WISCONSIN TAX BULLETIN

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WISCONSIN ADOPTS FEDERAL IRA AND KEOGH CHANGES

One of the tax provisions in the budget adjustment bill, Chapter 317, Laws of 1981, provides that Wisconsin will follow the IRA (Individual Retirement Account) and Keogh retirement plan changes enacted by Congress in the Economic Recovery Tax Act of 1981. The major changes permit employes covered by employer-sponsored retirement plans to establish IRAs and increase the deduction limits. The federal changes will apply for Wisconsin purposes retroactive to January 1, 1982.

Additional information on IRAs will appear in the October issue of the Wisconsin Tax Bulletin.

ADJUST DECLARATION PAYMENTS FOR 10% SURTAX

For taxable years 1982 and 1983, a surtax of 10% will be imposed on corporations. The surtax will be 10% of the corporation's tax, before reduction for any payments or credits, including the sales tax credit on fuel and electricity, farmland preservation credit, or declaration of estimated tax payments.

For the 1982 taxable year, any declaration payments that would have been due before July 1, 1982 solely because of the 10% surtax shall be prorated equally among, and paid with, any payments due on or after July 1, 1982. Any addition to tax penalty for underpayment of estimated taxes will be computed on the basis that the surtax for the 1982 taxable year was required to be included with installment payments due on or after July 1, 1982.

Example: A corporation filing on the calendar year estimated a $10,000 tax liability ($12,000 gross tax less $2,000 sales tax credit) for 1982. Installment payments of $2,500 were made on both March 15 and June 15, 1982.

The corporation's third and fourth installment payments are computed as follows:

$10,000	estimated net tax liability before surtax
1,200	add: 10% surtax (10% x 12,000 gross tax)
$11,200	estimated payments required for 1982
5,000	installment payments made prior to July 1, 1982
$ 6,200	remaining estimated tax payments required
$ 3,100	installment payments due September 15, 1982 and January 15, 1983 (6,200 ÷ 2 = $3,100)

IN THIS ISSUE

HOWICK CASE - STATUS OF RULES 2.30 AND 2.97

The department is in the process of amending administrative rule Tax 2.30 and repealing rule Tax 2.97 relating to the determination of gain on assets acquired prior to becoming a Wisconsin resident. The changes to these rules are being proposed so that the principles established by the Wisconsin Supreme Court's decision in the Romain A. Howick case relating to losses will also apply for determining gains when property acquired before becoming a Wisconsin resident is sold by an individual while he or she is a Wisconsin resident. After the changes are adopted, the computation of both gains and losses from the disposition of such property will generally be determined in the same manner for Wisconsin as for federal purposes.

The standing committees of both houses of the Wisconsin Legislature have completed their review of the proposed rule changes and approved them. Therefore, the rule changes will probably be effective on August 1, 1982, if they are published by the Revisor of Statutes in July as scheduled.

(Note: As of the date of printing this WTB, the effective date of these rule changes was not known.)

NEW WISCONSIN TAX LAWS

The April issue of the Wisconsin Tax Bulletin included explanations of new tax laws enacted in the budget adjustment bill, Senate Bill 783 (Chapter 317, Laws of 1981). In addition to the tax provisions in that bill, the Legislature also enacted other new tax laws in 1982 as explained below:

Income Taxes And Corporation Franchise/Income Taxes

1. Deduction Allowed for Contributions Made to the Community Development Finance Authority

(Chapter 371, Laws of 1981, amends 71.02 (2) (f) and 71.60 (1) (a) (intro.), creates 71.04 (5m) and 71.09 (12m), effective July 1, 1982).

A deduction is allowed for contributions which individuals and corporations make to the Community Development Finance Authority. The deduction is an itemized deduction for individuals. For corporations it is a deduction from gross income. In both cases, the amount of deduction available must be reduced by any credit claimed under s. 71.09 (12m). (See item 2 below for an explanation of this new credit.)

For individuals this new itemized deduction will *not* be considered a tax preference item for purposes of computing adjusted itemized deductions subject to the Wisconsin minimum tax.

The Community Development Finance Authority is a newly authorized nonprofit public corporation which is being created to develop or redevelop blighted or impoverished areas in Wisconsin.

2. Credit for Investment in Community Development Finance Company (Chapter 371, Laws of 1981, creates 71.09 (12m), effective July 1, 1982).

Individuals and corporations making a contribution to the Community Development Finance Authority and, in the same year, purchasing common stock or a partnership interest in the Community Development Finance Company will be allowed to claim a credit against Wisconsin income/franchise taxes otherwise due. The credit is nonrefundable and the amount allowable is equal to 75% of the purchase price of the stock or partnership interest, but not to exceed 75% of the amount which was contributed to the Community Development Finance Authority. Any unused portion of a credit may be carried forward for an unlimited time, until it is completely used up.

The Community Development Finance Company is an entity which will be created by the Community Development Finance Authority described in item 1 above. The statutes specify that it must be organized as either a corporation or a limited partnership.

3. Extend Deadline for Filing Refunds and Making Assessments Caused by Adjustments to the Basis of Partnership Interest (Chapter 139, Laws of 1981, amends 71.10 (10) (bn) and 71.11 (21) (bm), creates 71.10 (10) (h), effective only for 1975 taxable year).

Current Wisconsin law (s.71.05 (4) (b) as created by Chapter 277, Laws of 1979) provides that whenever a Wisconsin resident disposes of an interest in a partnership in a transaction in which gain or loss is recognized, a modification must be made to reflect any increases or decreases in the basis of the partnership interest which occurred in taxable years prior to 1975 as a result of losses or gains relating to business or property which had a situs outside of Wisconsin under the provisions of s. 71.07 in effect for years prior to 1975.

The law provides modification adjustments which have the effect of reversing any adjustments made to the federal basis of a partnership interest for distributive shares of pre-1975 income and losses derived from partnership business or property located outside of Wisconsin. For example, a taxpayer reports a gain of $3,500 on his or her 1981 federal return for the following transaction:

Original investment	$10,000
Distributive share of pre-1975 losses	(8,000)
Distributive share of pre-1975 income (not withdrawn)	3,000
Distributive share of 1975-80 losses	(1,500)
Distributive share of 1975-80 income (not withdrawn)	2,000
Basis of partnership interest on 1-1-81	5,500
Selling price on 1-1-81	9,000
Gain	$ 3,500

In this example the taxpayer would claim a subtraction modification of $5,000 on his or her 1981 Wisconsin income tax return. This would reverse the $5,000 decrease (pre-75 loss of $8,000 minus pre-75 gain of $3,000) made in the federal basis for pre-1975 out-of-state income and losses.

When this modification in current law was created, in Chapter 277, Laws of 1979, it applied retroactive to the 1975 tax year. However, when Chapter 277 became effective on May 13, 1980, the filing deadline for 1975 tax year refunds (April 15, 1980) had already expired.

Under the new law in Chapter 139, Laws of 1981, an exception is created to the four year statute of limitations. Refunds may be claimed and assessments made for the 1975 taxable year if they relate to a change in the basis of a partnership interest under s. 71.05 (4) (b) and if the refund is claimed or the assessment is made before May 13, 1984.

Sales and Use Taxes

1. Exemption for Motor Vehicles Transferred to a Corporation (Chapter 264, Laws of 1981, amend 77.54 (7), effective January 1, 1983).

The transfer of a motor vehicle from an individual to a corporation which is solely owned by such individual is exempt from sales and use tax.

Excise Taxes

1. Require Municipalities Which Issue Alcoholic Beverage Licenses to Issue Such Licenses to Private Golf, Tennis, Curling and Yachting Clubs (Chapter 220, Laws of 1981, amends 125.51 (5) (a) 1 and 4, creates 125.51 (4) (j), effective July 1, 1982).

Private sports clubs holding "Class B" liquor licenses issued by the department on June 30, 1982 will be issued their "Class B" alcoholic beverage licenses by the local municipalities on and after the effective date of this act. The department will continue to issue "Class B" licenses only to those sports clubs located in municipalities which do not, by referendum, issue such licenses.

