The taxpayer first raised the argument of the merger date before the Circuit Court. In an oral decision, the Circuit Court reversed the Commission's decision and found that EDC International Corp. had nexus in Wisconsin for its taxable year ending January 31, 1989. This decision was based partly on the date of the merger occurring prior to the end of the taxable year.

The department appealed the Circuit Court's decision to the Court of Appeals, but withdrew the appeal on August 5, 1997. □

HOMESTEAD CREDIT

Homestead credit – housing subject to property tax. *Jean B. Martin vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, July 15, 1997). The issue in this case is whether the claimant, who resides in and rents from a tax exempt, private nonprofit housing facility which makes payments in lieu of property taxes to the Village of Mishicot, is eligible for homestead tax credits if she satisfies all other eligibility criteria.

The claimant is a senior citizen who resides at Mishicot, Wisconsin, in a multi-unit apartment complex owned by the Mishicot Housing Corporation ("MHC"). MHC is a not-for-profit corporation organized in 1976 to provide rental housing for elderly and low income persons. The properties of MHC are exempt from local property taxes. The corporation makes payments in lieu of real estate taxes to the Village of Mishicot, patterned on a 1976 "Cooperation Agreement" between the Village and MHC.

The claimant applied for and received homestead tax credits for 1986, 1987, 1988, and 1989. During 1987, 1988, and 1989, she reported no income other than social security. The source of her income for 1986 is not indicated in the record.

In January 1991, the department made an assessment disallowing the claimant's four homestead credits. The claimant is one of eight residents at the apartment complex from whom the department sought repayment of disallowed homestead credits. In March 1991, the claimant and the seven others filed a petition for redetermination. In September 1991, the department denied the petition for redetermination, stating that since MHC is a privately owned, nonprofit corporation, is exempt from taxation under ch. 70, Wis. Stats., and does not make payments in lieu of taxes under sec. 66.40(22), Wis. Stats. (1987-88), the claimants do not qualify for homestead credit for 1986, 1987, 1988, and 1989.

The Commission concluded that the claimant was ineligible for homestead credits during the period under review because the apartments of the Mishicot Housing Corporation where she rented and lived were exempt from property taxation under sec. 70.11(4), Wis. Stats., and MHC did not make payments in lieu of taxes under sec. 66.40(22), Wis. Stats.

The claimant has not appealed this decision. □

FARMLAND PRESERVATION AND FARMLAND TAX RELIEF CREDITS

Farmland preservation credit – gross farm profits; Farmland tax relief credit – gross farm profits. *Warren and Patricia Clow vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, May 20, 1997). The issues in this case are:

A. Whether farmland preservation credits and federal gas tax credits may be used in calculating the "gross farm profits" requirement to qualify for farmland tax relief credit (FTRC) and farmland preservation credit (FPC).

B. Whether proceeds from the sale of a bulk milk tank, which was once an indispensable part of a dairy operation, may be used in calculating the "gross farm profits" requirement to qualify for FTRC and FPC, under any circumstances.

The taxpayers, Warren and Patricia Clow, owned and operated a farm in 1991, the period under review. Warren Clow ("the taxpayer") had been a dairy farmer. In August 1988, the farm was hit by a tornado which caused so much damage to his property that he was forced to sell his cows and give up the dairy operation. Previously, the taxpayer had entered into a farmland preservation agreement, with an expiration date of May 15, 2010.

In April 1992, the taxpayers filed their 1991 Wisconsin income tax return. On Schedule F they claimed farm income of $3,345: $1,944 from crop insurance proceeds and $1,401 from federal gas tax refunds. They also claimed as income a farmland preservation credit for 1990, received in 1991. They did not claim a farmland preservation credit or a farmland tax relief credit for 1991.

