C. Whether the department is equitably estopped from seeking to assert the validity of the 1975 RAR assessment.

On August 4, 1977, the department issued an assessment against Grace for additional franchise taxes and interest for the years 1973 through 1975. The matter was appealed to the department and then to the Tax Appeals Commission, where only the part of the assessment for the year 1975 was at issue. Subsequently, the Commission held that Grace's domestic operations constituted a unitary business, but that its foreign and domestic subsidiaries were not part of such unitary business and, therefore, dividends and gains from such subsidiaries were not includable in Grace's apportionable income. Both the department and Grace appealed this decision to the Dane County Circuit Court. Such matters shall be referred to herein as "the court cases."

On October 12, 1981, the department issued another assessment against Grace for the years 1974 through 1975 for additional franchise tax and interest. The assessment was based on federal audit adjustments to Grace's income for those years. Such adjustments are referred to as "RAR" adjustments, which stands for "Revenue Agent's Report" adjustments. Grace paid the amount due for 1974, but appealed the inclusion of dividends and gains in apportionable income in 1975. Grace and the department agreed to hold this appeal in abeyance pending the disposition of the first Grace appeal which was then pending before the Commission. This second appeal shall be referred to herein as "the 1975 RAR assessment."

On June 14, 1982, the department issued still another assessment against Grace, this one for additional franchise tax and interest for the years 1976 through 1980. The matter was also held in abeyance pending the Commission's decision on the first appeal. The principal issues in this appeal were the unitary business issue and taxation of dividends and gains issues common to the "court cases" and the 1975 RAR assessment. This appeal shall be referred to herein as "the 1976-1980 assessment."

On June 26, 1985, while the "court cases" were pending in court and the 1975 RAR assessment and the 1976-1980 assessment were both pending before the department's Appellate Bureau, the parties held a meeting. At the meeting, the parties reached a basis of settlement reflecting the Commission's decision to the extent that Grace's domestic operations were treated as a unitary business and dividends and gains were excluded from Grace's income. After the meeting, the department sent Grace two revised audit reports, one for the "court cases," which showed an amount due for tax with interest computed to September 30, 1985, of $111,722.44; the other for the 1976-1980 assessment, which showed an amount due for tax with interest computed to October 15, 1985, of $565,462.12.

On October 14, 1985, the parties executed a stipulation of settlement in the "court cases," which provided as follows:

> It is hereby stipulated by and between the parties hereto, by their respective counsel, that the respondent/petitioner, W. R. Grace & Company, has an existing Wisconsin franchise tax deficiency, for the year 1975, in the amount of $60,106.22, along with interest thereon, computed to October 15, 1985, in the amount of $51,838.97 for a total of $111,945.19; and, it is hereby further stipulated by and between the parties hereto, by their respective counsel, that the respondent/petitioner, W. R. Grace & Company, shall pay such deficiency and interest, in the amount of $111,945.19 plus additional interest of $14.85 for each day after October 15, 1985, such deficiency remains outstanding, **and that such payment shall be in full settlement of the above-entitled actions**; and, it is hereby further stipulated by and between the parties hereto, by their respective counsel, that the parties file a stipulation of dismissal in the above-entitled actions. (Emphasis added)

On October 17, 1985, the parties executed a closing agreement relative to the 1976-1980 assessment, which provided as follows:

> IN THE MATTER OF THE ADDITIONAL FRANCHISE TAX ASSESSMENT AGAINST W. R. GRACE & CO. DATED JUNE 14, 1982 FOR THE YEARS 1976 THROUGH 1980.
>
> IT IS HEREBY STIPULATED AND AGREED that for purposes of settlement, **the correct adjusted incomes of the above-named, W. R. Grace & Co., for the years 1976 to 1980, both inclusive, are in the amounts set forth in the attached schedule(s) and that upon the basis of such adjusted incomes there are taxes and interest to October 15, 1985, totaling $565,462.12.**
>
> IT IS FURTHER STIPULATED that this agreement and the payment of the above additional taxes shall serve as a final disposition of the taxpayer's franchise tax liability up through and including the year 1980. (Emphasis added)

On March 6, 1986, the department sent Grace a closing agreement relative to the 1975 RAR assessment which made the same adjustments to income that were made in the "court case's" revised audit report, except that it imposed tax on the federal audit adjustments. Grace declined to sign the agreement claiming the stipulation of settlement in the "court cases" precluded the 1975 RAR assessment. The department issued its notice of action denying Grace's petition for redetermination and Grace appealed to the Commission. Grace's appeal claimed that the 1975 RAR assessment was barred by the closing agreement for the 1976-1980 assessment.

