WISCONSIN TAX BULLETIN

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TAX FORMS WILL BE DIFFERENT FOR 1980

Department of Revenue personnel are in the process of finalizing the 1980 individual income and corporate tax forms and instructions. Some of the changes are as follows:

Form 1A - Wisconsin Individual Income Tax Return (Short Form): The 16% one-time tax credit, which appeared on the 1979 return, applied only to 1979 and therefore will not be reflected on the 1980 return. Also, taxpayers who claim credit for taxes paid to another state will no longer be able to use Form 1A, but instead must use Form 1, the long form.

Part-year residents and nonresidents in 1980 will be required to enter their federal adjusted gross income on Form 1A. Part-year residents must also enter the dates and number of months they were Wisconsin residents in 1980.

Form 1 - Wisconsin Individual Income Tax Return (Long Form): As on Form 1A, the 16% credit will also not be available on the 1980 Form 1. Part-year residents and nonresidents will also be required to enter their federal adjusted gross income on Form 1. Part-year residents will have to enter the dates and number of months they were a Wisconsin resident in 1980.

The major change to the 1980 Form 1 is the rearrangement of the income and tax computation areas. On the 1979 Form 1, the entries to compute Wisconsin total income were made on page 2 and the tax computation (gross tax, personal exemptions, credits, etc.) was made on page 1. These two parts will be reversed on the 1980 Form 1, with the computation of Wisconsin total income being made on page 1 and the tax computation being made on page 2.

When you receive your 1980 Form 1 or 1A booklet in the mail later this year, you will notice that Schedule H (Homestead Credit claim) and its instructions are not included in the 1980 booklets. Persons who filed a Schedule H for 1979 will automatically receive a 1980 Wisconsin Homestead Credit booklet in a separate mailing. The 1981 Form 1-ES, Wisconsin Declaration of Estimated Tax form, also will not be in the 1980 Form 1 booklet, but instead will be mailed separately to those persons who made 1980 declaration of estimated tax payments.

Persons who wish to file a 1980 Schedule H or 1981 Form 1-ES, but do not receive it in the separate mailing, may obtain these forms and instructions from any department office.

Form 5 - Wisconsin Corporation Franchise Tax Return (Short Form): The 1980 Form 5 has been revised to include computations for apportioning income for those corporations engaged in business activities in Wisconsin and one or more other states. As a result, such corporations will now be able to use Form 5. Previously, they could only use Form 4, the long form.

Form 4 - Wisconsin Corporation Franchise Tax Return (Long Form): The 1980 Form 4 booklet , which is sent to those corporations engaged in business in Wisconsin and at least one or more other states will include both Form 4 and Form 5 and instructions for completing both these forms. Previously, such corporations only received a Form 4 but because of the revisions to Form 5 as mentioned above, they will now have the option of using Form 5 or Form 4.

Form WT-9 - Wisconsin Withholding Tax Statement: Form WT-9 no longer will be available for use by employers beginning for 1980 and thereafter. Employers will instead use the "state" copy of the federal wage statement, Form W-2, for reporting wage and withholding information to the Department of Revenue.

IN THIS ISSUE

FEDERAL TAX LAWS ENACTED IN 1980 DO NOT APPLY FOR WISCONSIN PURPOSES

For the taxable year 1980, Wisconsin law provides that only those provisions of the federal Internal Revenue Code (IRC) which became law by December 31, 1979 may be used in determining Wisconsin taxable income. Therefore, none of the federal tax changes enacted during 1980, including the Crude Oil Windfall Profit Tax Act of 1980 and the Technical Corrections Act of 1979, apply for Wisconsin purposes for 1980.

This will result in certain income and deduction items being different on 1980 Wisconsin and federal income tax returns. As in past years, Wisconsin Schedule I should be used to adjust for these differences.

The following federal law changes enacted as part of the Crude Oil Windfall Profit Tax Act of 1980 (Public Law 96-223) will not apply for Wisconsin income tax purposes for 1980:

- Deduction for Tertiary Injectants (Act Sec. 251)
- Accelerated Depreciation Reinstated for Boilers Fueled by Petroleum Coke and Pitch (Act Secs. 222 (b) and 223 (a))
- Inclusion in Income of Alcohol Fuel Credit (Act Sec. 232 (c))
- Deduction for Windfall Profit Tax (Act Sec. 101 (b))

The changes listed below which were enacted as part of the Technical Corrections Act of 1979 (Public Law 96-222) also will not apply for Wisconsin for 1980:

- Tax-free Rollover to Individual Retirement Arrangement (IRA) Allowed to Surviving Spouse Upon Retirement Plan Termination (Act Sec. 101 (a) (14) (C))
- Deduction for Employer Contributions to IRA at Age 70½ or in Later Years Under Simplified Employee Pension Plan (Act Sec. 101 (a) (10) (D))
- Estate Taxes Deductible From Total Taxable Amount of a Lump-Sum Distribution (Act Sec. 101 (a) (8) (A))
- Inclusion in Income of Excess Medical Reimbursements - Discriminatory Benefits Defined (Act Sec. 103 (a) (13) (C))
- Inclusion in Income of Excess Medical Reimbursements - Effective Date (Act Sec. 103 (a) (13) (D))
- Limitation on Ordinary Loss on Small Business Corportation Stock (Act Sec. 103 (a) (9))
- Adjustment to Shareholder's Basis in Regulated Investment Company (Act Sec. 104 (a) (3) (B))
- Entertainment Facility Expenses - Club Dues Limitations (Act Sec. 103 (a) (10) (A), and (B))
- Entertainment Facility Expenses - Nonemployees (Act Sec. 103 (a) (10) (C))
- Deductibility of Expenses for Cooperative Housing Corporations (Act Sec. 105 (a) (6))
- Exclusion for Cost-Sharing Conservation Payments Received Under Local Programs (Act Sec. 105 (a) (7) (E))
- Exclusion Rules Modified for Cost-Sharing Conservation Program Payments (Act Sec. 105 (a) (7))

A more detailed explanation of these differences between Wisconsin and federal law for 1980 will be included on the instructions for the 1980 Schedule I.

If additional new federal tax laws, other than those laws mentioned above, are enacted in late 1980 which cause a difference in federal and Wisconsin income or deductions, such laws will be explained in the January, 1981 issue of the Wisconsin Tax Bulletin.

NEW FORM FOR REPORTING SALES AND USE TAX ON MOTOR VEHICLE TRANSFERS

Effective June 2, 1980 the sales and use tax information relating to transfers of motor vehicles, trailers, semi-trailers and mobile homes was incorporated into and became part of Department of Transportation Form MV-1-80, Application For Title/Registration.

The new form will be used both for sales by dealers and sales between individuals. It will replace Department of Revenue Forms ST-9 (Motor Vehicle Dealer Statement of Tax Payment) and ST-10 (Sales and Use Tax Return-Occasional or Non-Wisconsin Motor Vehicle, Mobile Home, Trailer or Semi-Trailer Sale).

Although the Department of Transportation will be the primary source of supply for the new Form MV-1-80, copies will also be available at all Department of Revenue offices and law enforcement agency offices.

HOMESTEAD AND FARMLAND PRESERVATION CREDIT FILING DEADLINES

Less than three months remain for Wisconsin residents to file a claim for the 1979 Homestead Credit and for farmland owners to file a 1979 Farmland Preservation Credit claim.