In April 1996, the taxpayers filed an amended 1991 Wisconsin return, on which they claimed a farmland preservation credit and a farmland tax relief credit. The department denied the claims for both FPC and FTRC, stating that they do not meet the gross farm profit requirement for either credit. The department indicated that gross farm profits for 1991 were $1,944, which is less than the $6,000 requirement, and the gross

farm profits for 1989, 1990, and 1991 combined were $12,775 ($7,782 + $3,049 + $1,944), which is less than the $18,000 three-year requirement. The department stated that the farmland credits and the gas tax credit do not qualify for the gross farm profit requirement.

The taxpayers filed a timely petition for redetermination, claiming that the farmland preservation credit, farmland tax relief credit, and federal gas tax credit should be considered as part of gross farm profits in calculating the $6,000 or $18,000 threshold requirements to qualify for the FPC and FTRC. They also stated they were actively farming the land and realized a gain of $6,403 from the sale of farming equipment, previously reported on their original 1991 return. This gain was from the sale of a bulk milk tank which the taxpayer had not been able to use since the tornado.

The Commission concluded as follows:

A. The taxpayers' farmland preservation credits and federal gas tax credits may not be used in calculating the "gross farm profits" required to qualify for farmland preservation credit and farmland tax relief credit for 1991.

B. The proceeds from the taxpayers' sale of a bulk milk tank in 1991 may be used in calculating the "gross farm profits" required to qualify for farmland preservation credit and farmland tax relief credit for 1991, under circumstances in which the taxpayers were the victims of a tornado which wiped out their dairy operation, followed by two additional years of bad weather.

The Commission held that tax credits are to be strictly construed, and that generally the sale of a farmer's farm equipment should not be calculated as part of gross farm profits, but that this is an extremely unusual case. In this case, the taxpayers were the victims of a tornado in 1988, followed by a drought, followed by excessively wet weather. Throughout, they attempted to continue farming and to honor their farmland preservation agreement.

In 1991, they grew a crop but withheld that crop from the market until the price improved, and consequently they received no income for this work in 1991. They did sell their bulk milk tank in 1991, and under these extreme circumstances, the proceeds from the sale may be viewed as gross receipts from dairying. The taxpayers have thus satisfied the gross farm profits requirements.

The department has not appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only. □

SALES AND USE TAXES

Boats, vessels and barges — nonresident purchases. *Raymond and Patricia Wehrs vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 2, 1997). The issues in this case are:

A. Whether the taxpayers qualify for exemption from use tax under sec. 77.53(17m), Wis. Stats., on the purchase of a boat.

B. Whether the boat at issue is exempt from use tax under sec. Tax 11.85(2)(d), Wis. Adm. Code.

At the times relevant to this matter, the taxpayers were domiciled in the state of Illinois. On July 2, 1992, the taxpayers bought a 12-meter boat. On the day of the sale, the taxpayers were in Illinois and the boat was physically located in Florida. The taxpayers were represented at the closing in Florida by Mr. Bernie Walker. While he was in Illinois, Raymond Wehrs (the taxpayer) gave his permission for Mr. Walker to enter into the agreement for the purchase of the boat.

A bill of sale was executed on the day of sale in the state of Florida. The boat was never registered or titled in Florida, and no sales tax was paid to the state of Florida on the sale of the boat. Almost immediately after the sale, the boat was moved to Illinois. On the day of the purchase, the taxpayers rented a slip in Racine, Wisconsin, for both 1992 and 1993. The boat was stored at this slip until at least September 12, 1992. The boat was used in Wisconsin for a short time in 1992 and was stored in Racine when not in use.

The application for title and registration for the boat, signed by the taxpayer, listed Wisconsin as the state of principal use and Racine County as the county where the boat was kept. On the application, the taxpayer claimed an exemption from use tax under sec. 77.53(17m), Wis. Stats., and the taxpayers did not pay any use tax.

When the taxpayer applied for insurance for the boat, Racine, Wisconsin was listed as the location of the boat. The boat was registered with the United States Coast Guard. At some point after 1992, it appears that the boat was registered in Illinois; however, no sales tax was paid to the state of Illinois in conjunction with the taxpayers' purchase of the boat.