2. Allow the Transfer of Retail Alcoholic Beverage Licenses to Licensee's Spouse (Chapter 235, Laws of 1981, amends 125.01 (12) (b) 1, effective July 1, 1982).

This new law will enable a municipality, upon application, to transfer a locally issued retail alcoholic beverage license to a qualified licensee's spouse should the licensee become disabled. When such transfer occurs, the spouse is exempt from payment of license fees in the year of transfer.

3. Provide for Municipally Issued Temporary Operator's Licenses for Bartenders (Chapter 170, Laws of 1981, amends 125.17 (3), creates 125.17 (4), effective July 1, 1982).

Municipalities are allowed to issue temporary operator's licenses (one to fourteen days) to persons employed by, or donating services to, nonprofit organizations.

4. Allow Unaccompanied Minors Present in Private Tennis Clubs (Chapter 265, Laws of 1981, amends 66.054 (19) (c) and 176.32 (1) (c), effective April 27, 1982).

Unaccompanied minors are permitted to enter and remain on premises licensed for the sale of alcoholic beverages if such premises are private tennis clubs.

NEW ISI & E DIVISION RULES AND RULE AMENDMENTS IN PROCESS

Listed below, under parts A, B and C, are proposed new administrative rules and amendments to existing rules that are currently in the rule adoption process. The rules are shown at their stage in the process as of June 15, 1982. Part D lists new rules and amendments which have been adopted in 1982.

A. Rules At Legislative Council Rules Clearinghouse

2.165 Change in taxable year **(amendment)**
2.39 Apportionment method **(amendment)**
2.40 Nonapportionable income **(repealed and recreated)**
2.82 Nexus **(amendment)**
11.01 Sales and use tax return forms **(amendment)**
11.03 Elementary and secondary schools and related organizations **(amendment)**
11.05 Governmental units **(amendment)**
11.08 Medical appliances, prosthetic devices and aids **(amendment)**
11.10 Occasional sales **(amendment)**
11.11 Waste treatment facilities **(amendment)**
11.16 Common or contract carriers **(amendment)**
11.17 Hospitals, clinics and medical professions **(amendment)**
11.26 Other taxes in taxable gross receipts and sales price **(amendment)**
11.38 Fabricating and processing **(amendment)**
11.49 Service station and fuel oil dealers **(amendment)**
11.57 Public utilities **(amendment)**
11.66 Communication and CATV services **(amendment)**
11.69 Financial institutions **(amendment)**
11.71 Automatic data processing **(new rule)**
11.84 Aircraft **(amendment)**
11.85 Boats, vessels and barges **(amendment)**
11.87 Meals, food, food products and beverages **(amendment)**
11.93 Annual filing of sales tax returns **(amendment)**
11.97 "Engaged in business" in Wisconsin **(amendment)**

B. Rules At Legislative Standing Committees

10.14 Valuation of United States treasury bonds **(new rule)**
11.56 Printing industry **(new rule)**

C. Rules Approved By Legislature But Not Effective

2.30 Property located outside Wisconsin—depreciation and sale **(amendment)**
2.97 Sale of constant basis assets acquired prior to becoming a Wisconsin resident **(repeal)**
5.01 Filing reports **(amendment)**
10.10 Taxation of savings, mortgage and credit life insurance **(amendment)**
10.11 Federal estate tax deduction **(amendment)**
10.12 Deductibility of income taxes **(amendment)**
10.13 Apportionment of property qualifying for exception **(new rule)**

D. Rules Adopted In 1982 (In parentheses is the date the rule was adopted.)

2.081 (3) Indexed income tax rate schedule for taxable year 1981 **(1/1/82, new rule)**
11.12 Farming, agriculture, horticulture and floriculture **(1/1/82, amendment)**
11.16 Common or contract carriers **(1/1/82, amendment)**
11.40 Exemption of machines and processing equipment **(1/1/82, amendment)**
11.53 Temporary events **(2/1/82, new rule)**

HOW TO APPEAL AN ASSESSMENT

Do you disagree with an assessment for additional taxes that you receive from the Department of Revenue? There are five steps in the appeal process which are available to a taxpayer who disagrees with an assessment of income, franchise, sales/use, gift, and withholding taxes. The five steps are taken in the following order: (1) Appellate Bureau of the Wisconsin Department of Revenue, (2) Wisconsin Tax Appeals Commission, (3) Circuit Court, (4) Court of Appeals, and (5) Wisconsin Supreme Court. This article discusses the first two steps.

Appeals to Appellate Bureau

Any taxpayer may appeal to the Appellate Bureau if the taxpayer disagrees with an office audit or field audit assessment, a notice of refund or a denial of a claim for refund. An appeal must be in writing and should state the specific reasons for objecting to the adjustments. The appeal should be mailed to the Wisconsin Department of Revenue, Appellate Bureau, P.O. Box 8906, Madison, WI 53708.

The appeal must be filed within 60 days of the date the taxpayer received the assessment notice, notice of refund or denial of claim for

refund. An appeal is considered "filed" with the Appellate Bureau if it is (1) actually received by the department within the 60 days, or (2) mailed in a properly addressed envelope with postage prepaid, which is postmarked before midnight of the 60th day and received by the department within 5 days of the 60th day. Except for the 2-year claim for refund procedure described below, an assessment becomes final if an appeal is not filed with the Appellate Bureau within this 60 day period.

(Note Regarding Office Audit Assessments: In the alternative, for an *office audit* assessment, a taxpayer may pay the full amount of the assessment without filing a timely objection. If the taxpayer later wishes to contest some or all of the adjustments a claim for refund may be filed. This claim for refund must be filed within 2 years from the date the assessment notice was issued. If the 60 days for appealing an assessment to the Appellate Bureau have expired and a taxpayer still wishes to contest an office audit assessment, payment of the assessment and a claim for refund is the only procedure available.

The claim for refund should be made by a letter addressed to the Wisconsin Department of Revenue, Audit Bureau, P.O. Box 8906, Madison, WI 53708. No special form is required. The letter should contain the taxpayer's name, address and social security number or corporation identification number, identify the tax year in question and state the facts and reasons for disagreeing with the assessment.

The Audit Bureau will notify the taxpayer in writing whether the claim for refund is approved or denied. If the claim is denied, the taxpayer may file an appeal with the Appellate Bureau within 60 days after receiving the denial notice. CAUTION: This claim for refund procedure may NOT be used if any part of the assessment was the subject of a timely filed appeal.)

In order to stop the accumulation of interest, a taxpayer may deposit the amount of an additional assessment, including any interest and penalty, with the Department of Revenue at the time the appeal is filed, or at any time before the Appellate Bureau issues a decision on the appeal. Any deposited amount which is later refunded will bear interest at the rate of 9% per year. A taxpayer may also pay any portion of an assessment which he or she admits to be correct. Such payment shall then be considered an admission of the validity of that portion of the assessment and may not be recovered in an appeal or any other action or proceeding.

Most appeals to the Appellate Bureau are handled by correspondence. A conference may be held if requested by the taxpayer although in some cases it may be suggested by the Appellate Bureau because of complex issues. Conferences may be held in Madison, Milwaukee, Eau Claire or Appleton. Taxpayers may represent themselves or be represented by another person, such as an attorney or an accountant.

The conferences are informal. The taxpayer may present whatever facts or arguments he or she desires. These may be presented either orally or in writing or both.

The Appellate Bureau will notify the taxpayer in writing of its decision on the appeal.

Wisconsin Tax Appeals Commission

The Wisconsin Tax Appeals Commission is a five member panel. It is entirely separate from the Department of Revenue. If a taxpayer disagrees with a decision of the Appellate Bureau and wishes to appeal it, the appeal must be taken to the Commission.

The appeal is taken by filing a "petition for review" with the Commission. A $5.00 filing fee must be submitted with each petition, except that there is no filing fee for appeals of homestead credit, farmland preservation credit, and 1978 Property Tax/Rent Credit cases. If assessments were issued against husband and wife (one assessment against each) and each desires to appeal the Appellate Bureau's decision, each spouse must file a separate petition with the Commission and submit the $5.00 filing fee.