December 31, 1980 is the last day allowed for filing a claim for 1979 Homestead Credit. It is also the last day for filing a 1979 Farmland Preservation Credit claim for farmland owners who are calendar year taxpayers.

Homestead Credit should be claimed on Schedule H and Farmland Preservation Credit on Schedule FC.

If a person previously filed a 1979 Wisconsin income tax return and now wishes to file either a homestead or farmland preservation claim, write the words "income tax return previously filed" at the top of the homestead or farmland preservation claim. Attach a complete copy of the income tax return to the claim and write "duplicate" at the top of the income tax return.

So far this year, 351,500 Homestead claims and 4,900 Farmland Preservation claims have been received. These claims have provided more than $99 million in rent and property tax rebates.

BULK ORDERS OF TAX FORMS

In early October, the department will mail out the order blank (Form P-744) which practitioners and other persons or organizations should use to request bulk orders of 1980 Wisconsin income tax forms. As in past years, professional tax preparers are subject to a handling charge on orders which they submit. No charge is made for forms which will be used for distribution to the general public (for example, in a bank, library or post office).

In view of increasing paper and printing costs, every person ordering forms is urged to determine their needs as accurately as possible. Orders should be placed as early as possible after you receive the order blank. By receiving the orders early, the department can better identify possible shortages of specific forms.

This year's mailing list for bulk order blanks contains the names of all persons and organizations who placed orders for 1979 forms. If you are not on this mailing list and do not receive a Form P-744, you may request the bulk order blank by contacting any department office or by writing to the Wisconsin Department of Revenue, Central Services Section, Post Office Box 8903, Madison, WI 53708.

REMINDER! TAXPAYERS MUST NOTIFY DEPARTMENT OF FEDERAL ADJUSTMENTS AND AMENDED RETURNS

If an individual or corporation taxpayer's federal income tax return is adjusted by the Internal Revenue Service (IRS), and the adjustments affect the amount of Wisconsin income reportable or tax payable, such adjustments must be reported to the Wisconsin Department of Revenue within 90 days after they become final. In addition, taxpayers filing an amended return with the IRS or another state must also notify the department within 90 days of filing if any information contained in the amended return affects the amount of Wisconsin income reportable or tax payable.

If a taxpayer fails to notify the department of federal audit adjustments or an amended return filed, the statute of limitations for adjusting the Wisconsin return for the year involved is extended from the normal 4 year period to 10 years. Administrative Rule Tax 2.105 provides additional information regarding this reporting requirement and indicates when adjustments made by the IRS are considered to become final.

To simplify the filing of an amended return, Wisconsin Form 1X for individuals and Form 4X for corporations may be used. These forms are available at any department office. The amended Wisconsin return or copy of the federal audit report should be sent to:

Wisconsin Department of Revenue
Audit Bureau
Post Office Box 8906
Madison, Wisconsin 53708

REMINDER! EMPLOYERS MUST SUBMIT COPIES OF CERTAIN EMPLOYE WITHHOLDING EXEMPTION CERTIFICATES TO THE DEPARTMENT

Effective April 30, 1980, Wisconsin law (Section 71.20(8)(f) as created by Chapter 221, Laws of 1979) requires employers to submit copies of employe withholding exemption certificates to the department whenever they are required to provide such information to the Internal Revenue Service (IRS). The copies must be submitted to the department within 15 days after they are filed with IRS.

For both federal and Wisconsin purposes employers are required to submit copies of any employe's withholding exemption certificate if: 1) the number of exemptions claimed is 10 or more, or 2) the employe is claiming complete exemption from withholding and he or she earns more than $200 per week.

SALES AND USE TAX NEWSLETTER NOW PRINTED AS PART OF THE WTB

A copy of the department's sales and use tax newsletter entitled "Tax Report" has been included in the mailing of the last several issues of the Wisconsin Tax Bulletin (WTB). Beginning with this issue of the WTB, the "Tax Report" will be reproduced as part of the bulletin (see page 14).

Generally the "Tax Report" is published three times each year (in March, June and September) and mailed to all sales tax registrants. It will be reproduced (without change) and appear as part of the next WTB published after those dates. Because the "Tax Report" will not be changed when it is placed in the WTB, it is possible that some articles may duplicate information included in the WTB.

DO YOU HAVE SUGGESTIONS FOR ARTICLES?

The Wisconsin Tax Bulletin is designed to provide current and accurate information on topics of general interest to taxpayers and tax practitioners. Articles pertain primarily to income, franchise, sales and use, inheritance, gift, motor fuel, cigarette, and beer and liquor taxes.

To make this bulletin more useful to its readers, the department is seeking suggestions for topics and areas of reader interest for articles in future issues. Send your suggestions to: Wisconsin Tax Bulletin, Technical Services Staff, Post Office Box 8910, Madison, WI 53708.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answers 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

I. Standard Mileage Rates

The Internal Revenue Service has issued Revenue Procedure 80-32 increasing the optional standard mileage rate for the first 15,000 miles of business use of an automobile from 18½ cents to 20 cents. It also increased the standard rate for mileage in excess of 15,000 miles per year from 10 cents per mile to 11 cents per mile.

The rate per mile for use of an automobile for charitable, medical, and moving expense purposes has been increased from 8 to 9 cents a mile.

The new standard mileage rates are effective for transportation expenses paid or incurred in 1980 and thereafter. The rates will apply in the same manner for Wisconsin income tax purposes for 1980 and thereafter as they do for federal purposes.

II. Taxable Status of Interest From Transit Bond of Washington Metropolitan Area Transit Authority

Under federal law, the Secretary of Transportation is authorized to guarantee payment of principal and interest on bonds issued by the Transit Authority. Since the U.S. government, acting through the Secretary of Transportation, guarantees the payment of principal and

interest, the bonds constitute obligations of the United States. Interest from such securities is not taxable for Wisconsin under s. 71.05 (1) (b) 1, Wis. Stats.

III. Tax Treatment of Farmland Preservation Credit and Alternative Energy System Credit

The Department of Revenue received rulings from the Internal Revenue Service (IRS) regarding the federal income tax treatment for Wisconsin's farmland preservation credit (including treatment of repayments) and alternative energy system credit.

A. Farmland Preservation Credit

The IRS has ruled that farmland preservation credits are considered a recovery of the property tax upon which the credit is based. Therefore, for federal income tax purposes, the tax benefit rule of Section 111 of the Internal Revenue Code governs the taxability of the receipt of farmland preservation credits. The federal tax treatment of credits received is influenced by whether a claimant takes a deduction for such property taxes and when this deduction is taken as follows:

(1) Claimants who have already deducted property taxes upon which the credit is based on their federal income tax return must include the farmland preservation credits in gross income to the extent of any federal income tax benefit received. A deduction of property taxes produces no tax benefit if it could have been disallowed without increasing the claimant's income tax for the year of deduction, or for any earlier year (through loss carrybacks) or later year (through loss carryovers).

(2) Claimants who have not deducted and will not deduct such property taxes on their federal income tax returns receive no tax benefit and, therefore, are not required to include the credits in gross income.

(3) Claimants who will deduct the property taxes upon which the credits were claimed are not required to include the credits in gross income; however, such claimants must reduce their deductions for property taxes by the amount of the credits. For example, a claimant files a 1979 Schedule FC (Wisconsin Farmland Preservation Credit Claim) based on real estate taxes levied in 1979 but not paid until 1980. If this claimant deducts the 1979 real estate taxes on a 1980 federal return, then the deduction must be reduced by the amount of credit received in 1980.