The Commission concluded:

A. The department properly imposed use tax on the purchase of the boat. The boat at issue was not purchased in the state of Illinois, thus, the taxpayers do not qualify for the exemption from use tax under sec. 77.53(17m), Wis. Stats.

B. The boat at issue is not exempt from use tax under sec.Tax 11.85(2)(d), Wis. Adm. Code, because this exemption applies only to temporary use within Wisconsin, not to storage over a period of at least two months.

There is no doubt that, aside from the two exemptions at issue, the taxpayers' storage and use of the boat in Wisconsin during 1992 was sufficient to make the boat subject to the use tax. Because they are domiciled in Illinois, the taxpayers do not qualify for the exemption in sec. 77.53(17m), Wis. Stats., unless the boat was purchased in Illinois. While the taxpayers were not in Florida on the day of the sale, the boat, the taxpayers' representative, and the seller's representative were.

The taxpayers have appealed this decision to the Circuit Court. □

Exemptions – commercial vessels and barges. *La Crosse Queen, Inc., vs. Wisconsin Department of Revenue* (Wisconsin Supreme Court, April 18, 1997). This is an appeal from the April 14, 1996 decision of the Court of Appeals, District IV. For a summary of the Court of Appeals decision, see *Wisconsin Tax Bulletin* 99 (October 1996), page 22.

The issue in this case is whether a boat leased by the taxpayer to Riverboats America, Inc. was used primarily in interstate commerce so as to exempt the gross receipts from the lease from sales tax.

During the years in issue, 1989 through 1991, the taxpayer was the owner and lessor of a boat known as the La Crosse Queen IV ("La Crosse Queen"). The boat, an excursion paddle wheeler exceeding 50 tons, was leased to a related corporation, Riverboats America, Inc., for the purpose of providing sightseeing and dinner cruises exclusively on the Mississippi River. The boat is operated under Interstate Commerce Commission ("ICC") authority transferred to the taxpayer in 1975 when the boat was purchased. Until the time of deregulation, the vessel was required to file tariff charges with the Interstate Commerce Commission.

The previous owner of the boat had challenged the imposition of the sales tax on its sales of tickets for the cruises on the Mississippi claiming, among other things, that the sales tax resulted in an unconstitutional burden on interstate commerce. The Dane County Circuit Court held that the sales tax did not burden commerce because no interstate commerce was involved in the previous owner's operations.

The taxpayer's president, Linda Sayther, conceded that her method of operation and its purpose during the years in issue was "basically the same" as that of the previous owner. Thus, according to the La Crosse Queen's president, the primary purpose of the La Crosse Queen's operation during the period in question was recreation, entertainment, and dining. The cruises on the La Crosse Queen were advertised as one and one-half hour cruises on the Mississippi River. During her excursions from 1989 through 1991, the La Crosse Queen crossed between Wisconsin and Minnesota waters on the Mississippi River.

The La Crosse Queen's passengers are individuals and groups from Wisconsin and other states. On her northern trip, the La Crosse Queen loads at a wharf in La Crosse, travels up the river several miles to the lock and dam north of the I-90 bridge, turns around, and returns to the same wharf in La Crosse. Since there are no facilities where the La Crosse Queen can dock on either her northern or southern trip, the passengers never disembark until their return to the wharf in La Crosse. Thus, all passengers embark and disembark at the same dock in La Crosse, Wisconsin.

The Wisconsin Supreme Court concluded that the LaCrosse Queen was not engaged in interstate commerce during the years in issue and the gross receipts of LaCrosse Queen, Inc. from the lease of the LaCrosse Queen are not exempt under sec. 77.54(13), Wis. Stats. It was unnecessary for the Wisconsin Supreme Court to discuss whether the vessel is "primarily" engaged in interstate commerce.