Late petitions are not permitted. A "petition for review" is timely "filed" with the Commission if it is:

a) Actually received by the Commission within 60 days of the date the taxpayer received the Appellate Bureau's decision; or

b) Mailed to the Commission by certified mail in a properly addressed envelope with postage prepaid by the 60th day after receipt of the Department of Revenue's notice of action.

The petition must summarize the facts involved in the appeal and must contain a statement of the tax laws involved. An original plus four copies of the petition must be filed with the Commission.

The Tax Appeals Commission will notify the taxpayer and the legal staff of the Department of Revenue of the time and place for the hearing on the petition.

The taxpayer may appear on his or her own behalf or may be represented by an attorney. However, the taxpayer is required to attend the hearing (an officer may appear for a corporation) and testify under oath about the facts involved in the dispute. An unexcused failure to appear may result in dismissal of the petition.

The hearing is conducted in a manner similar to a trial in court. The taxpayer, besides giving sworn testimony, may present witnesses and written evidence in support of his or her position. The Department of Revenue will be represented by an attorney who also may present witnesses and written evidence supporting the department's position.

If issues involving interpretations of the tax law are involved in the appeal, the Commission may ask the taxpayer and the Department of Revenue to file summaries of the law or briefs on the legal questions.

After reviewing the evidence and testimony, the Commission will issue a decision and order. Generally, a decision is in writing. However, with the consent of both parties, an oral decision may be given. A decision and order of the Commission is binding on both parties for that case unless an appeal is taken to Circuit Court.

If the Commission construes a statute adversely to the contention of the Department of Revenue, the department is deemed to have acquiesced in the construction of the statute unless it (1) appeals the decision to Circuit Court, or (2) issues a notice of nonacquiescence in the decision as provided for by s. 73.01 (4) (e) 2. The effect of nonac-

quiescence is that even though the Commission's decision and order is binding for that case, the rationale and construction of the statutes is not binding upon or required to be followed by the department in other cases.

In addition, another provision of the law permits both parties to agree in writing to waive the right to appeal an oral decision. In such case, the oral decision shall not be binding upon the department as to statutory construction in a subsequent matter.

Note: If the taxpayer chose not to deposit the taxes with the department at the time his/her case is before the Appellate Bureau, the taxpayer may at the time of the appeal to the Commission, elect to either deposit the total taxes and interest with the State Treasurer or pay the portion of the assessment not being appealed. Either election should be set forth in the petition for review with the Commission.

INTERSPOUSAL TRANSFERS EXEMPT FROM GIFT AND INHERITANCE TAX

Gifts made between spouses on or after July 1, 1982 are exempt from Wisconsin gift taxes. For the first six months of 1982 (January 1-June 30, 1982), gifts between spouses were subject to Wisconsin gift taxes, however, there was a lifetime personal exemption between spouses of $100,000, plus the $3,000 annual exemption.

Property inherited from a spouse is exempt from Wisconsin inheritance taxes for deaths occurring on or after July 1, 1982.

The interspousal exemption for both gift and inheritance taxes was passed by the Legislature in late 1981.

TAXPAYER ASSISTANCE AVAILABLE

Although most taxpayer assistance activity is concentrated in the January through April 15 filing season each year, the department does offer assistance in answering Wisconsin tax questions throughout the year. However, for the portion of the year after April 15, assistance in many of the department's offices is available on a more limited basis than during the filing season.

The schedule below indicates the locations of the various offices, their telephone numbers, and the times they will be open for the rest of 1982. It is suggested that persons who visit one of the offices indicated as being open only on Mondays call in advance and make an appointment.

Offices Providing Daily Assistance (Monday-Friday 7:45 AM to 4:30 PM)

Location	Address	Telephone
Appleton	265 W. Northland	(414) 735-5001
Eau Claire	718 W. Clairemont	(715) 836-2811
Madison	4638 University Avenue	(608) 266-2772
Milwaukee	819 N. Sixth St.	(414) 224-4000

Offices Providing Assistance on Mondays Only

Baraboo	1007 Washington	(608) 267-9089
Barron	Courthouse	(715) 537-3621
Beaver Dam	211 S. Spring St.	(414) 887-8108
Beloit	165 Liberty St.	(608) 362-0044
Elkhorn	300 S. Lincoln St.	(414) 723-4098
Fond du Lac	160 S. Macy St.	(414) 929-3985
Grafton	101 Falls Road	(414) 377-6700
Green Bay	1600 W. Shawano	(414) 497-4230
Hayward	221 Kansas Ave.	(715) 634-8478
Hudson	753 Sommer St. N.	(715) 386-8225
Janesville	115 S. Franklin	(608) 755-2750
Kenosha	5500 8th Ave.	(414) 656-7100
La Crosse	620 Main	(608) 785-9721
Lancaster	237 W. Hickory St.	(608) 723-2641
Manitowoc	1314 Memorial Drive	(414) 684-1909
Marinette	Courthouse	(715) 735-5498
Marshfield	630 S. Central Ave.	(715) 387-6346
Monroe	1220 16th Ave.	(608) 325-3013
Oshkosh	Courthouse	(414) 424-2100
Park Falls	1114 S. 4th Ave.	(715) 762-2160
Racine	616 Lake Ave.	(414) 636-3711
Rhinelander	Sunrise Plaza	(715) 362-6749
Shawano	1456 E. Green Bay St.	(715) 526-5647
Sheboygan	504 S. 14th St.	(414) 459-3101
Superior	Courthouse	(715) 394-0204
Tomah	City Hall	(608) 372-3256
Watertown	415 E. Main St.	(414) 261-7700
Waukesha	261 South St.	(414) 544-8690
Waupaca	201 1/2 S. Main St.	(715) 258-9564
Wausau	Courthouse Annex	(715) 847-5380
West Bend	429 Walnut St.	(414) 338-4730
Wisconsin Rapids	1681 Second Ave. S.	(715) 421-0500

The offices providing assistance on Mondays only are open on Monday mornings, except for Green Bay, La Crosse, Kenosha, Racine, Waukesha and Wausau which are open from 7:45 AM to 4:30 PM on Mondays.

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 last paragraph of each WTAC decision in which the department's determination has been reversed will indicate one of the following: 1) "the department appealed", 2) "the department has not appealed but has filed a notice of nonacquiescence" or 3) "the department has not appealed" (In this case the department has acquiesced to Commission's decision).

The following decisions are included:

Income and Franchise Taxes

Business and Institutional Furniture, Inc. vs. Wisconsin Department of Revenue
Carol Candee vs. Wisconsin Department of Revenue
Domain International Sales Corp. vs. Wisconsin Department of Revenue
Wisconsin Department of Revenue vs. Eugene Dowty
Andrew F. Fallon vs. Wisconsin Department of Revenue
Frederick R. Hardt vs. Wisconsin Department of Revenue
Thomas E. Hildebrandt vs. Wisconsin Department of Revenue
Gerald R. Hoeppner vs. Wisconsin Department of Revenue
Koenig & Lundin, S.C. vs. Wisconsin Department of Revenue
Madison Gas and Electric Company vs. Wisconsin Department of Revenue
NCR Corporation vs. Wisconsin Department of Revenue
Howard U. Taylor, Margaret T. Taylor, Wayne Thomas Feyereisen, Frances C. Feyereisen, James W. McCarville, Karen Beth McCarville, Michael E. Fairfield and Donna J. Fairfield vs. Dennis J. Conta, Individually and as Former Secretary of the Wisconsin Department of Revenue, and Mark E. Musolf, Individually and as Secretary of the Wisconsin Department of Revenue

Sales/Use Taxes

Boggis-Johnson Electric Company vs. Wisconsin Department of Revenue
Feedmobile, Inc. vs. Wisconsin Department of Revenue
A. F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue
Marquette University vs. Wisconsin Department of Revenue
Mining Equipment Mfg. Corp. vs. Wisconsin Department of Revenue
Mushel & Mushel vs. Wisconsin Department of Revenue
The Mylrea Company, Inc. vs. Wisconsin Department of Revenue
Servomation Corporation, Successor to Servomation of Wisconsin, Inc. vs. Wisconsin Department of Revenue

Withholding

William A. Mitchell vs. Secretary of Revenue, Mark E. Musolf, et. al.