The second issue of this IRS ruling concerns the federal income tax status of payback amounts of farmland preservation tax credits. Under certain circumstances, the owner of the farmland can become responsible for paying back part or all of the farmland preservation tax credits received. The ruling stated that this repayment of credits is a nondeductible expense, except to the extent the repayment is a business expense or an expense for the production of income as described in sections 162 and 212 of the Code, respectively.

Note: For Wisconsin tax purposes, all amounts received under the farmland preservation program must be included in Wisconsin taxable income on the recipient's Wisconsin individual income tax return or corporation franchise/income tax return for the year in which the credit is received, regardless of how treated for federal purposes. This is required by s. 71.09 (11) (c), Wis. Stats.

B. Wisconsin Alternative Energy System Credit

For systems which were installed during April 20, 1977 through the close of an individual's 1978 tax year, the Wisconsin alternative energy system credit was an income tax credit provided by s. 71.09 (12), Wis. Stats. For systems installed after an individual's 1978 tax year, the credit is granted under s. 101.57 as a direct payment to the individual by the Wisconsin Department of Industry, Labor and Human Relations (DILHR).

The IRS has ruled that alternative energy system credits provided by sections 71.09 (12) and 101.57 of the Wisconsin Statutes to individuals installing solar, wind or waste conversion energy systems on real property located in Wisconsin are taxable. The amount of credit received must be included in the recipient's federal adjusted gross income. The full cost of the alternative energy system (not reduced by the credit received) should be used to increase the basis of the property upon which it is installed. This tax treatment is the same for both federal and Wisconsin.

IV. Payment of Employee's FICA by Employer

In some instances, an employer will pay an employee's share of FICA (social security) tax. Under Section 61 of the Internal Revenue Code and IRS Revenue Ruling 74-75, this payment is considered to be additional wages. The employer is viewed as having given the employee cash which the employee uses to pay his or her debt. Therefore, for federal and Wisconsin income tax purposes the employer's payment of an employee's share of FICA tax is taxable income to the employee.

For example, an employee earns wages of $15,000 in 1980. The employer pays the employee's share of the FICA tax of $919.50 ($15,000 x 6.13%). The employee must report total compensation paid of $15,919.50 ($15,000 + $919.50) on a 1980 income tax return.

V. Addition to the Tax Exception for Ex-Subchapter S Corporations

Every corporation subject to taxation under Wisconsin law must file a Declaration of Estimated Tax and pay the estimated tax thereon in equal installments if it can reasonably expect to have a tax liability of $2,000 or more. If a required installment is not paid by its due date or is insufficient in amount, a 9% "addition to the tax" may be imposed on the amount of the underpayment for the period of the underpayment.

Beginning with calendar year 1979 and corresponding fiscal years, corporations filing under the federal Subchapter S law are also subject to Wisconsin's Subchapter S provisions. A question has arisen regarding whether a corporation for the first taxable year after it has revoked its Subchapter S status may be allowed to use the exception under s. 71.22 (10) (b) to avoid the addition to the tax.

Under s. 71.22 (10) (b), Wis. Stats., an exception to the "addition to the tax" is available when a corporation has made estimated tax payments which equal or exceed an

amount that would have been due by recomputing its preceding year's tax using the current year's tax rates based on information shown on its return, and the law applicable to, the preceding taxable year. In this particular case, there would be no Wisconsin liability existing for the prior year since the corporation filed under Subchapter S.

The answer to the question is that s. 71.22 (10) (b) applies to a corporation for the first year after it has revoked its Subchapter S status. By completing line 11 of 1980 Form 4U (Underpayment of Estimated Tax by Corporations), a corporation can determine if it is liable for an addition to the tax for underpayment. For purposes of this computation, the preceding year's net income used in the computation is the net income without consideration of the Subchapter S deduction.

REPORT ON LITIGATION

(This portion of the WTB summarizes recent significant Tax Appeals Commission and Wisconsin court decisions. The last paragraph of each decision indicates whether the case has been appealed to a higher court.)

The following decisions are included:

Income and Franchise Taxes

- R.P. Behling vs. Wisconsin Department of Revenue
- Business and Institutional Furniture vs. Wisconsin Department of Revenue
- Department of Revenue vs. Exxon Corporation
- Eugene T. Dowty vs. Wisconsin of Department of Revenue
- Raymond W. Koch vs. Wisconsin Department of Revenue
- Russell J. Neumann vs. Wisconsin Department of Revenue
- Carl L. Petsch vs. Wisconsin Department of Revenue
- Louis Webster, Sr., Alex Askenette, Sr., Sue Askenette vs. Wisconsin Department of Revenue

Sales/Use Taxes

- Astra Plating, Inc. vs. Wisconsin Department of Revenue
- Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue
- Fort Howard Paper Company vs. Wisconsin Department of Revenue
- Leicht Transfer & Storage Co., Inc. vs. Wisconsin Department of Revenue
- Martens Marts, Inc. vs. Wisconsin Department of Revenue
- Miss Wisconsin Pageant, Inc. vs. Wisconsin Department of Revenue
- North-West Services Corporation and North-West Telephone Co. vs. Wisconsin Department of Revenue
- Rice Insulation, Inc. vs. Wisconsin Department of Revenue
- Frank A. Teskie, D/B/A Teskie & Teskie vs. Wisconsin Department of Revenue
- Wisconsin Bridge and Iron Company vs. Wisconsin Department of Revenue
- The Wisconsin Electric Railway Historical Society vs. Wisconsin Department of Revenue

Gift Tax

- Dolores Haas and Robert W. Kessenich, Donees, and the Estate of Katherine H. Kessenich vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

R.P. Behling vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 22, 1980). During the years 1974-77, taxpayer, R.P. Behling, was a resident of Menomonie, Wisconsin. The taxpayer taught full-time during the school year and one-half time during the summer vacation months at the University at Stout during these years. In addition to his teaching profession the taxpayer was a licensed fishing guide and during the summer vacation months he sold his services as a fishing guide in the Hayward-Stone Lake area.

On his 1974-77 Wisconsin individual income tax returns, the taxpayer annually reported from $250 to $325 of income from his fishing guide efforts and deducted related expenses in amounts ranging from $2,357 to $4,017 annually, resulting in substantial losses each year. For each year involved taxpayer included as a deductible expense depreciation on his cottage at Stone Lake, Wisconsin, based on ¾ of its cost as well as ¾ of its utilities. Taxpayer used his cottage for personal as well as fishing guide activities.

The department issued an assessment for the years 1974 through 1977 disallowing one-half of the losses claimed by the taxpayer. This disallowance was based on two grounds: lack of substantiation and the allegation that the taxpayer's fishing guide operation was more of a hobby than a venture for profit.

At the hearing before the Commission taxpayer conceded he did not have receipts or cancelled checks to substantiate the expenses he had claimed as deductions for each of the years involved. In addition, the taxpayer did not offer any evidence as to the cost basis of his cottage on Stone Lake, Wisconsin.

The Commission held that the department can by law require a taxpayer to substantiate deductions claimed and that the taxpayer failed to substantiate, with credible evidence, any of the expenses he incurred in his fishing guide activities.

Because the taxpayer's case failed for lack of substantiation, the issue of whether the taxpayer carried on his fishing guide operation as a hobby or venture for profit became moot.

The taxpayer has appealed this decision to the Circuit Court.

Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 11, 1980). Taxpayer is engaged in the business of making mail order sales of furniture and other items for industrial use. Principal customers are churches and schools.

