construction of roads, buildings, and other structures. In its Wisconsin operation, the taxpayer performed the work as a subcontractor. For the out-of-state projects, the taxpayer formed joint ventures with other contractors. Nonetheless, the type of work done on the in-state projects and the out-of-state projects was essentially the same.

The operations did not require specialized equipment. In Wisconsin, the taxpayer owned several pickup trucks and several trailers in which the workers would change in to and out of work clothes. For the out-of-state projects, the equipment was either purchased or leased by the joint venture and disposed of upon completion of the project. The taxpayer did not provide the steel for either the in-state or out-of-state projects.

In Wisconsin, the taxpayer operated through its three corporate officers, all of whom worked part-time in the business, and one full-time general manager. The taxpayer employed one part-time bid preparer and two full-time supervisors who, among other tasks, prepared bids for projects. The taxpayer also contracted with an accountant for services including preparation of tax returns and advising management of cost overruns for projects both in-state and out-of-state. In Wisconsin, the taxpayer hired foremen and iron workers, while the out-of-state joint ventures hired a project manager who in turn hired the foremen and iron workers.

The taxpayer became involved in the joint ventures by seeking out-of-state projects. The taxpayer obtained specifications and project plans and was in contact with other contractors in search of potential joint venture partners. If bids were rejected, the taxpayer absorbed all the expenses it incurred.

The taxpayer's eight joint venture agreements all contained essentially the same provisions for equal sharing of profits, losses, and initial capitalization costs, and provisions for the selection of representatives to handle all matters pertaining to the performance of the project. The agreements also contained a provision that the cost of added clerical or accounting personnel solely attributable to the joint venture would be charged to the joint venture. While travel, lodging, and food expenses that the taxpayer's officers incurred while in pursuit of the out-of-state contracts were chargeable to the joint venture, the taxpayer's overhead expenses and time expended by its employes on any out-of-state projects were absorbed by the taxpayer and were not chargeable to the joint venture.

The agreements provided that the hiring and firing of project managers and other management matters would be decided by consensus of the two joint venturers. The Commission found that the taxpayer actually controlled the performance of the projects by its control over the project managers. Project managers reported to the senior management of each joint venture partner, and both joint venture partners shared responsibility for the direction, supervision, and evaluation of each project manager. The taxpayer's management visited all sites every six to eight weeks and visited particular sites when problems developed.

The Commission determined that, because the taxpayer's Wisconsin operation assumed out-of-state operating expenses, the taxpayer had underreported its Wisconsin income for tax purposes.

The Court of Appeals concluded:

A. The factual findings of the Commission were supported by substantial evidence.

B. The Commission's finding of unitariness was correct.

   As was the case in *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983), the taxpayer supplied money not for the mere purpose of investment, but rather to serve an operational function. The taxpayer and its partner provided all start-up capitalization and the only source of operating capital. There is no evidence that this transfer of money was accomplished via an arm's length transaction, as one might expect to be the case if the money were intended as an investment in a totally autonomous operation. The taxpayer provided its half of the capitalization, not with the understanding that it would receive a fair rate of return in the form of interest or dividends, but rather, with the understanding that it would equally divide all proceeds of the project after liquidation.

   The managerial role that the taxpayer played in its out-of-state joint ventures indicates that all operations were part of a unitary business. The taxpayer's role was not merely one of occasional oversight, contrary to its contention. Although each project manager had certain autonomy in the day-to-day operational decisions, the project managers were ultimately responsible to the partners for the progress of the partnerships. The taxpayer and its joint venture partner were responsible for the hiring, firing, and evaluation of each project manager.

As was the case in *Container Corp.*, the management role was based upon the taxpayer's own operational expertise and strategy. The taxpayer was engaged in the same line of work as the projects, but most importantly, without the taxpayer, the joint ventures clearly were not viable operations. According to the terms of each joint venture agreement, both the taxpayer and its joint venture partners appointed representatives who were responsible for all matters arising from the operations of the joint venture.

Furthermore, the joint ventures were not a separate business enterprise which sought out projects on its own. Rather, the projects were handed to the joint ventures after the bidding and hammering out of the details of each contract was completed by the taxpayer and the other joint venture partner. The taxpayer's employes were responsible for the bidding and the contracting, and this work went uncompensated by the joint venture. The taxpayer's Wisconsin operations absorbed all such costs regardless of whether the bid was ultimately accepted or rejected.

The typical joint venture agreement provided that the entity was formed for the completion of a certain project. Thus, after completion of a project, it appears that the joint venture dissolved, or at least liquidated all assets, and divided all remaining capital and any profits among the partners. At that point, the taxpayer's employes, and not the joint venture as a separate entity, sought out new projects in which to apply their expertise.

The joint ventures were not discrete business enterprises, but instead, were completely dependent upon the taxpayer for all bidding and contracting functions, financing, and all upper-level management decisions. Thus, the taxpayer provided the money, the customer, the contract, and the direction. In return, the out-of-state ventures provided a source of great profits, which no doubt then became the capital for subsequent joint ventures. Both in-state and out-of-state operations benefitted from the sharing of bidding and contracting operations.

Therefore, the Court confirmed the Commission's conclusion that the taxpayer's operations, inclusive of its joint ventures, were unitary, and are subject to apportionment without violating the taxpayer's due process rights.