The Commission concluded that:

A. The assessment dated October 12, 1981, issued to the taxpayer is not barred by the closing agreement dated October 17, 1985.

B. The department, by its actions in the course of settling two related matters regarding the taxpayer, did not agree to absolve the taxpayer of all its franchise tax liability for 1975.

C. The department is not estopped from seeking to assert the validity of the 1975 RAR assessment.

The taxpayer has appealed this decision to the Circuit Court.

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SALES/USE TAXES

Telecommunication services. *GTE Sprint Communications Corporation, now known as U.S. Sprint Communications Company vs. Wisconsin Bell, Inc.* (Circuit Court of Milwaukee County, November 9, 1988). The issue in this case is whether the sales tax which is imposed by the State of Wisconsin on transfers of services to an inter-exchange carrier which permit the origination or termination of telephone messages between a customer in this state and one or more points in another telephone exchange (LATA) is invalid as repugnant to the Commerce Clause of the United States Constitution and the Equal Protection Clauses of the United States and Wisconsin Constitutions.

The Modification of Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131, 227 (D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983), ordered AT&T to divest itself of its Bell Operating Company subsidiaries, including the company now known as Wisconsin Bell, and that these subsidiaries become separately owned and operated by January 1, 1984.

Beginning on January 1, 1984, the MFJ limited the former Bell Operating Companies, including Wisconsin Bell, to the furnishing of intra-exchange telecommunications services, and exchange access services for inter-exchange telecommunications services. This limitation remains today. Thus, U.S. Sprint provides toll telecommunications services and private line communications between exchanges (LATAs), while Wisconsin Bell provides those same services within exchanges (LATAs).

Wisconsin Bell provides two types of services. They provide services for the origination and termination of telephone calls within their services areas. These origination and termination services are called "access services." They are local in nature. While it may not be completely accurate in terms of the electronic pathway, it is useful to think of this service as the telephone which sits on a desk or hangs on a wall. It does, however, include electronic pathways up to a general switching area which allows access to both intra-exchange and inter-exchange pathways. Wisconsin Bell secondly provides end-to-end transmissions within exchanges (LATAs). Wisconsin Bell uses its own equipment for the entire transaction. Wisconsin Bell is prohibited from providing end-to-end transmission when the transmission crosses exchange lines (LATAs).

U.S. Sprint provides only one service, the transmission of communications across exchange lines (LATAs). This includes communications across state lines but also includes communications entirely within Wisconsin. U.S. Sprint is prohibited from providing origination and termination services.

U.S. Sprint purchases the origination and termination services from local companies such as Wisconsin Bell and pays for them pursuant to tariffs. The tariffs at issue in this case are on file with the Public Service Commission of Wisconsin or the Federal Communications Commission.

Wisconsin Bell's sale of these origination and termination services, the access services, is the taxable event which U.S. Sprint contends is unconstitutional. U.S. Sprint contends that sec. 77.52(2)(a)4, Wis. Stats., violates the Commerce Clause and the Equal Protection Clause of the United States Constitution. The tax is imposed when a telephone call goes from one LATA to another but does not get imposed when the case originates and terminates in the same LATA.

The Court concluded that where a call goes from one LATA to another and creates a transaction, that becomes taxable, there is a rational basis for the imposition of a tax.

U.S. Sprint has appealed this decision to the Court of Appeals.

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Farming—machines. *L. T. Hampel Corporation vs. Wisconsin Department of Revenue* (Circuit Court of Dane County, March 30, 1989). This case comes before the Court for judicial review of a Wisconsin Tax Appeals Commission decision and order, dated September 2, 1988, which determined that sales of the taxpayer's "Calf-tel" calf hutches are not exempt from Wisconsin sales tax under the provisions of sec. 77.54(3), Wis. Stats.

The taxpayer has been selling its calf hutches to farmers and farm equipment dealers throughout Wisconsin. From 1981 through 1984, the taxpayer sold its calf hutches without collecting Wisconsin sales tax. In a decision dated September 2, 1988, the Commission affirmed the department's determination that the sale of calf hutches was subject to the Wisconsin sales tax and that the hutches were not exempt as machines under sec. 77.54(3), Wis. Stats.

The Commission found that hutches helped reduce stress, disease, and death loss among young calves raised in hutches during the first six to eight weeks of life. The Calf-tel hutch has been very effective at achieving these goals, and in creating an environment conducive to raising healthy calves. The Calf-tel has movable parts, but none that are in constant or automatic motion. It has no electronic parts, nor does it utilize or contain any sources of mechanical energy such as gas, electricity, steam, etc. The movable parts are movable either by the calf or by humans.