During the taxable years 1973, 1974 and 1975, taxpayer did not own any factories and manufactured no goods. All goods sold were purchased from suppliers. Taxpayer had offices in Milwaukee, Atlanta and Los Angeles. Each of the three offices handled sales to purchasers located in designated states. Sales were made to purchasers in every

state in the nation. Except for small amounts of shipments from a Milwaukee warehouse and a California warehouse, all goods sold were shipped directly from suppliers to purchasers.

In filing Wisconsin income/franchise tax returns for the years 1973, 1974 and 1975, taxpayer did not include in the Wisconsin sales allocation factor those sales handled by its Milwaukee office which were shipped from third parties located outside Wisconsin to purchasers located outside Wisconsin. These orders came into taxpayer's Milwaukee office by mail or telephone. The orders were written up by taxpayer's employes and sent to the appropriate supplier. When the goods were shipped by the supplier to the purchaser, taxpayer received an invoice from the supplier. Taxpayer then billed its customers. If an order was received in Milwaukee from the purchaser located in a state which was handled by taxpayer's Atlanta or Los Angeles office, the order was referred to the office handling that state.

For the years 1973, 1974 and 1975, taxpayer filed state income or franchise tax returns only in Wisconsin, California and Georgia.

The sole issue for the Commission to decide was whether the sales handled through the taxpayer's Milwaukee office should be included in the Wisconsin sales allocation factor for Wisconsin franchise tax purposes. The Commission found that such sales were properly includable.

The taxpayer has appealed this decision to Circuit Court.

Department of Revenue vs. Exxon Corp. (U.S. Supreme Court, June 10, 1980). The issue in this case is how the income of this major oil company should be apportioned to Wisconsin. The years involved were 1965 through 1968 when Humble Oil and Refining Company, a wholly-owned subsidiary of Standard Oil Company of New Jersey, operated in Wisconsin. The latter company subsequently changed its name to Exxon.

The three principal operating and functional departments of the corporation in the years involved were exploration and production, refining, and marketing, each organized into regional geographic divisions. The taxpayer only carried on marketing operations in Wisconsin. None of the taxpayer's refined gasoline or fuel oil was sold in Wisconsin, as they were obtained from Pure Oil Company through an exchange agreement. Motor oils, greases and other packaged products were produced outside Wisconsin and sold in Wisconsin. Other items such as tires, batteries and accessories were centrally purchased in Houston and sold in Wisconsin.

During the period under review, the company had a uniform credit card system throughout the United States. There was also centralized advertising, purchasing, accounting and management from the main office in Houston.

The department treated the taxpayer as a unitary business and imposed a Wisconsin tax on the apportioned income of the three operating departments (exploration and production, refining and marketing).

The Wisconsin Supreme Court determined that the taxpayer is a unitary business subject to apportionment. The decision of the Wisconsin Supreme Court was affirmed by the United States Supreme Court on June 10, 1980.

Eugene T. Dowty vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 20, 1980). Taxpayer claimed the standard deduction for federal income tax purposes on 1975 and 1976 returns but itemized deductions for Wisconsin income tax purposes in those years. Taxpayer received state tax refunds in 1976 and 1977 but did not report the refunds as income on his Wisconsin income tax returns.

In 1979, the department issued an assessment for the years 1976 and 1977 taxing the state income tax refunds the taxpayer received. The department contended that for Wisconsin purposes a taxpayer must compute income and deductions under the Internal Revenue Code as defined in Section 71.02 (2) of the Wisconsin Statutes. The Statutes do not provide that a taxpayer's income must be computed as determined on the federal return filed with the Internal Revenue Service (IRS). In other words, an individual is not bound by elections made on tax returns filed with the IRS, and therefore income and deduction items may differ on Wisconsin and federal returns.

The taxpayer contended that Wisconsin income must be computed by using federal adjusted gross income as determined on the federal return filed with IRS and the modifications prescribed in s. 71.05 (1), Wis. Stats. There is no add back modification under s. 71.05 (1) (a), Wis. Stats., for state income tax refunds.

The Tax Appeals Commission held in favor of the taxpayer. The Commission stated that the taxpayer's state tax refunds are not includable in his federal income for 1976 and 1977 and that there is no add back modification under s. 71.05 (1) (a), Wis. Stats., which can be used to include the refunds in Wisconsin income.

The department has appealed this decision to Circuit Court.

Raymond W. Koch vs. Wisconsin Department of Revenue (Wisconsin Supreme Court, Docket 79-989, May 30, 1980). Raymond Koch appealed to the Wisconsin Supreme Court from a Court of Appeals decision which affirmed a Circuit Court judgment that periodic payments may be Koch to his former wife, Betty, were more in the nature of a divorce property settlement than support and were therefore not deductible by Raymond under IRC Section 215. (A summary of the Court of Appeals decision is in WTB #18.)

The Supreme Court denied Mr. Koch's petition requesting a review of the Court of Appeals decision. Therefore, the Court of Appeals decision is final.

Russell J. Neumann vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 30, 1980). During the years 1974 through 1976, taxpayer, Russell J. Neumann, was a resident of Wisconsin, subject to the income tax provisions of Chapter 71 of the Wisconsin Statutes.

For the taxable years 1974-76, incomplete or no returns were filed based upon federal constitutional and statutory provisions. Despite

requests from the department to do so, taxpayer did not file completed Wisconsin income tax returns. On June 26, 1978, the department issued an estimated assessment against the taxpayer for income taxes for 1974-76.

Taxpayer contended that the assessment was not correct and that Wisconsin income tax statutes are unconstitutional and requested a trial by jury.

The Wisconsin Tax Appeals Commission held in favor of the department. It concluded that income tax assessments made by the department are presumptively correct and the burden of proof to establish that assessments are incorrect is on an assessed person. Taxpayer failed to meet his burden of proof. The Commission further stated that Wisconsin's income tax statutes are deemed to be constitutional unless declared unconstitutional by a court of record. The Commission does not have the jurisdiction to determine constitutionality of Wisconsin income tax statutes and, therefore, issued no finding on taxpayer's contention of unconstitutionality. The Commission also stated it had no statutory authority to impanel a jury and conduct a jury trial.

The taxpayer has appealed this decision to Circuit Court.

Carl L. Petsch vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 30, 1980). During the year 1976, taxpayer, Carl L. Petsch, was a Wisconsin resident, subject to the income tax provisions of Chapter 71, Wis. Stats.

For the taxable year 1976, taxpayer filed an incomplete Wisconsin income tax return based upon the 4th and 5th Amendments to the U.S. Constitution. Taxpayer indicated that he did not understand the return nor the laws applicable to the return. On the return filed, no dollar amounts were entered except on the line indicating Wisconsin income tax withheld of $424.82, personal exemptions claimed of $80, and a refund claimed for $424.82. Attached to the return was a W-2 wage and tax statement issued by Cooleys, Inc., in West Bend, Wisconsin, reflecting, among other information, $24,560 of income and $424.86 of Wisconsin income tax withheld.

On June 6, 1977, the department issued the taxpayer a "Notice of Amount Due" for $1,522.79 ($1,491.89 tax and $30.90 interest) on the basis of the amount stated as wages on the W-2 form, amounts stated as interest and dividends on Federal Form 1040 attached to the Wisconsin return, the Wisconsin standard deduction and $80 of personal exemption credits.