Gift Tax

Anna Gerovac and Peter Gerovac vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

Business and Institutional Furniture, Inc, vs. Wisconsin Department of Revenue (Circuit Court of Milwaukee County, May 29, 1981). This is an appeal of a decision of the Tax Appeals Commission (see WTB #20) which imposed franchise taxes on Business and Institutional Furniture, Inc. for the years 1973, 1974 and 1975, based on s. 71.07, Wis. Stats., and Wisconsin Adm. Code Section 2.39.

The taxpayer's principal place of business was in Wisconsin. Business and Institutional Furniture, Inc. was engaged in the business of mail order sales to various institutions and businesses.

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.

The issue in this case is whether s. 71.07 (2) (c) 5, Wis. Stats., authorized the creation of Wisconsin Adm. Code Section 2.39 (5) (c) (7).

Wisconsin Statute 71.07 (2) (c) 5 reads as follows:

> "If the income of any such person properly assignable to the state of Wisconsin *cannot be ascertained with reasonable certainty by either of the foregoing methods,* then the same shall be apportioned and allocated under such rules and regulations as the department of revenue may prescribe." (Emphasis supplied)

The Circuit Court found that income in this case can be ascertained with reasonable certainty and there is no need for a rule governing this situation and in fact no statutory authority for such rule. The Court held that the "gap" created by the statute should be closed by legislation rather than by rule.

The department has not appealed this decision.

Carol Candee vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March

10, 1982). The issue in the case is whether Carol Candee realized a taxable gain as a result of the transfer of appreciated real property to her former husband pursuant to a stipulated divorce property settlement.

Carol Candee (formerly Carol Gregory) was divorced from George Gregory on a judgment that was entered on October 9, 1973, in the Circuit Court for Fond du Lac County.

The parties entered into a written stipulation whereby the plaintiff (Carol Candee) and defendant (George Gregory) were both denied alimony; the homestead was awarded to Carol together with household furniture, furnishings and equipment; George was awarded all right and title and interest to the Butler Apartments in Fond du Lac; Carol shall be responsible for payments of all mortgage insurance and taxes on the homestead at 295 East 19 Street; George shall be responsible for payment of all mortgage and other indebtedness in connection with the Butler Apartments; George was awarded property at 65-67 South Main Street, Fond du Lac, Wisconsin, and shall hold Carol harmless in connection with any and all mortgage, interest and taxes and other expenses; George was awarded all equity, interest and assets in and to Terry Hearing Aid Service at 45 Sheboygan Street, Fond du Lac, Wisconsin, and shall hold Carol harmless in connection with any and all indebtedness in connection therewith.

At the time of the divorce the Butler Apartments were valued at $235,000 subject to mortgage of $200,000; the residence was valued at $28,400 subject to a mortgage of approximately $15,000; George Gregory had no equity in his one-half interest in rental property on South Main Street, Fond du Lac, Wisconsin; and the parties own various items of household furniture and furnishings, a 1972 Corvette and 1969 Oldsmobile, plus equity from the sale of their prior residence at 827 Ellen Lane, Fond du Lac, Wisconsin.

Did taxpayer's transfer to her former husband of appreciated real property jointly held with him, pursuant to a stipulated divorce property settlement, in excess of 50% of the aggregate net fair market value of the real property jointly held by the parties, together with her being removed as an obligor under the mortgage covering a parcel which she transferred, result in a 1973 taxable gain to her for Wisconsin income tax purposes?

The Commission held that the taxpayer's transfer to her former husband of appreciated real property jointly held with him, and her being removed as an obligor under the mortgage covering that property, pursuant to a stipulated divorce property settlement, in excess of 50% of the aggregate net fair market value of the real property jointly held by the parties, resulted in a 1973 taxable gain to her for Wisconsin income tax purposes.

The taxpayer has not appealed this decision.

Domain International Sales Corp. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). During the years 1973 through 1975, the taxpayer, Domain International Sales Corp., a Minnesota corporation, was a wholly-owned subsidiary of Domain Industries, Inc., a Wisconsin corporation located in New Richmond, Wisconsin. The issue for the Commission to determine was whether the taxpayer, Domain International Sales Corp., was subject to the Wisconsin franchise tax provision as assessed for the years under review or if the income at issue be taxed to Domain Industries, Inc. and not Domain International Sales Corp.

The taxpayer qualified as a domestic international sales corporation (DISC) under Sections 991 et seq, of the Internal Revenue Code of 1954. Domain Industries, Inc. was a Wisconsin corporation engaged in the business of manufacturing and selling packaging machinery and animal feed and growing, raising and processing turkeys. The main offices of Domain Industries, Inc. are located in New Richmond, Wisconsin. Two if its packaging machinery plants, a feed mill and farmland property are located in New Richmond, Wisconsin. It also owns facilities in Menomonee, Wisconsin, and in the states of Iowa and Minnesota and in Hamburg, Germany and Tokyo, Japan. The officers of the taxpayer were also officers of the parent corporation, and such officers were residents of Wisconsin.

On April 26, 1972, taxpayer entered into a written agreement with its parent company whereby taxpayer would act as a commission agent for export sales. Taxpayer maintained its own bank account and separate books and records. It had no employees on its payroll. Instead it used employees of its parent manufacturing company based in Wisconsin to handle its transactions.

The commission income received by taxpayer pursuant to the written agreement was reported for federal income tax purposes on Form 1120-DISC in the following amounts for years in questions:

	Fiscal Year Ended January 31,		
	1973	1974	1975
Commission income	$60,585	95,456	160,893

Domain International Sales Corp. reported the same amounts as net income for Minnesota income tax purposes for the fiscal years ended January 31, 1973 and 1974, however no tax liability resulted therefrom. The commissions received by the taxpayer from its parent company were deducted from gross income on the Wisconsin tax return filed by the parent company. During these years the transactions of the taxpayer were conducted in Wisconsin.

The Commission held in favor of the department. The Commission held that during the fiscal years ended January 31, 1973 through January 31, 1975, the taxpayer was a business corporation "exercising its franchise or doing business in this state in a corporate capacity" within the meaning of s. 71.01 (2), Wis. Stats. The Wisconsin franchise and income tax law makes no provision for exempting from taxation the net incomes of domestic international sales corporations (DISCs) during this period.

The taxpayer has appealed this decision to the Circuit Court.

Wisconsin Department of Revenue vs. Eugene Dowty (Circuit Court of Sheboygan County, February 24, 1982). For the tax year 1975, Eugene T. Dowty itemized his deductions for state income tax purposes (having taken the federal standard deduction for federal income tax purposes), and received a refund from Wisconsin of $356, which he

did not report as income in tax year 1976. For 1976, Mr. Dowty again itemized his deductions for state income tax purposes only, and received a $589 refund from Wisconsin, which he again did not report as income in tax year 1977. The department issued a notice of additional tax due for the two unreported state refunds.

The Tax Appeals Commission held in favor of the taxpayer on this issue (see WTB #20). The Commission held that since Wisconsin has no add back modification for such refunds, the refunds were not taxable income for Wisconsin purposes.

Sec. 71.02 (2) (a), Wis. Stats., provides that as used in ch. 71, . . . "federal adjusted gross income" (means) taxable income or adjusted gross income as determined under the internal revenue code or, if redetermined by the department as determined by the department under the internal revenue code . . ."