When the taxpayer's boat picks up passengers at the wharf in La Crosse for the purpose of an excursion cruise either up or down the Mississippi River and then returns them to the same wharf in La Crosse, it is not conducting interstate commerce or interstate business. Although the La Crosse Queen crosses over into Minnesota waters, there is no commerce or business carried on between Wisconsin and Minnesota as a result of the excursion cruises. The people who use the taxpayer's boat are not using it for the purpose of being transported from Wisconsin to Minnesota, but rather for the purpose of recreation and entertainment.

The voyages of the La Crosse Queen do not constitute a necessary link for the completion of an interstate journey. The La Crosse Queen's journey ends where it begins, with no stops in between. The relationship of the La Crosse Queen to interstate com-

merce is, at best, "casual and incidental."

In order for an activity to qualify as interstate commerce, there must not only be interstate movement but also interstate business. There was none involved here. The taxpayer's boat is not involved in the transfer of any goods, money, or people from Wisconsin to any other state.

The taxpayer has not appealed this decision. □

Exemptions — telephone company central office equipment. *Ameritech Mobile Communications, Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, November 22, 1996). The Wisconsin Tax Appeals Commission issued a decision on December 21, 1995, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 96 (April 1996), page 19, for a summary of the Commission decision. The issues in this case are:

A. Whether the taxpayer's cell site equipment is exempt from Wisconsin sales and use taxes under sec. 77.54(24), Wis. Stats.

B. Whether sec. 77.54(24), Wis. Stats., as it may be applied to the transactions involving the cell site equipment, is in violation of the Equal Protection Clauses of the constitutions of the State of Wisconsin and of the United States.

The taxpayer, a wholly-owned subsidiary of Ameritech Corporation, is a Delaware corporation, with its principal place of business in Illinois. During January 1, 1985 through December 31, 1988, the taxpayer and certain of its affiliates were engaged in the business of providing cellular telephone services in Wisconsin and elsewhere. The equipment at issue consists of equipment purchased for and used at the cell sites.

The Commission concluded:

A. The cell site equipment at issue was not exempt from Wisconsin sales and use taxes under sec. 77.54(24), Wis. Stats., during the taxable period.

B. Section 77.54(24), Wis. Stats., as it may be applied to the transactions involving the cell site equipment, is not found to be in violation of the Equal Protection Clauses of the constitutions of the State of Wisconsin and of the United States.

The Circuit Court reviewed the decision by the Wisconsin Tax Appeals Commission denying the taxpayer's claim for a sales and use tax exemption under sec 77.54(24), Wis. Stats. Because the decision is free from material legal error and supported by substantial evidence, The Tax Appeals Commission decision is affirmed.

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

Officer liability. *Maurice D. West vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, June 12, 1997). The issue in this case is whether the taxpayer is a responsible person under sec 77.60(9), Wis. Stats.

In the spring of 1993, the taxpayer, Grant Vaughan, and Arthur Koehler formed a corporation called W.A.G., Inc., to acquire and operate a tavern in Fond du Lac, Wisconsin. The tavern was purchased from the taxpayer's brother. Mr. Vaughan and Mr. Koehler were each issued 100 shares of stock and were elected president and vice president, respectively. The taxpayer was elected secretary/treasurer, and all three men were made directors. Although the taxpayer put no money into the new business and received no stock, he was elected an officer, made a director, and named operating manager of the tavern because, unlike the others, he had a background in the tavern business.

The taxpayer was given substantial authority to operate the business, hire and pay employes, order supplies, and pay vendors. The taxpayer had control over the checkbook and the receipts and records, although the other officers could also write checks.

The Commission concluded that the taxpayer was a responsible person under sec. 77.60(9), Wis. Stats., for the delinquent sales taxes assessed.

Having control of the checkbook and access to the bank balance statements, as well as the authority to pay bills, including taxes, the taxpayer could not escape responsibility to pay taxes. Seeing to it that the taxes are paid goes with the territory when a person is the treasurer of a corporation, a director, the manager of the business, the person who controls the checkbook, and the person who normally pays the bills.