Taxpayer contended that he "really had no personal income" for 1976; that he had entered a religious organization, the Life Science Church, and endorsed the checks he received from Cooleys, Inc., over to the church because he had taken a vow of poverty; and that he had no further testimony regarding income or deductions.

The Wisconsin Tax Appeals Commission held that income tax assessments made by the department are presumptively correct and the burden of proof to establish that assessments are incorrect is on an assessed person.

Taxpayer failed to meet his burden of proof.

The Commission also held that Wisconsin's income tax statutes are deemed to be constitutional unless declared unconstitutional by a court of record. The Commission does not have the jurisdiction to determine constitutionality of Wisconsin income tax statutes and, therefore, issued no finding on taxpayer's contention of unconstitutionality. Commission further stated that taxpayer received income for services rendered by him during 1976 and giving the income away upon receiving it does not absolve him from being required to report it as income.

The taxpayer has appealed this decision to Circuit Court.

Louis Webster, Sr., Alex Askenette, Sr., Sue Askenette vs. Wisconsin Department of Revenue (Circuit Court of Dane County, April 3, 1980). Taxpayers are Menominee Indians who resided and worked in Menominee County in 1972 and 1973. Sue Askenette, although not a Menominee, is married to a tribal member, and the department has not challenged her status in the action. Louis Webster was employed by Menominee County as a deputy sheriff, and by the sawmill operated by Menominee Enterprises, Inc., during 1972 and 1973.

Alex Askenette was head sawyer at the sawmill, and his wife Sue was employed by Menominee County Head Start as a teacher's aide. The central issue was whether income earned by these taxpayers while employed within Menominee County was subject to Wisconsin income tax.

Prior to 1961, the Menominee Tribe held its reservation lands and other assets (including the sawmill at Neopit) in tribal ownership under supervision of the federal government. Neither the assets nor the income of the individual Menominees were subject to state or federal taxation. With passage of the Menominee Termination Act in 1961, the Menominees' tribal status ended, and federal supervision over the tribe, its lands and its assets were terminated. What had been the Menominee Indian Reservation became Menominee County, and all assets of the tribe were transferred to Menominee Enterprises, Inc. (MEI), a corporation created to manage all tribal property and enterprises. MEI issued stock and debentures to tribal members and a voting trust was organized to hold the individual shares.

The Termination Act was repealed by the Menominee Restoration Act, which became effective on December 22, 1973, and the parties agree that the Indians' income has not been subject to state taxation since that date. The question to be decided was whether the Termination Act gave the state authority to tax the petitioners' income earned in 1972 and 1973.

The Circuit Court stated that the Restoration Act became law on December 22, 1973, and that the taxpayers were liable for state taxes owing on income earned prior to that date.

The taxpayers have appealed this decision.

SALES/USE TAX

Astra Plating, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June

30, 1980). The question in this case was whether the taxpayer was engaged in manufacturing as defined in s. 77.51 (27), Wis. Statutes, and therefore was exempt from the sales and use tax under s. 77.54 (2) and eligible for the franchise tax credit under s. 71.043 (2). Section 71.043 (2) provides a franchise tax credit for sales and use taxes paid on fuel and electricity consumed in manufacturing, while s. 77.54 (2) exempts property becoming an ingredient or component part of an article of tangible personal property or which is consumed or destroyed or loses its identity in the manufacture of property destined for sale.

The taxpayer's principal business activity was acquiring physically damaged automobile bumpers from body shops and applying its processes to these bumpers to produce a bumper capable of being put on an automobile. A damaged bumper is referred to as a "core" in the trade, and the customers of the taxpayer have no use for the cores in the condition in which they are received from the taxpayer. Some of the bumpers received are so damaged that they are sold or given to scrap dealers rather than being repaired.

The procedure used by taxpayer begins by straightening and repairing a "core" by putting it into a press and dies to restore its shape and contour; the core is recontoured to the specifications of the original manufacturer. The core is then moved to a grinding department where all exterior, visible damages are removed. Next the core goes through an inspection station and then to a polishing department where a finer finish is put onto it by 3 different machines that smooth the steel to a very high luster. Next the core is prepared for a plating cycle, where it goes through a series of plating tanks which add a coat each of nickel and chrome equal to the original manufacturer's specifications. The core is then inspected again and placed in inventory.

After putting a damaged bumper through its procedures, the bumper emerges looking "like new" with exact size and measurement specifications of new bumpers. The taxpayer then sells the final product (a new bumper) to automobile body shops in competition with original equipment manufacturers and a small number to a fire engine manufacturer.

The Commission found the taxpayer produced a new article with a different form, use and name from existing materials. However, it also held that there was no direct and explicit evidence that the taxpayer's process is popularly regarded as manufacturing and that the taxpayer did not meet its burden of proof. Therefore, the Commission found that Astra Plating, Inc. was not engaged in manufacturing as that term is defined in s. 77.51 (27), Wis. Statutes.

The taxpayer has appealed this decision to the Circuit Court.

Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, May 19, 1980). Additional sales and use taxes were assessed against taxpayer for the years 1972 through 1975 on July 18, 1977. On September 27, 1977 taxpayer's attorney filed a petition for redetermination with the department. The department declined to accept the petition on the basis that it was not filed within the 30 day time period prescribed by statute. Taxpayer requested that the Tax Appeals Commission review the department's action, claiming that the reason the petition was late filed was because the department had failed to mail a copy of the assessment notice to taxpayer's attorney. The Tax Appeals Commission upheld the department's decision. Taxpayer then requested the Circuit Court of Dane County to review the matter.

The Circuit Court determined that the department's refusal to accept the late filed petition for redetermination was proper.

The taxpayer has not appealed this decision.

Fort Howard Paper Company vs. Wisconsin Department of Revenue (Dane County Circuit Court, Branch 4, June 5, 1980). This is an appeal from the April 20, 1978 decision of the Wisconsin Tax Appeals Commission. The taxpayer is a large manufacturer of paper and paper products. Four sales tax issues were involved, as follows:

1. The taxpayer purchased large quantities of coal in each year involved in the audit and used it to produce all of its steam and virtually all of its own electrical power. Taxpayer claimed that its coal purchases were exempt from the sales tax under the language of s. 77.54 (6) (c), Wis. Stats., which exempts "Coal . . . converted to electric energy, gas or steam by utilities and that portion of the amount of coal . . . converted to steam for purposes of resale by persons other than utilities". The Joint Survey Committee on Tax Exemptions discussed the public policy implications when amending this statute in 1975, and the Court found that it understood the statute to refer to public utilities or those involved in the sale of steam to others, not to one using the steam and electricity for its own purpose. The Court sustained the Tax Appeals Commission's decision that the purchases were not exempt because the taxpayer was not a "utility".

2. Taxpayer maintained an art department consisting of 23 artists. The art department assisted in the manufacturing of specialty products such as napkins, placemats, tray covers, coasters, dollies, paper towels, and company reports, manuals and brochures. The art department had its own composing operation which prepared initial drawings or paintings through finished art work which was reduced to photographic plates for imprinting on the taxpayer's paper products. Taxpayer also maintained a staff of photo technicians and printers involved in manufacturing specialty paper products.

The Court affirmed the Commission's finding that the following types of art supplies, listed in the Commission's Conclusion of Law No. 3, were exempt from the sales and use tax under s. 77.54 (2), Wis. Stats., as property which is "consumed or destroyed or loses its identity in the manufacture of tangible personal property (i.e., paper specialty products) destined for sale": pencils, poster white, ink, cement, water color sets, colored pencils, erasers, kleer kote, tracing paper, and masking tape.