The Circuit Court held in favor of the department. Section 71.02 (2) (a), Wis. Stats., does not bind the department to the amount of federal adjusted gross income reported by the taxpayer on his federal return, rather, it allows the department to recompute or redetermine a taxpayer's federal adjusted gross income, using the Internal Revenue Code. Having received the benefit of the state income tax deductions for Wisconsin purposes, he was required to report the state tax refunds as income in 1976 and 1977 on the state income tax returns. Section 71.02 (2) (a), Wis. Stats., allows the department to redetermine, for state purposes, taxpayer's federal adjusted gross income, considering that, just as the Internal Revenue Code would have required taxpayer to report the state refunds on his federal return if he had itemized for federal tax purposes, the taxpayer must report for state tax purposes the refund of state taxes received as a result of his claiming an itemized deduction of state income taxes on his state return. When taxpayer enjoys the benefit of a tax deduction, he is required to report that benefit as income in the year it is recovered or refunded.

With the tax benefit rule being a part of the Internal Revenue Code, it was properly used by the department in redetermining Mr. Dowty's federal adjusted gross income in order to reach his Wisconsin adjusted gross income, as defined by s. 71.02 (2) (e), Wis. Stats. The modifications in ss. 71.05 (1) and (4), Wis. Stats., are specifically listed because they have no counterpart in the Internal Revenue Code, and therefore, are not all inclusive. These modifications are not all inclusive, because the department is allowed to use the Internal Revenue Code to redetermine the federal adjusted gross income.

The taxpayer has not appealed this decision.

Andrew F. Fallon vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, March 16, 1982). Andrew Fallon filed a 1975 resident Wisconsin income tax return with the department. On Fallon's Wisconsin income tax return he subtracted in computing his Wisconsin total income, $46,379 reported on his 1975 federal income tax return as the taxable gain from the sale of Illinois real estate subject to Illinois income tax. On January 7, 1980 the department issued an office audit determination and worksheet, assessing additional income tax to the taxpayer based on his gain on the sale of the Illinois real estate.

During the year 1960, the taxpayer inherited 36 acres of farmland and during the year 1969 he inherited 35 acres of farmland. Both properties were located in Illinois. On December 11, 1974 Fallon and others entered into a sales agreement for purposes of selling such property, possession of which was given to the buyer on March 1 and the transaction was closed on October 1, 1975, for a sales price of $133,740. Fallon's total cost basis in said properties for 1975 federal income tax purposes was $40,983, and his net gain for 1975 federal income tax purposes under Section 1231 of the Internal Revenue Code was $92,757, fifty percent of which, or $46,379 of which, was federally taxable. Fallon filed a 1975 nonresident Illinois income tax return which reflected a payment of $1,419 income tax to Illinois based on his gain on the sale of the property, which payment was duly credited by the department in its assessment.

The issue in this case is whether the taxpayer's basis in the Illinois property sold was, for purposes of s. 71.07 (1), Wis. Stats., as the department contended, that determinable under the Internal Revenue Code ($40,983), or, as the taxpayer contended, the fair market value of the property as of January 1, 1975 ($133,740), when the amendment to s.71.07 (1), Wis. Stats., rendering the transaction taxable became effective. Section 471m of Chapter 39 of the Laws of 1975 amended s. 71.07 (1), Wis. Stats., to read, in part, as follows:

> "All income or loss of resident individuals. . . shall follow the residence of the individual. . . ."

Section 735 (6) of Chapter 39 provided in part as follows:

> " (n) Situs of Income. The treatment of sections. . . 71.07 (1). . . of the statutes by this act shall be applicable only to the reporting of income for the calendar year 1975 and corresponding fiscal year and thereafter."

The Commission held that the basis of Fallon's Illinois real property which he sold in tax year 1975 for purposes of s.71.07 (1), Wis. Stats., is the basis under the Internal Revenue Code incorporated into Wisconsin's individual income tax for the tax year by s. 71.02 (2) (b) 1, 1975 Wis. Stats.

The taxpayer has not appealed this decision.

Frederick R. Hardt vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 22, 1982). This is an appeal of the department's determination that the taxpayer, Frederick R. Hardt, was domiciled in Wisconsin during the period April 12, 1973 to October 16, 1975. Taxpayer lived in Wisconsin with his parents and attended high school in Lake Geneva, Wisconsin. Hardt later attended the University of Wisconsin as both an undergraduate and law student. In June of 1972, the taxpayer graduated from the University of Wisconsin law school and was admitted to the practice of law in Wisconsin under the diploma privilege. On June 18, 1972 Hardt entered the United States Navy, and was assigned to the Judge Advocates Corps at Newport, Rhode Island

where he remained during the entire period in dispute.

On April 12, 1973, while visiting his brother in Florida on a two week leave, Hardt:

1. registered to vote in Florida,
2. surrendered his Wisconsin driver's license, and obtained a Florida driver's license, and
3. transferred his Wisconsin auto registration to Florida.

Upon leaving Wisconsin in 1972, the taxpayer had closed out his Wisconsin bank account and opened one in Newport, Rhode Island. Taxpayer did not open a bank account in Florida.

Upon arriving in Rhode Island, taxpayer resided in furnished bachelor quarters provided by the Navy until his marriage in April, 1973, when he and his wife moved into an apartment. During the entire period involved, taxpayer's address of record with the U.S. Navy was Rt. 4, Lake Geneva, WI.

Hardt retained his membership in the Wisconsin Bar Association during his entire tour of duty. He was not a member of any other State Bar Association, and did not apply for admission to practice law in Florida.

During the entire period in dispute the taxpayer traveled to Florida on only two occasions, spending a total of three weeks there, residing with his brother. During this period, Hardt also returned to Wisconsin twice. Upon discharge from the U.S. Navy (on or about October 15, 1975) the taxpayer returned to Wisconsin and accepted a position with a Lake Geneva law firm.

Taxpayer alleged that in April, 1973 he relinquished his Wisconsin domicile and established a new one in Florida, and, thus is not subject to Wisconsin income taxation during the years in dispute.

The Commission held in favor of the department. During the period involved the taxpayer did not successfully establish a new domicile in Florida, or any other state. A taxpayer cannot abandon his Wisconsin domicile until he has re-established a new domicile in another state.

The taxpayer has appealed this decision to the Circuit Court.

Thomas E. Hildebrandt vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). The issue in this case is whether a transfer by a husband to a wife of full title in an appreciated parcel of real estate held in joint tenancy during the marriage, such transfer being made pursuant to a court-imposed divorce judgment making a final division of the marriage estate, creates taxable income to the husband.

Thomas and Kathleen Hildebrandt were divorced in June of 1978. Pursuant to the divorce decree, Mr. Hildebrandt was ordered to quitclaim his interest in the residence of the parties to Kathleen Hildebrandt, which he did. The basis of the tax assessment was the fair market value of $41,000 for the residence as of the date of quitclaiming. There was an adjusted basis of $21,650 in the residence, resulting in a total gain of $19,650, of which the department assessed $9,675 against Mr. Hildebrandt as his one-half interest. The property had been owned in joint tenancy with right of survivorship until it was terminated by quitclaim deed in 1978.

By the terms of the divorce judgment, jointly owned property of the parties was divided unequally with taxpayer's spouse receiving, in lieu of alimony, all household furniture, furnishings, and appliances, a 1974 Mercury Comet automobile, and full title to the family residence. Taxpayer received a 1971 Chevelle Malibu automobile and all recreational equipment and tools.

Mr. Hildebrandt did not dispute the amount of gain assessed by the department, or the related calculations, but instead limited his appeal to the department's authority under the law to assess additional income based upon the Wisconsin Supreme Court Decision in Department of Taxation v. Siegman, 24 Wis. 2d 92 (1964).

The Commission held that the taxpayer realized a gain as a result of the transfer of his interest as a joint tenant in the family residence to his former wife, pursuant to a divorce judgment which ordered the taxpayer to quitclaim his interest in the family residence of the parties to his former wife.

The taxpayer has not appealed this decision.

Gerald R. Hoeppner vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 22, 1982). The issue in this case is whether the taxpayer's 1978 mileage expense for traveling from his home in Milwaukee to a construction site in Port Washington, Wisconsin is a nondeductible commuting expense or a deductible transportation expense. During the year 1978, Hoeppner was employed by the Crichton Corporation, a Milwaukee based construction company. During the year 1978, Hoeppner resided in the city of Milwaukee.

