeds of conveyance.

In order that a gift be considered complete for gift tax purposes three things must occur. First, there must be a form of transfer. Second, such transfer must divest the grantor of all beneficial interest in the property transferred. Third, the grantor must have no power to revest any such interest in herself or her estate. The Circuit Court held that the second and third requirements were not met. The second requirement is absent, because Josephine, the grantor, did not divest herself of all beneficial interest. The third requirement is not met, for this would require that Josephine had no power to revest any interest in herself or her estate. All parties acknowledged they were bound by the agreement requiring reconveyance to Josephine at such time as she paid the obligations owed to Peter and Anna.

The department 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. Prepayment of Mortgage Loan for Discount Considered Income

Facts and Question: A financial institution is offering a discount on the prepayment of a mortgage for certain mortgage customers. In consideration for the advance payment, the financial institution grants a discount on the amount of the prepayment on the mortgage loan. The prepayment and discount are both credited to the mortgage customer's account.

Example: A savings and loan association offers taxpayer a 15% discount on the prepayment of a mortgage loan. Taxpayer prepays $5,000 on his $10,000 mortgage and receives a discount of $750 ($5,000 x 15%) for the advance payment. Taxpayer's loan balance is reduced to $4,250 after applying the prepayment and discount. What is the tax treatment of the $750 discount?

Answer: Under section 61 (a) (12) of the Internal Revenue Code, gross income is defined as including income from the discharge of indebtedness. Taxable income is realized in situations involving the reduction of indebtedness for advance payment. For both federal and Wisconsin purposes, therefore, the amount of the discount ($750 in this example) must be included in the taxpayer's income.

Note: Under section 108 of the Internal Revenue Code, gross income does not include income from the discharge of indebtedness if a) the discharge occurs in a Title 11 case, b) the discharge occurs when the taxpayer is insolvent, or c) the indebtedness discharged is qualified business indebtedness. It is assumed in the example above that the taxpayer is solvent and his mortgage pertains to his personal residence, and, therefore, he does not qualify for any of these exceptions.

2. Deductible Municipal Utility Charges Not Property Taxes for Homestead, Farmland Preservation and Property Tax Credits

Facts and Question: Under certain circumstances, Section 164 (c) (1) of the Internal Revenue Code permits real property owners to deduct a portion of charges which they pay to a municipally owned utility as an itemized deduction for property taxes. The amount allowable as an itemized deduction is that portion of the utility charge which the municipality has identified as being attributable to maintenance and interest charges.

Can the portion of a municipal utility charge which a property owner is allowed to claim as an itemized deduction on the federal income tax return be considered as property taxes for purposes of calculating the following Wisconsin credits:

(1) The 12% property owner's credit provided by s. 71.53, Wis. Stats.
(2) Homestead credit provided by s. 71.09 (7), Wis. Stats.
(3) Farmland preservation credit provided by s. 71.09 (11), Wis. Stats.

Answer: No. The statutes which provide the above credits all define property taxes as amounts "exclusive of special assessments, delinquent interest and *charges for service*...." (emphasis supplied). The statutes do not permit any portion of a charge imposed by a municipal utility for services received by a property owner to be treated as property taxes for purposes of the three credits mentioned above. ("Property taxes" is defined for Homestead Credit purposes in s. 71.09 (7) (a) 8, Wis. Stats., for Farmland Preservation Credit purposes in s. 71.09 (11) (a) 7, Wis. Stats., and for the 12% property owner's credit in s. 71.53 (1) (c), Wis. Stats.)

FARMLAND PRESERVATION CREDIT

1. Converting Initial Farmland Preservation Agreements to Long-Term Agreements

Facts and Questions: Initial farmland preservation agreements entered into under Subchapter III of Chapter 91, Wis. Stats., will expire on September 30, 1982. Sections 71.09 (11) (a) 3.cm and 91.41, Wis. Stats., allow Farmland Preservation Credit claimants to apply for conversion of initial agreements to long-term agreements (under Subchapter II of Chapter 91) by the end of the year in which a certified agricultural preservation plan is