The taxpayer has not appealed this decision.

CAUTION: This is a small claims decision of the Wisconsin Tax Appeals Commission and may not be used as a precedent. This decision is provided for informational purposes only. □

Penalties – negligence – incorrect return. *Dolphin Swimming Pool Co., Inc. vs. Wisconsin Department of Revenue* (Circuit Court for Dane County, April 16, 1997). The Wisconsin Tax Appeals Commission issued a decision on October 3, 1996, which was appealed to the Circuit Court. See *Wisconsin Tax Bulletin* 101 (April 1997), page 16, for a summary of the Commission's decision. The issue in this case is whether the Commission correctly determined that the department properly imposed the negligence penalty pursuant to sec. 77.60(3), Wis. Stats. The taxpayer seeks a reversal of the Commission's decision.

The department's assessment mainly involved sales and use tax on the taxpayer's purchase of tangible personal property used in its construction of new inground swimming pools and spas. The department also assessed the 25% negligence penalty on underreported sales and use tax.

The taxpayer admitted in the record that it did not have "good cause" for filing incorrect returns and for failing to report all the sales and use tax owing. Although the law places the filing and reporting obligation on the taxpayer, the taxpayer argues that it relied on the advice and counsel of a CPA firm in preparing the returns in its attempt to comply with its sales and use tax obligations.

The Circuit Court concluded that the Commission acted in appropriate discretion, in accordance with the law, and based its decision upon substantial evidence in the record. The Court affirmed the decision of the Commission.

The taxpayer has not appealed this decision. □

Statute of limitations – nonfilers; Manufacturing – exemption of property consumed or destroyed. *Zignego Company, Inc. vs. Wisconsin Department of Revenue* (Court of Appeals, District IV, May 22, 1997). This is an appeal from the April 9, 1996 decision of the Circuit Court for Dane County.

The Circuit Court affirmed the conclusion of the Wisconsin Tax Appeals Commission (Commission) that the taxpayer was liable for sales and use tax on materials it purchased for use in its construction business. The Circuit Court reversed the Commission's conclusion that the taxpayer's failure to file a sales and use tax return tolled the statute of limitations. For a summary of the Circuit Court decision, see *Wisconsin Tax Bulletin* 99 (October 1996), page 24.

The issues are:

A. Whether, as a result of the taxpayer's failure to file a sales and use tax return, the applicable statute of limitations never began to run.

B. Whether the taxpayer was liable for sales and use tax on materials it bought and used in its construction business.

The taxpayer builds roads and highways for various units of government. It purchases cement, aggregate, and other ingredients and mixes them in a "batch plant" or what are commonly called "cement trucks." It takes the concrete to construction sites and places it in forms, where it is finished by the taxpayer's employes. The result is completed road surface and curb and gutter.

From April 1, 1984 to March 31, 1992, the taxpayer paid no sales or use tax on most of the materials used to make its concrete. As a result of a field audit, the department issued an assessment against the taxpayer for unpaid sales and use taxes, interest, penalties, and late filing fees.

The Court of Appeals concluded:

A. As a result of the taxpayer's failure to file a sales and use tax return, the applicable statute of limitations never began to run.

   The Commission's conclusion – that if a sales and use tax return is never filed, the four years never begins to run – is a reasonable interpretation of sec. 77.59(3), Wis. Stats. A department determination of sales or use tax liability can never be untimely where the taxpayer fails to file a sales and use tax return.

B. The taxpayer was liable for sales and use tax on materials it bought and used in its construction business.

   The Commission's conclusion that the taxpayer's purchases of materials used in making concrete were not exempt from sales and use tax is reasonable.

The taxpayer appealed this decision to the Wisconsin Supreme Court, which denied the petition for review. The case is on remand to the Commission regarding the issue of a sales tax exemption for occasional sales. □