The services performed by the taxpayer for the Crichton Corporation related in large part to relining boilers at electric power generating plants. The services were performed at various construction sites, not on the premises of the Crichton Corporation in Milwaukee. He worked at a number of job sites during 1978, including Port Washington, Oak Creek, A.O. Smith, Sheboygan, the Amp Company, and Milwaukee Drop Forge Company. He usually received his work assignments over the telephone, but could be "pulled off" a job at any time to go to another job site. Hoeppner was a member of a labor union, and the union contract with construction companies, including the Crichton Corporation, provided for payment of travel expenses by the construction company when union members traveled to job sites beyond a five-county area. Milwaukee and Ozaukee counties are within the five-county area where the construction firms did not pay travel expenses. For work beyond the five-county area, construction companies were obligated to pay travel expenses.

Hoeppner drove his own car at his own expense from his home in the city of Milwaukee to various job sites, including the Port Washington power plant located in Ozaukee county. Taxpayer worked at the Port Washington construction site for 130 days during 1978. On his 1978 income tax return he claimed mileage expenses for traveling from the Milwaukee county line to Port Washington at the rate of 12 miles one way, in other words, 24 miles per day for 130 days.

The Commission held that the taxpayer's travel expenses were nondeductible personal expenses in-

curred by the taxpayer in commuting from his home to his place of employment. Commuting expenses are not allowable as deductions under the provisions of Section 212 IRC (1954) as interpreted by Internal Revenue Regulation 1.212-1 (f).

The taxpayer has appealed this decision to the Circuit Court.

Koenig & Lundin, S.C. vs. Wisconsin Department of Revenue (Circuit Court of Marathon County, February 23, 1982). Koenig & Lundin, S.C. appealed a decision of the Wisconsin Tax Appeals Commission in which the Commission ruled that the taxpayer was not entitled to a depreciation allowance for tax files it received when it purchased a Wausau accounting practice.

Fred Lundin, the sole stockholder of Koenig & Lundin, S.C., purchased the accounting practice in December, 1975. When Lundin become owner, he acquired among other items, 1,211 individual tax files and 546 corporate tax files. Each file contained one year's records for one client, and consisted of information which could be useful if, for instance, there were any tax audits or disputes, amendments of tax returns, carrybacks of losses, etc.

The issue in this case is whether these client files can be depreciated for corporate income tax purposes. In the purchase agreement no specific value was placed on the files, nor were the files even described as an asset. Nonetheless, the taxpayer contended that a very substantial portion of the purchase price should be held attributable to the aqcuisition of the files. The taxpayer contended that both the cost and the useful life can be estimated with reasonable accuracy and, therefore, a depreciation allowance should be allowed.

Section 167 (a) of the Internal Revenue Code provides that generally a reasonable deduction can be taken for the exhaustion, wear and tear of property held for the production of income. However, Tax Regulation 1.167 (a) -3 does not permit the depreciation of goodwill. Also, in Rev. Rul. 69-311 the Internal Revenue Service ruled that the purchaser of an accounting firm was not entitled to a deduction for amortization or depreciation of the client accounts it acquired, but which were subsequently terminated because of a client's death or other reasons.

The Circuit Court held that the Commission was correct in concluding that the client files do not have an ascertainable cost basis over and above their value as goodwill and that the files do not have an ascertainable limited useful life. Although the taxpayer did make a persuasive showing that the files would have little value after five years, the Court concluded that the customers might continue to use the taxpayer's services after the five years expired, and therefore the useful life of the files could not be accurately estimated.

The taxpayer has not appealed this decision.

Madison Gas and Electric Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 23, 1982). The issue in this case is (1) whether, as the taxpayer claims, ss. 71.04 (2b) and 71.02 (1) (c) of the 1969 Wisconsin Statutes do not require that the the Kewaunee Nuclear Power Plant (for which the waste treatment or pollution abatement plant and equipment was purchased or constructed) be completed and in operation in the year for which the deduction under these sections is claimed or (2) whether, as the department claims, the taxpayer would not be entitled to the deduction for the pollution abatement plant and equipment purchased or constructed for the plant until 1973 since the plant must be operating and in service and thus qualify for depreciation deductions before the deduction under ss. 71.04 (2b) and 71.02 (1) (c) of the Wisconsin Statutes of 1969 may be allowed.

Taxpayer filed an amended Wisconsin Form 4 (Corporation Franchise or Income Tax Return) for the calendar year 1970 and elected to deduct the cost of pollution abatement or waste treatment plant or equipment which it purchased or constructed and accrued during the year 1970 in the amount of $571,423. The department informed Madison Gas and Electric Company that its amended 1970 Form 4 had been treated as a claim for a refund and that such refund in the amount of $38,730.34 had been denied. On October 28, 1976 the department notified the taxpayer that its application for a redetermination of its claim for refund for the calendar year 1970 was denied.

Taxpayer has maintained its books and records on an accrual basis and has reported its income on the basis of the calendar year. In pursuance of its obligation to provide adequate electrical power to people living in the vicinity of Madison, Wisconsin, the taxpayer, along with Wisconsin Power and Light Company and the Wisconsin Public Service Corporation acquired real estate and commenced the construction of the Kewaunee Nuclear Power Plant. Taxpayer has a 17.8 percent undivided interest in the Kewaunee Nuclear Power Plant which it held with Wisconsin Power and Light and Wisconsin Public Service Corporation as tenants in common.

During the calendar year 1970, the companies purchased or constructed waste treatment or pollution abatement plant and equipment in connection with the plant. The share of the cost of such plant and equipment incurred on behalf of the taxpayer in calendar year 1970 was $567,064. In addition, Madison Gas and Electric Company also incurred expenses in the amount of $4,359 for waste treatment or pollution abatement plant and equipment purchased or constructed in 1970 in connection with other plants which were operating in 1970. The department agreed that said $4,359 is deductible for the taxable year 1970.

In accordance with its accrual method of accounting, the taxpayer accrued the amount of $571,423 as its cost of waste treatment or pollution abatement plant and equipment purchased or constructed by it in the calendar year 1970. In the calendar year 1970, a cash disbursement was made by the taxpayer, either directly or through its agent, in the amounts accrued by it. Such disbursements were in satisfaction for its liability for the cost of waste treatment or pollution abatement plant and equipment. Madison Gas and Electric Company elected, in its amended return, to deduct in the calendar year 1970 the cost of all of the waste treatment or pollution abatement plant and equipment purchased or constructed by or on its behalf in calendar year 1970. The amount of the deduction so claimed was the amount accrued by the tax-

payer in calendar year 1970 ($571,423).

All of the waste treatment or pollution abatement plant and equipment purchased or constructed by or on behalf of the taxpayer in the calendar year 1970 would qualify as "depreciable property" or would qualify as "lagooning costs" as those terms are used in s. 71.04 (2b) (b), Wis. Stats. The sum of the 1970 deductions and all prior deductions claimed, if any, for the waste treatment or pollution abatement plant and equipment does not exceed the cost of such waste treatment or pollution abatement plant and equipment. Except for a small amount of the pollution abatement plant and equipment, described above, which was purchased in the last few months of 1970, all of the waste treatment and pollution abatement plant and equipment was actually installed in the Kewaunee Nuclear Power Plant prior to the end of calendar year 1970. Construction of the Kewaunee plant commenced in November 1967 and continued until 1972.

The Kewaunee plant was granted its operating license on December 21, 1973 and commenced its operation at that time. Some portions of the plant were used for training purposes prior to December 1973. However, had the taxpayer elected to depreciate the equipment in issue, no deduction for depreciation of such equipment would be allowed for 1970 since the plant was not operating and in service for Wisconsin depreciation purposes during or prior to calendar year 1970. Under all methods of accounting, depreciation of an asset, for state and federal tax purposes, begins at the time an asset is operating and in service in the taxpayer's business and not at the time that the liability for payment of such an asset is incurred nor at the time the cash disbursement is made.