The taxpayer has not appealed this decision. □

SALES AND USE TAXES

Coin-operated laundry machines. *Charles M. Malone vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 25, 1993) The issues in this case are:

A. Whether sec. 77.52(2)(a)6, Wis. Stats., exempts from sales tax the gross receipts from washers and dryers which are activated by tickets and not by coins.

B. If not, whether the department should be estopped from collecting the sales tax from the taxpayer.

C. Whether the department has retroactively applied sec. Tax 11.72, Wis. Adm. Code, to the taxpayer.

Section 77.52(2)(a), Wis. Stats. (1987-88), imposes the retail sales tax on specified services enumerated therein, including:

> 6. Laundry, dry cleaning, pressing and dyeing services..., <u>except when the service is performed by the customer through the use of coin-operated, self-service machines</u> (emphasis supplied).

The underlined language was first enacted in 1966 and remained unchanged through the period under review.

Regarding issue A, the taxpayer insists that his ticket-operated machines qualify for the "coin-operated" exemption; the department holds that only those activated by coins qualify.

Regarding Issue B, the taxpayer claims non-action on the part of the department in failing to apply the sales tax to ticket-activated machines for many years prior to the assessment under review estops the department from collecting sales tax on those machine receipts.

Regarding Issue C, sec. Tax 11.72, Wis. Adm. Code, in effect for the periods under review, simply repeated the statutory exemption language. The 1991 revision, which petitioner claims was applied retroactively, states with even more clarity than the earlier version that machines activated by "tokens" or "magnetic cards" are ***not*** "coin-operated."

The Commission concluded:

A. Section 77.52(2)(a)6, Wis. Stats., does not exempt from sales tax the gross receipts from washers and dryers which are activated by tickets and not by coins. Since the statutory language is clear and unambiguous, no judicial construction is permitted and the Commission must arrive at the intention of the legislature by giving "coin" and "coin-operated" its ordinary and accepted meaning, which does not include "ticket" and "ticket-operated."

B. The Department is not estopped from collecting the sales tax from the taxpayer. For the Commission to apply estoppel against the department, the taxpayer must show: 1) action or non-action on the part of the department, which 2) induced reliance thereon by the taxpayer, either in action or non-action, which was 3) to the taxpayer's detriment.

   The taxpayer did not prove that it relied on any oral or written statements of the department or its agents, or even on the department's alleged inaction with respect to enforcing the tax. Proof of estoppel must be clear and convincing, and may not rest on conjecture.

C. The 1991 revision to sec. Tax 11.72, Wis. Adm. Code, is of no consequence. The ruling on Issue A obviates a decision on Issue C since the Commission had already ruled that the department's assessment was valid under the statute.

The taxpayer has appealed this decision to the Circuit Court. □

Exemptions — commercial vessels and barges.
Washington Island Ferry Line, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 16, 1993). The issue in this case is whether the taxpayer's purchases of a vessel and related accessories, attachments, parts, lubricants, and fuel during the years 1986-1990 qualify for sales and use tax exemption under sec. 77.54(12) or (13), Wis. Stats.

The taxpayer is a ferry line utilizing five vessels, all of which exceed "50 ton burden," operating from the mainland of Door County to Washington Island, both within the boundaries of the state of Wisconsin.

The taxpayer is the sole source of supplying the necessities of life to the island. It is a regulated common carrier. The state of Wisconsin has issued a certificate which permits it "to operate as a common carrier of passengers and property by water." The federal Interstate Commerce Commission has issued a certificate which permits the taxpayer to operate as a common carrier "in interstate or foreign commerce" in the transportation of passengers and commodities. It is required to file its tariff (rates) and operates under a published schedule which it is required to maintain.

Substantially all building materials, fuel, produce, and other necessities of life are transported from outside Wisconsin to the island by the taxpayer.

The taxpayer is a carrier for the United States mail, being the only link between the post office on the mainland and the post office on the island.

United Parcel Service uses the taxpayer to continue the transport of packages, many from outside Wisconsin, to the island for delivery.

Commercial fishing is an island industry. Approximately one and one-quarter million pounds of fish were transported from the island by the taxpayer in the five years under review, with more than 90% destined for outside Wisconsin.

Tourism is a major island industry, particularly during the summer months. The large majority of these tourists come from outside Wisconsin, and arrive and leave using the ferry.

The transportation of automobiles and passengers by the taxpayer to and from Washington Island during the years under review earned the taxpayer the majority of its revenue.

The department takes the position that the taxpayer fails to prove that its ferry activities qualify as railroad "rolling stock" activities exempt from sales tax under sec. 77.54(12), Wis. Stats. when such ferry line operates exclusively on water, and that its activities do not raise a constitutional issue. It also takes the position that the taxpayer does not "primarily engage in interstate commerce" so as to qualify for exemption from sales tax under sec. 77.54(13), Wis. Stats.

The Commission concluded that the vessels and related equipment and supplies purchased by the taxpayer were exempt from sales tax under sec. 77.54(13), Wis. Stats., as the commercial vessels utilized were of 50-ton burden or over engaged primarily in interstate commerce. Because a substantial amount of the goods and a substantial number of the persons transported by the taxpayer either originate from or are destined for points outside the state of Wisconsin, the Commission held that the taxpayer was primarily engaged in interstate commerce and, therefore, entitled to the exemption from sales tax provided by sec. 77.54(13), Wis. Stats.

The department has appealed this decision to the Circuit Court. □