The major Wisconsin case construing the exemption under sec. 77.54(3), is *Wisconsin Department of Revenue v. Greiling*, 112 Wis. 2d 602 (1983). In that case, the Court found that: "'Machine' may be a nontechnical commonplace word; however, it is not the word 'machine' by itself that is to be analyzed, but the word in conjunction with its use in floriculture that must be considered. The *Greiling* Court applied the use and function test as set out

in *Ladish Malting Co. v. Wisconsin Department of Revenue*, 98 Wis. 2d 496 (Ct. App. 1980).

The Court found that the Calf-tel calf hutch meets the above test. The Commission's findings of fact indicate that the Calf-tel calf hutches are a significant contributive factor in the production of healthy calves. Thus, the "use or function" test, articulated in *Ladish* and followed in *Greiling* would indicate that the Calf-tel hutches are "machines" under sec. 77.54(3), Wis. Stats.

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

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Leases and rentals. *Charles L. Peterson vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 30, 1989). The issues for the Commission to determine are:

A. Whether or not the gross receipts from the lease of taxicabs by the taxpayer during the period under review are subject to sales and use tax under Subchapter III of Chapter 77 of the Wisconsin Statutes.

B. Whether under the circumstances and facts of this case, the Wisconsin Department of Revenue is equitably estopped from collecting a tax assessed for any period prior to and including the last quarter of 1984.

During the period under review, 1979 through 1984, Charles L. Peterson was in the business of owning and operating a taxicab franchise in the city of Milwaukee. Charles L. Peterson owned and operated this taxicab franchise since 1967. The City of Milwaukee issued the taxpayer three permits, one for each of his three taxicabs, in 1967, 1979, and 1980, respectively. The taxpayer has operated this franchise by driving one cab himself and by leasing his other two cabs to independent drivers. When the taxpayer did drive, he always drove the same cab and the other cabs were exclusively leased.

The taxpayer had no control over the drivers who leased his motor vehicles. For the payment of the leasing fee, the drivers obtained the right to use a licensed taxicab with a meter, a radio, and a top light all in operable condition. The drivers were obligated to furnish gasoline.

The taxpayer did not collect or report sales and use tax on the lease of his taxicabs to the independent drivers. The taxpayer claimed that the taxicab rentals were not subject to Wisconsin sales tax because the lease arrangements are not "a transfer of personal property for use or consumption but not for resale as tangible personal property or services" within the meaning of sec. 77.51(14), Wis. Stats. The taxpayer also contends that if the tax is properly imposed on these rentals, assessment should be barred by reason of the doctrine of equitable estoppel, which he asserts to be applicable against the department. As support for his contention, he alleges that the department failed to disseminate to the taxicab industry information stating that cab rentals were taxable and that the department failed to routinely and systematically collect sales tax on such collections. This, he asserts, constitutes action or inaction by the department upon which he reasonably relied to his detriment in failing to collect sales tax from his lessees.

In 1971, two years after enactment of the statute taxing gross receipts from tangible personal property, the department assessed tax on cab rentals from the two largest of the few taxi businesses in Milwaukee. The assessments were challenged on appeal but settled on the basis of allocating a portion of the gross receipts to provision of dispatch services. The record does not reflect whether other similar assessments were subsequently made or whether other taxi businesses which rented cabs to drivers paid sales tax thereon.

The department has published administrative rules interpreting and implementing the statutes making gross receipts from rental of tangible personal property taxable. These rules were in effect during the period in question and clearly identify leases of automobiles as taxable. The department does routinely audit taxicab companies. However, due to the diverse manner in which cabs are operated, i.e., by owner/drivers, lessee/drivers, or employes, it is possible that in the case of a number of businesses, for example, those particularly in smaller towns where no leased or rented vehicles are involved, the issue simply would not have arisen.

Although the taxpayer and his witnesses lacked knowledge during the period prior to 1984 that the receipts were taxable, the record suggests that there were periodic efforts by the Wisconsin Taxicab Association to obtain an exemption for rentals. This, in turn, suggests that not everyone in the industry was unaware of the department's position that these receipts were taxable.