The Commission held that Madison Gas and Electric Company is allowed its claimed deduction under s. 71.04 (2b), Wis. Stats., in its 1970 tax year and that ss. 71.02 (1) (c) and 71.04 (intro.) and (2b), 1969 Wis. Stats., do not require that the utility plant in question, for which the waste treatment or pollution abatement plant and equipment was purchased or constructed, be completed and in operation in the year for which the deduction under s.71.04 (2b), Wis. Stats., is claimed.

The department has not appealed this decision.

NCR Corporation vs. Wisconsin Department of Revenue (Circuit Court of Dane County, February 16, 1982). Appleton Papers, Inc. was merged into NCR Corporation by Articles of Merger executed on December 14, 1972, with an effective date of January 1, 1973. Appleton Papers, Inc. transacted no business as a separate legal entity and filed no tax returns after 1972.

At the time of merger, the Wisconsin adjusted basis of Appleton Papers, Inc.'s assets exceeded the federal adjusted basis by $1,947,303. The company deducted that amount from its 1972 gross income on its Wisconsin franchise/income tax return for 1972.

The issue in the case is whether Appleton Papers, Inc. acted properly in taking a $1,947,303 deduction in 1972, or whether the company was only entitled to deduct 20 percent of that amount that year. The dispute centers on the application of the phrase "the year of. . .merger" in s. 71.04 (15) (c), Wis. Stats. This statute permits the use of accelerated depreciation methods in determining Wisconsin taxable income beginning in the taxable year 1972. The statute provides for amortization over a five-year period beginning in 1972 of the difference between the federal and the Wisconsin adjusted basis of depreciable property. If the Wisconsin adjusted basis exceeds the federal adjusted basis, 20 percent of such differential may be deducted from gross income each year for five years beginning in 1972. The statute further provides that if a corporation merges within the five-year period, any remaining balance of the differential "shall be deducted from gross income. . .in the year of. . .merger".

The amount of allowable deduction depends on whether the "year of merger" was 1972 or 1973. If it was 1972, the 1972 deduction taken was proper; if the "year of merger" was 1973, the company was only entitled to 20% of the amount deducted in 1972. The Wisconsin Tax Appeals Commission held that the year of merger was 1973 (see WTB #23) based on the fact that the Articles of Merger provided that the merger would be effective on January 1, 1973.

The Circuit Court held in favor of the taxpayer. The Court contended that the "year of merger" was 1972 because all the substance of the transaction took place in that year. There was no substantive reason for providing for an effective date of January 1, 1973, instead of midnight December 31, 1972. Further, the two companies "remained separate and distinct corporations until midnight of December 31, 1972". The Court held that Appleton Papers, Inc. was no longer in existence as a separate entity on January 1, 1973 and could not have merged on that date. Appleton Papers, Inc. generated no income in 1973. The company was not required to and did not file income tax returns for 1973. The Circuit Court further held that even if the merger were said to have technically occurred at 1:01 a.m. on January 1, 1973, the phrase "year of. . .merger" in s. 71.04 (15) (c), Wis. Stats., should be construed to mean in the year of the final tax return.

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

Howard U. Taylor, Margaret T. Taylor, Wayne Thomas Feyereisen, Frances C. Feyereisen, James W. McCarville, Karen Beth McCarville, Michael E. Fairfield and Donna J. Fairfield vs. Dennis J. Conta, Individually and as former Secretary of the Wisconsin Department of Revenue, and Mark E. Musolf, Individually and as Secretary of the Wisconsin Department of Revenue (Wisconsin Supreme Court, March 2, 1982). The issues in this case are whether ss. 71.05 (1) (a) 5 and 71.05 (1) (a) 7, Wis. Stats. 1975, are unconstitutional and contravene the privileges and immunities clause of the federal constitution. The Circuit Court declared the statutes constitutional (see WTB #21).

Taxpayers contended that it is unconstitutional for Wisconsin to tax the 1976 gains on the sales of their residences since the taxpayers qualified for non-recognition of the gains under Section 1034 of the Internal Revenue Code by purchasing new residences outside of Wisconsin.

Section 71.05 (1) (a) 5, Wis. Stats. 1975, provides that "gain on the sale or exchange of a principal residence, excluded under sec. 1034 (a) of the Internal Revenue Code (is included in income taxable in Wisconsin) if the 'new residence' referred to therein is located outside the state." In contrast, under the 1976 Wisconsin tax laws if the new principal residence were located in Wisconsin the gain would be deferred under federal and Wisconsin law. Although the Wisconsin income tax laws were "federalized" in 1965, the Wisconsin legislature departed from the federal code in several respects. For Wisconsin income tax purposes state adjusted gross income is defined as federal adjusted gross income, "with modifications" prescribed in the state statutes. Sections 71.05 (1) (a) 5 and 71.05 (1) (a) 7, Wis. Stats. 1975, are such modifications which relate to persons who move outside of Wisconsin.

The United States Supreme Court, recognizing that a state may be justified in discriminating between a resident and nonresident, has set forth the "substantial reason for the discrimination" test to determine the constitutionality of the the differential treatment. In contrast with the federal government whose taxing power extends thoughout the country, the taxing power of state governments is limited by their state boundaries. Persons moving from one state to another or having transactions in several states create difficulties for a state tax system. Each state must decide how to impose its tax burden on such persons and on such transactions in a way which comports with the state's limited jurisdiction to tax and which distributes the tax burden among the "multi-state" persons and the "full-time residents" as equitably as possible in a manner which is administratively feasible. Section 71.05 (1) (a) 5, Wis. Stats., is the means chosen by the Wisconsin Legislature to accomplish these objectives. In 1976 the justification for treating Wisconsin residents who acquire new residences outside the state differently from those who acquire new residences within the state was twofold: First, the legislature was concerned that unless the gain was taxed immediately the state would lose jurisdiction to tax the gain realized on the sale of the Wisconsin residence when the taxpayer left the state. Second, the legislature was concerned with the administrative problems to the state and to the former residents which would arise if the state were forced to keep track of the former residents until the taxability of the "deferred gain" was conclusively determined.

Also, if Wisconsin would allow taxpayers to defer gains when the new residence is purchased outside the state and lost jurisdiction to tax the portion of the gain that is attributable to Wisconsin, former residents would have an unfair tax advantage over residents. For example, this would be true in cases where the taxpayer sells the home located outside of Wisconsin and is required to report all deferred gains for federal purposes because a new residence is not purchased.

The Supreme Court held that the constitutional value of interstate equality of citizens and non-citizens is not eroded by the Wisconsin law and that s. 71.05 (1) (a) 5, Wis. Stats., does not contravene the privileges and immunities clause of Article IV, sec. 2 of the federal constitution. The legislature was appropriately concerned that unless it taxed the former residents immediately they would escape all Wisconsin tax on the gain, while persons continuing to reside in Wisconsin would not necessarily escape all Wisconsin taxation on the deferred gain. The privileges and immunities clause protects the nonresident "against discriminatory taxation", but gives the nonresident no right to be favored by discrimination or exemption. By denying deferral to the former resident, Wisconsin treats resident and former resident as fairly as possible within our federal system.

The second issue involved the constitutionality of s. 71.05 (1) (a) 7, Wis. Stats. 1975, which denies taxpayers a deduction from their Wisconsin taxable income for moving expenses incurred in commencing employment outside Wisconsin. The taxpayers contended the statute creates an unjustified burden on former residents. The Supreme Court held that since Wisconsin does not tax income earned by former residents in their new domicile, Wisconsin has no constitutional obligation to allow deductions for expenses incurred to generate income that is beyond its taxing jurisdiction. The United State Supreme Court in Shaffer vs. Carter, 252 U.S. 37 (1920), established that a state need not grant a nonresident deduction of expenses incurred in connection with the producion of income outside the taxing state since the taxing state has no jurisdiction to tax the income. The Supreme Court in Shaffer vs. Carter concluded that the different treatment of residents and nonresidents as to deductions related to the production of income outside the taxing state is substantially related to the state's power to tax and raise revenue and therefore cannot be regarded as unjustifiable under the privileges and immunities clause.