3. The taxpayer was ordered by the Wisconsin Department of Natural Resources to reduce its pollution discharge. To comply with the order, taxpayer installed various items of effluent treatment equipment, principally aerators and clarifiers, which added an additional recycling oper-

ation to the papermaking operation, improved their efficiency and reduced the amount of waste discharge and which the Commission concluded was an integral part of taxpayer's operation. The Court agreed with the Tax Appeals Commission that this equipment was exempt under s. 77.54 (6) (a), Wis. Stats.

4. Taxpayer maintained railroad-type equipment and used it to switch and transport loads on its premises, maintaining crews to work the railroad-type equipment. Taxpayer contended that its purchases of a switch engine and trackmobile were exempt from sales tax under s. 77.54 (12), Wis. Stats., which exempts "locomotives or other rolling stock used in railroad operations . . . ." The Court affirmed the Tax Appeals Commission's decision that the railroad-type segment of taxpayer's business constitutes "railroad operations" and that its purchases of a switch engine and trackmobile are exempt from the sales and use tax under s. 77.54 (12).

Both parties have appealed this decision to Court of Appeals.

Leicht Transfer & Storage Co., Inc. vs. Wisconsin Department of Revenue (Circuit Court of Dane County, May 19, 1980). This was a proceeding by Leicht Transfer & Storage Co., Inc., (hereafter the taxpayer) to review a decision and order of the Wisconsin Tax Appeals Commission (hereafter the Commission) dated November 23, 1979. The Commission determined that for the years January 1, 1970, through March 31, 1975, the corrugated boxes and packing materials purchased by the taxpayer were not utilized to transport the taxpayer's merchandise to its customers and thus were not exempt from Wisconsin sales and use tax within the intent and meaning of sec. 77.54 (6) (b), Stats.; and that miscellaneous items such as furniture pads, covers, packing supplies, tape, piano boards, stepladders, walk boards, straps, lining paper, and corrugated boxes did not qualify for the exemption from sales and use tax contained in sec. 77.54 (5) (b), Stats. The Commission also made further determinations with respect to whether other items were subject to sales and use taxes which the taxpayer did not contest.

The taxpayer raised the following two issues before the Circuit Court: (1) Whether the purchase of corrugated containers by movers of household goods such as taxpayer is exempt from Wisconsin sales and use tax under sec. 77.54 (6) (b), Stats., "the container exemption" and (2) Whether the purchase and use of miscellaneous van equipment and supplies are exempt from Wisconsin sales and use tax under the exemption contained in sec. 77.54 (5) (b), Stats., "the common carrier" exemption which includes an exemption for accessories, attachments, parts, supplies and materials related to a carrier's vehicles.

With respect to the first issue, section 77.54 (6) (b), Wis. Stats., exempts the gross receipts from the sale of and the storage, use or other consumption of "Containers, labels, racks, cans, boxes, drums, bags or other packaging and shipping materials for use in packing, packaging, or shipping tangible personal property, provided such items are used by the purchaser to transfer merchandise to his customers." In its holding, the Commission stated in its conclusion of law No. 1: "The corrugated boxes and packing materials purchased by the petitioner are not utilized to transport the petitioner's merchandise to its customers and thus are not exempt from Wisconsin sales and use tax within the intent and meaning of Section 77.54 (6) (b) of the Wisconsin Statutes."

The Court concluded that "considering whether there is an ambiguity it cannot be held that taxpayer's interpretation of the statutory language is more reasonable than that of the department. Therefore, if two reasonable interpretations exist, the statute must be ambiguous." The court went on to say that "In a close case of statutory interpretation the Court is inclined to defer to the interpretation made by the administrative agency charged with the administration of the statute if it is a reasonable one. Here the interpretation contained in TIM S-33.2, par. 3.j., issued June 14, 1974, is a reasonable one. The Court after giving due weight to the instant agency interpretation has determined to follow it and uphold the Commission's determination of the taxability of the corrugated containers."

Concerning the second issue, the Court cited the Tax Appeals Commission's finding of fact No. 5, which reads: "During the period involved, the petitioner purchased for use in its moving operation, furniture pads, covers, packing supplies, tape, piano boards, ladders, walk boards, straps, lining paper and corrugated boxes, all without paying a sales tax." By its conclusion of law No. 5 the Commission determined that the miscellaneous items described in finding of fact No. 5 did not qualify for the exemption contained in sec. 77.54 (5) (b), Stats., citing Department of Revenue v. Milwaukee Refining Corp., 80 Wis. 2d 44, 257 N.W. 2d 855 (1977).

The taxpayer contended that, instead of the Milwaukee Refining Corp. case supporting the taxability of the disputed miscellaneous items, the case supports the taxpayer's position that where the language of a tax statute is clear and unambiguous "no judicial rule of construction is permitted, and the court must arrive at the intention of the legislature by giving the language its ordinary and accepted meaning . . . (80 Wis. 2d, at p. 48).

Taxpayer asserted that the legislature has used very broad encompassing and overlapping terms so as to exempt from tax all possible items which could be used on or with the motor vehicles described in the exemption, and that all of the disputed miscellaneous items fall within these categories.

The court held that the taxpayer's interpretation of the statute was a reasonable one. Therefore, judgment was entered reversing that part of the Commission's decision and order which determined that the items of property described in finding of fact No. 5 do not qualify for the exemption from tax contained in sec. 77.54 (5) (b), Stats., and affirmed all other portions of said decision and order.

Both parties have appealed this decision to Court of Appeals.

Martens Marts, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 8, 1980). The taxpayer operated a food products store in Spencer, Wisconsin and on July 29, 1978 ceased operating this business; two

days later (July 31, 1978) the taxpayer sold its inventory, equipment and fixtures to Websters of Wisconsin, Inc.

Martens Marts, Inc., left its Wisconsin seller's permit in the Spencer premises with the instructions for the new owner to surrender it to the Wisconsin Department of Revenue. A representative of the new owner testified that the permit was mailed to the department in an envelope addressed to an unspecified Madison, Wisconsin address on the morning of July 31, 1978. The letter was sent by ordinary mail, had a return address on it, and it was not returned by the Postal Service.

A supervisor of the Department of Revenue, who supervises the closeout of seller's permits, testified that the department had no record of receiving the permit.

The sole issue for the Commission to determine was whether the taxpayer properly surrendered its seller's permit prior to the sale of its business fixtures and equipment so as to qualify for the occasional sales exemption in s. 77.54 (7), Wis. Stats. Section 77.51 (10) (a) provides in part: "No sale of any tangible personal property or taxable service may be deemed an occasional sale if at the time of such sale the seller holds or is required to hold a seller's permit . . .".

The Commission held that the taxpayer did not effectively surrender its seller's permit on July 31, 1978. Thus, it did not qualify for the occasional sale exemption contained in s. 77.54 (7), Wis. Stats., as defined in s. 77.51 (10) (a), and its gross receipts from the sales of business equipment and fixtures on July 31, 1978 were subject to the sales tax.

The taxpayer has not appealed this decision.

Miss Wisconsin Pageant, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, July 8, 1980). The issue in this case was whether this once-a-year event, the Miss Wisconsin Beauty Pageant, qualifies for the occasional sale exemption provided under s. 77.54 (7), Wis. Statutes, as defined in s. 77.51 (10) (c), Wis. Statutes.