The Commission concluded that the leases by the taxpayer of automobiles to lessee/taxicab drivers were retail sales by the taxpayer of tangible personal property for use or consumption of the lessees, but not for resale, within the meaning of sec. 77.51(14)(j), Wis. Stats. As lessor of tangible personal property to lessees for use as taxicabs located in Wisconsin, the taxpayer was a "retailer" as defined in sec. 77.51(13)(k), Wis. Stats. The gross receipts from the leases in question were "from the sale, lease, or rental of tangible personal property . . . at retail in this state," and, thus, taxable under sec. 77.52(1), Wis. Stats. The taxpayer has failed to establish elements which would warrant the application of estoppel in this case.

The taxpayer has not appealed this decision.

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When and where sale takes place. *Republic Airlines, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 4, 1989). The sole issue in this case is whether during the period 1981 through 1984, Republic Airlines, Inc.'s (Republic's) sales of liquor and use of liquor, pop, and peanuts on flights which fly over Wisconsin that don't land or take off in Wisconsin, and fly over Wisconsin's

portion of Lake Michigan, are "in this state" within the meaning specified in the Wisconsin Statutes.

Republic sold liquor to passengers, while its aircraft were in flight, both while flying over Wisconsin and while not flying over Wisconsin. In addition, it furnished to passengers while its' aircraft were were in flight, both while flying over Wisconsin and while not flying over Wisconsin, liquor, pop, and peanuts, without charge.

Republic's air transportation business includes: (a) flights which arrive at or depart from Wisconsin airports; (b) flights which fly over Wisconsin but which do not land or take off in Wisconsin; and (c) flights which neither arrive at nor depart from Wisconsin airports or fly over Wisconsin.

Republic does not maintain any record of what states it was flying over when it sold liquor or furnished liquor, pop, and peanuts. The taxpayer computed its Wisconsin sales of liquor by calculating a ratio of revenue passenger miles (RPMs) flown in Wisconsin to RPMs flown everywhere and applied the ratio to its gross receipts from its system-wide sales of liquor. The numerator of the ratio included the RPMs of flights which arrived at or departed from a Wisconsin airport but did not include RPMs of flights flying over Wisconsin, which did not land or take off in Wisconsin. In addition, the eastern boundary line of Wisconsin used for purposes of computing Wisconsin RPMs did not extend to the middle of Lake Michigan. The same RPM ratio was applied by Republic to its purchases of complimentary liquor, pop, and peanuts to determine the amount of such items used in Wisconsin.

The department issued an assessment notice which, among other adjustments not at issue, adjusted Republic's Wisconsin RPM ratio or fraction by including in the numerator RPMs for flights which flew over Wisconsin, but did not land in or take off from Wisconsin, and in addition, miles flown past the Wisconsin border to the middle of Lake Michigan. The assessment notice also imposed use tax on the complimentary liquor, pop, and peanuts.

The Commission concluded that Republic's in-flight sales of liquor "over" Wisconsin occurred in Wisconsin, that Wisconsin had jurisdiction to tax the sales, and that the sales tax was not an undue burden on interstate commerce nor a violation of Due Process. The Commission also concluded, however, that the consumption of complimentary food was exempt from the use tax and remanded the case to the department with directions to recalculate the use tax owing after excluding the complimentary items.

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

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Appeals—award of costs. *Susie Q Fish Co., Inc. v. Wisconsin Department of Revenue* (Court of Appeals, District IV, January 26, 1989). Susie Q Fish Co., Inc. appeals from a Circuit Court order affirming a decision of the Tax Appeals Commission denying its motion for costs under Wisconsin's Equal Access to Justice Act, sec. 227.485, Wis. Stats. The taxpayer prevailed in a contested tax exemption case with the Department of Revenue involving its two commercial fishing vessels — the Susie Q and the Avis-J. See Wisconsin Tax Bulletin 53, page 10, for a review of that case.

Under sec. 227.485(3), Wis. Stats., as a small business, the taxpayer was entitled to costs, unless the Tax Appeals Commission determined that the Department of Revenue's position was substantially justified or that special circumstances existed that would make an award of costs unjust.

The Court of Appeals concluded that the Tax Appeals Commission correctly determined that the Department of Revenue was substantially justified in relying on the original certificates of documentation which showed that the Susie Q and the Avis-J did not meet the tonnage requirements of sec. 77.54(13), Wis. Stats., and sec. Tax 11.16(3)(b)1, Wis. Adm. Code. The Tax Appeals Commission correctly found that the Department of Revenue did not have a duty under sec. Tax 11.16(3)(b), Wis. Adm. Code, to measure the vessels to determine, independently of the certificates, whether the vessels qualified for the exemption.

The taxpayer appealed this decision to the Wisconsin Supreme Court; however, its petition was denied.

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