The Miss Wisconsin Pageant is held to select a young Wisconsin woman to the Miss America Pageant and to provide a vehicle for young women to win educational scholarships. The 1978 pageant was held in Oshkosh from the 18th to the 25th of June. It consisted of preliminary judging on Wednesday, Thursday and Friday and the final judging and selection on Saturday.

The pageant hired an eleven piece orchestra to perform all 4 evenings and the eleven musicians, who were all union members, were paid approximately $3,000. They were all part-time musicians holding other full-time employment in the Oshkosh area.

Section 77.51 (10) (c), Wis. Statutes, which defines exempt "occasional sales" provides in part that such exempt sales of admissions must be to an event "not involving professional entertainment".

The Tax Appeals Commission found the use of an eleven piece orchestra constituted professional entertainment within the intent and meaning of s. 77.51 (10) (c). Therefore, the occasional sale exemption in s. 77.54 (7), Wis. Statutes, did not apply to this event.

The taxpayer has appealed this decision to Circuit Court.

North-West Services Corporation and North-West Telephone Co. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 22, 1980). North-West Telephone Company (hereinafter NW Telephone) is a public utility regulated by the Wisconsin Public Service Commission primarily engaged in providing telephone services to customers. Northwest Services Corporation (hereinafter NW Services) is a wholly owned subsidiary of NW Telephone and is engaged in the business of purchasing, selling and renting PBX equipment and other items.

"PBX" equipment is an acronym for "private branch exchange". It is an arrangement of equipment, situated on a customer's premises, consisting of a switchboard with an operating telephone, telephones connected with the switchboard, and connected by trunks with a central office, providing for intercommunication between these telephones, and for communication with the general exchange system for toll service. Telephone communication is thereby provided between the stations internal to the system and to the outside general exchange and long-distance telephone system.

NW Telephone leased (did not sell) its PBX equipment to its customers (ex., factories, hospitals, schools and hotels) under standard written leases. NW Telephone was, by Public Service Commission rule, prohibited from selling its PBX equipment to its customers. NW Telephone accounted for these lease payments of PBX equipment separately from other charges to its customers, as required by the Federal Communications Commission's system of accounts, and collected sales tax on such payments. After a lease agreement expires or is otherwise terminated, NW Telephone removes and repossesses the PBX equipment covered by a lease. If a lease has not expired, the customer is required under the written agreement to pay for the full unexpired portion of the lease agreement.

NW Telephone's PBX equipment competitors (including Executone, RCA and Satterfield Electronics) both sold and leased PBX equipment to NW Telephone's customers. NW Telephone obtained the PBX equipment which it leased to its customers in 2 ways: (a) by purchasing the equipment from wholesalers outside Wisconsin; and (b) by leasing the equipment from NW Services. In so acquiring PBX equipment, NW Telephone did not pay either a sales or use tax.

NW Services leased all of its PBX equipment to NW Telephone under standard written lease agreements and did not collect sales taxes on the proceeds of these leases until April or May of 1975 when it began paying sales tax on the proceeds of these leases. After a lease agreement expired, NW Telephone was required to return to NW Services the PBX equipment covered by the agreement.

Because it is a public utility, s. 196.19, Wis. Stats., requires NW Telephone to file with the Public Service Commission schedules showing all rates, tolls and charges in effect for any service performed by it within Wisconsin. In the schedules filed by NW Telephone covering the period under review, rates are established for what is identified as "Private Branch Exchange Services" (emphasis added).

Issues for determination in this case:

1. The central issue to these cases is whether NW Telephone's furnishing PBX equipment to its customers constituted (a) the rental of tangible personal property subject to the sales tax under s. 77.52 (1), Wis. Stats., or (b) the providing of a taxable service under s. 77.52 (2) (a) 4, Wis. Stats. The Commission found this constituted a rental of tangible personal property.

2. Did the purchases of PBX equipment by NW Services and the equipment's subsequent rental by NW Services to NW Telephone constitute a "sale at retail" under the definition contained in s. 77.51 (4) (intro), Wis. Stats., or a purchase from a "retailer" under s. 77.51 (7), Wis. Stats., for purposes of imposition of the sales and use tax under ss. 77.52 (1) and 77.53 (1), Wis. Stats.? The Commission found these were purchases and sales for resale not subject to the sales and use tax.

3. Did the purchases of PBX equipment by NW Telephone from wholesalers outside Wisconsin constitute purchases from a "retailer" under the definition of s. 77.51 (7), Wis. Stats., for purposes of imposition of the use tax under s. 77.53 (1), Wis. Stats.? The Commission found these were also purchases for resale not subject to the 4% tax.

The department has appealed this decision to Circuit Court.

Rice Insulation, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, June 12, 1980). The taxpayer had its principal place of business in Milwaukee where it was engaged as an insulation distributor and insulation contractor.

In a written document dated November 22, 1972 between the taxpayer and an exempt hospital (St. Michael Hospital of Franciscan Sisters in Milwaukee), the taxpayer agreed to provide the hospital with insulation materials and with the labor to install such materials. The document specified that $11,258 would be paid to the taxpayer by the hospital for the materials. Change orders in 1973 reduced the order for materials by $628 and increased the order by $1,351. The hospital's purchase orders for the materials indicated the purchases were exempt from the sales and use tax. The materials were invoiced to and delivered to the hospital, and the hospital paid the taxpayer in 4 payments.

The taxpayer purchased the materials for this job without tax, claiming they were purchased for resale, by furnishing resale certificates to suppliers. Taxpayer purchased the materials without tax knowing that it would sell the materials to the hospital for its addition and renovation. The taxpayer installed and applied these insulation materials it sold to the hospital. The materials were a proprietory mix of mineral fibers conveyed through a hose, wetted with a nozzle at the end of the hose, and applied to a surface.

The Commission found the following questions must be answered: (1) Is the taxpayer a "contractor" or "subcontractor" for purposes of s. 77.51 (18), Wis. Stats.? and, (2) Is the taxpayer liable for use tax on these insulation materials?

The Commission found the taxpayer was a subcontractor who purchased and was the consumer of tangible personal property used by it in real property construction activities and use tax applies to the sale of the materials used by it. It also found under s. 77.51 (18) the contractor did not issue proper resale certificates because it had sound reason to believe it would sell the materials to customers for whom it would perform real property construction activities involving the use of the materials. In addition it found the taxpayer liable for the use tax under s. 77.53 (1), Wis. Statutes, on its purchases of materials which it sold and later installed in a hospital exempt from sales and use tax under s. 77.54 (9a).

The taxpayer has appealed this decision to Circuit Court.

Frank A. Teskie, D/B/A Teskie & Teskie vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 22, 1980). The taxpayer is a commercial fisherman, licensed by both Wisconsin and Michigan, who uses his vessel for commercial fishing operations in Lake Michigan and Green Bay. The vessel used to pursue this business is 37 feet long and 10 net tons. The sole issue in the case was whether the exemption in s. 77.54 (13), Wis. Statutes, applies to a vessel of 10 net tons, and its accessories, attachments, parts and fuel therefore.

The Commission held that the sales and use tax exemption in s. 77.54 (13) applies to vessels and barges with the following characteristics:

1. Must be used for commercial purposes;

2. Must be of 50-ton burden or over; and

3. Must be primarily engaged in interstate or foreign commerce or in commercial fishing.

The Commission found the taxpayer has not demonstrated that he comes within the clear language of a tax exemption statute. Therefore, his purchases of radar equipment and a diesel engine for a fishing vessel of 10 net tons are subject to the 4% tax.

The taxpayer has not appealed this decision.

Wisconsin Bridge and Iron Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 22, 1980). The principal question in this case was whether the Wisconsin Bridge and Iron Company was engaged in manufacturing as defined in s. 77.51 (27), Wis. Stats., and was therefore exempt from use taxes under s. 77.54 (6) (a). The Commission concluded that, under these statutes and in light of the undisputed facts, the machinery used by the taxpayer was exempt from the Wisconsin sales and use tax.

The taxpayer was engaged in the purchase of raw steel having various shapes and varying in weight from 6 pounds to 730 pounds per square foot, and from 10 feet to 60 feet in length. The machines involved were used to punch, drill, weld, fit, tack and/or stiffen the raw structural steel taken from inventory, depending on the particular design and use of the finished product.

All of the finished products produced by the taxpayer are designed for specific purposes. Typically, detailed drawings are made of every piece that is to be produced for a project. The finished products produced are used in some sort of structure; like a building, bridge, conveyor, hopper, tank silo, stack, racks or rack buildings.

After being processed by it, the raw structural steel has different dimensions and configurations than it had at the beginning of the process. Oil and other lubricants, including shot blast and paint, are added to the steel. The raw structural steel which it purchases has no practical use in the form purchased. The purpose of its operations is to produce a finished product which, unlike the raw structural steel it purchases, has a specific designation or use for its customers.

The raw structural steel purchased is generally referred to as structural bars and plate mill products. The specific names given to the various raw materials are wide flange sections, channels, angles, bars, plate, tubing and pipe. The finished products produced are designated by specific design drawings and variously called beams, columns, girds, purlings, sag rods, brace rods, braces, base plates, girders, trusses, hoppers, silos, and conveyors.

The Commission found that this process is popularly regarded among persons familiar with the industry as "manufacturing", and that the company produces by machinery a new article with a different form, use and name from existing materials. Therefore, it was engaged in manufacturing as defined under s. 77.51 (27), Wis. Stats.

Another issue in the case was whether the use tax imposed under s. 77.53 (1) is imposed on the taxpayer's raw materials committed to various construction jobs. The Commission found that under the provisions of ss. 77.53 (12), 77.51 (16) and 77.54 (2) the taxpayer is subject to the use tax, unless it is otherwise exempt, on the raw materials it commits to its various jobs at the time it commits the materials to the jobs.

The final issue was whether the taxpayer's claim for refund for a retailer's discount on use tax was timely filed within the period of limitation contained in s. 77.59 (4). The Commission found the taxpayer's claim for refund dated June 26, 1975 for a retailer's discount on use tax for taxable year 1970 was not timely filed.

The department has not appealed this decision.

The Wisconsin Electric Railway Historical Society vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission oral decision of June 18, 1980). The issue in this case was whether the sale of tickets for a ride on a trolley car was subject to the sales tax under s. 77.52 (2) (a) 2 as the sale of admissions to an amusement, entertainment or recreational event or nontaxable as admissions to a museum of history.

The Society is a nonstock, nonprofit corporation dedicated to the preservation of the electric railway. The museum consists in part of a depot where various newspaper clippings and trolley car artifacts are displayed, and includes a yard where 33 trolley cars are being restored. Five of the cars are operational.

The museum also furnishes rides on trolley cars over 7½ miles of track owned by the Village of East Troy. The rides are given on Saturdays, Sundays and holidays from May through December. No admission is charged to tour the depot or yard, but an admission is charged for the ride. Lectures about the history of trolley cars are given on each trolley run.

The Commission found that the purpose of the rides was primarily educational although entertainment played a part. Therefore, the charge for the ride on the trolley was not taxable because it was an admission to a museum.

The department has not appealed this decision.

GIFT TAX

Dolores Haas and Robert W. Kessenich, Donees, and the Estate of Katherine H. Kessenich, Donor, vs. Wisconsin Department of Revenue (Tax Appeals Commission, Dockets Nos. G-6896 & G-6897, June 30, 1980). This case involves an appeal by Dolores Haas and Robert W. Kessenich, donees, and the estate of Katherine H. Kessenich, donor, (taxpayers) from assessment of gift tax and interest by the Wisconsin Department of Revenue (department). The sole issue was whether the department's assessments are barred by the statute of limitations under section 72.81 of the 1967 Wisconsin Statutes.

On December 31, 1968, Katherine H. Kessenich made 2 types of transfers to her niece, Dolores Haas, and her nephew, Robert Kessenich. She gave to each (1) real property and common stock in exchange for the private annuity obligation that each donee would pay her $6,005.54 per year for her life; and (2) a gift of other property with a value of $20,425.75.

Timely 1968 Wisconsin gift tax reports were filed in 1969 by the niece and nephew and by Katherine H. Kessenich covering the second group of gifts ($20,425.75 of value to each donee). The gift tax reports did not include any reference to the transfers in exchange for the annuities. The exclusion of these transfers from the report was not with willful intent to defeat or evade gift tax. These transfers were not included, under the good faith belief that the transfers were not gifts but were equal exchanges of value. This belief was based on the value of the annuities computed under provisions of the Internal Revenue Code whereby the transfers were of equal value and there were no gifts. However, the value of the annuities exceeded the property transferred under the method of valuation required under Wisconsin Statutes. Thus, gifts had been made under Wisconsin law, and on April 28, 1978 (about 9 years and 4 months after the transfers), the department issued gift tax assessments covering the transfers involving the annuities. The assessments were appealed on the grounds that they were barred by the statutes of limitations.

At the time the transfers in controversy were made, Wisconsin's gift tax statute, s. 72.81, 1967 Wis. Stats., required the filing of a gift tax report by April 15 of each year following the year in which "any transfers" by gift between a donor and a donee exceeded $1,000. The reports were required to be on forms prescribed by the department and were required to disclose such information required on the forms. Any gift tax due was payable by April 15 by the donee. The taxpayers complied with these statutes in 1969 regarding the transfers which they knew were gifts. They did not include information on the reports about the annuity transfers which they believed in good faith were not gifts under the Wisconsin gift tax law.

Section 72.81 (4) of the 1967 Wisconsin Statutes provided that "As soon as practicable after the report is filed, but within 3 years thereafter, the department . . . shall audit it and assess any additional tax that may be due". However, Section 72.81 (5) of the 1967 statutes also provided that income tax laws regarding assessment of taxes not in conflict with the gift tax statutes shall apply.

Section 71.11 (21) (c) of the 1967 income tax statutes allowed the department to assess additional gift taxes beyond the 3-year gift tax statute of limitations period when a person "has failed to file any . . . tax return" for the year in question. Since a report was filed in 1969, the taxpayers contend the 3-year statute of limitations began to run in that year.

The department claimed that it was not barred from assessing by section 71.11 (21) (c), 1967 Statutes, because, although taxpayers each filed a 1968 gift tax report, they did not list the disputed transfers on those reports, as required by s. 72.81 (2), 1967 Statutes, so the statute of limitations never began running on those transfers. The department also asserted that the income tax statute applies only if it does not conflict with the gift tax statute. If there is a conflict, the gift tax statute controls. The department claimed there was a conflict; therefore s. 71.11 (21) (c), 1967 Statutes, did not apply and the assessments were properly made.

The Commission concluded that the department's assessments of gift tax were barred by the statute of limitations under s. 72.81, 1967 Wis. Stats.

The department has appealed this decision to Circuit Court.