SALES/USE TAXES

Boggis-Johnson Electric Company vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 23, 1982). The first issue in this case is whether the Department of Revenue can make a sales and use tax assessment on the basis of a field audit conducted by means of sampling without first obtaining the consent of the taxpayer, when the taxpayer claims to have complete and accurate records with respect to all of its taxable transactions. The second issue is whether the taxpayer took certain exemption certificates in good faith so as to relieve it of the burden of proof to show the sales in question were nontaxable within the meaning of s. 77.52 (14), Wis. Stats.

During the period involved Boggis-Johnson Electric Company was a Wisconsin corporation located in Wauwatosa, Wisconsin, engaged in the business of selling electrical goods and supplies. The department made a field audit of the taxpayer's books and records by using what is known as the "Alpha Sampling Method", although there was no agreement between the company and the department as to the utilization of said sampling method. There was no allegation by the department that the taxpayer's books and records were incomplete or inaccurate.

The Alpha Sampling Method consisted of having the auditor actually audit approximately 25% of the company's sales invoices for each of the four years involved and then multiplying the figure by four. The resulting assessment was identified as the "average annual additional mea-

sure of tax". The department used its sampling method rather than a complete audit of the taxpayer's books and records because of the very large volume of sales invoices and other records kept by the taxpayer which were housed in 27 file drawers.

The auditor did not actually count the total number of invoices involved, but relied on an estimate to arrive at the 25% per year sampling. Included in the sample were a substantial amount of sales made to a Miller Electric Company, which were inadvertently made ex-tax. Upon discovering this error, the taxpayer corrected it in August, 1976. The department conceded that the inclusion of the Miller Electric Company error distorted its sampling projection.

The invoices actually examined by the department and used in its sample involved the sale of electrical supplies to manufacturers and others located in the Milwaukee, Wisconsin area. Many of the company's customers provided it with continuous exemption certificates claiming that the items they purchased became:

(1) "an ingredient or component part of an article of tangible personal property destined for sale" or

(2) "were machinery and processing equipment . . . exclusively and directly used . . . in manufacturing tangible personal property."

The department's auditor reviewed the nature of the products sold, the claimed exemption, if any, the name of the manufacturer and the nature of the product produced and information contained in the purchase order. With the help of the taxpayer's sales catalog, the auditor then arbitrarily decided whether said product would "probably" be used by purchasers in the manner certified on the various exemption certificates. This procedure resulted in the exemption certificates involved herein being disallowed on the grounds that they had not been accepted in "good faith", as required by ss. 77.52 (13) - (16), Wis. Stats.

At the hearing the department's auditor conceded that the items involved could "conceivably" have been utilized as claimed in the exemption certificates at issue. The exemption certificates in question were on forms designed by the department, were signed and contained the names and addresses of the purchasers. Only exemptions actually authorized by statute were printed on the forms, with the applicable box checked by each purchaser. The auditor made no attempt to physically investigate how the supplies in question were utilized by the taxpayer's customers.

The Commission concluded that neither s. 77.59 (2), Wis. Stats., nor any other Wisconsin sales or use tax statute authorizes the Department of Revenue to conduct a sales and use tax field audit by means of sampling, without the consent of the taxpayer, when the taxpayer has complete and accurate records with respect to all taxable transactions. The Commission also held that the "Alpha Sampling Method" utilized by the department was distorted by the inclusion of the erroneously reported sales to Miller Electric Co. It also held that the taxpayer accepted the exemption certificates from its customers in "good faith" within the intent and meaning of s. 77.52 (14), Wis. Stats., and thus is relieved of the burden of proof to show said sales to be nontaxable.

The department has not appealed but has adopted a position of nonacquiescence in regard to this decision.

Feedmobile, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, February 26, 1982). Feedmobile, Inc. is a Pennsylvania corporation with offices located in Lititz, Pennsylvania. On June 30, 1978, the department issued a notice of additional sales and use tax against the taxpayer in the amount of $17,419.21, for the years 1973 through 1977 which amount included interest and penalties. The issue for the Commission to determine was whether the product made by the taxpayer, the "Feedmobile", was a machine used by persons engaged in "manufacturing" as defined in s. 77.51 (27), Wis. Stats., and therefore exempt from use tax under s. 77.54 (6) (a), Wis. Stats.

Taxpayer was a retailer engaged in business in Wisconsin by virtue of having a commission salesman soliciting and contracting for sales within Wisconsin and within the meaning of the terms in s. 77.53 (3), Wis. Stats. Feedmobile, Inc. was a Pennsylvania firm that manufactured a product known as the "Feedmobile", and the taxpayer did not have any direct sales in Wisconsin as it delivered its product to Wisconsin customers in the state of Indiana, which customers then transported the product to Wisconsin and used it there as well as other states. Taxpayer through its sales agent, Gordon Gifford, of Barron, Wisconsin sold a number of Feedmobiles which were used by the purchasers in Wisconsin in the operation of their feedmilling businesses.

The Feedmobile is a piece of machinery, costing in excess of $30,000.00 per unit, exclusive of the truck body upon which the unit is mounted. The Wisconsin purchasers of the Feedmobile from Feedmobile, Inc. paid the necessary sales taxes on the trucks which carried the Feedmobile. The Feedmobile contained its own power source (diesel engine) and was completely independent of the truck upon which it was located. The Feedmobile was designed to be operated at a fixed location, and was often used as an addition to a stationary feedmill operation.

The Feedmobile used machinery in its operation, including lifting devices (such as elevators, feedtables and hydraulic augers), forming altering devices (such as hammermills, roughagizers, rollers, and crimpers), and combining devices (such as mixers, beaters, concentrate carriers, and molasses carriers and injectors). The designed method of operating the Feedmobile was as follows: a number of raw materials including: raw grains, such as oats, hay and corn (including ear corn); supplements, such as soybean oil meal and poultry concentrate; minerals and salts, such as dicalcium phosphate and salts; vitamins, such as vitamins A, B, D, and E; and molasses, heated and under pressure; were all combined through the use of the machinery described above, to produce a new product, which was primarily used by dairy and poultry farmers for the feeding of their livestock. Raw grain was placed on a feedtable which then transfers the grain to a hammermill, where it was then ground to a uniform size. The grain was then transferred to the mixer containing five beaters, where the supplements, vitamins, minerals, and

heated molasses were then added. Once all of this had been thoroughly mixed, the mixture was rolled or crimped to a specified size and dimension, whereupon the mixture was then transferred by hydraulic auger to the customer's desired storage receptacle.

The Feedmobile produced a new article with a different form, different use, and different name. The article produced was a fully complete balanced animal ration. The different form which the product takes can be either of a meal or a flake, and further the new article contained different protein and fiber content from that of the component ingredients from which it was made. The finished product was used for animal feed, while the component ingredients, if given individually, were either physically harmful to the livestock, or are in such a form, that they would not be properly digested by the animals, and therefore of no benefit to them. The finished product had a new name, which was known in the industry, either as "grist", "finished ration" or "formula feed".

The Commission held in favor of the taxpayer. The processes used in the Feedmobile are popularly regarded as manufacturing by persons familiar with the processes and the feedmill industry, in which both the taxpayer and his customers are engaged. The processes used and product produced by the Feedmobile are identical in all respects to the processes used and product produced in stationary feedmills, which are exempt under s. 77.54 (6) (a), Wis. Stats.

During the period involved, the "Feedmobiles" sold by the taxpayer in Indiana to Wisconsin purchasers and subsequently used by them in Wisconsin, were used by persons engaged in "manufacturing" as that term is defined in s. 77.51 (27), Wis. Stats. The taxpayer's customers were entitled to the manufacturing exemption provided by s. 77.54 (6) (a), Wis. Stats., and the taxpayer was therefore not required to collect use tax from its Wisconsin customers, pursuant to s. 77.53 (3), Wis. Stats.

The department has not appealed this decision.

A. F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 24, 1982). The issue in this case is whether mining and processing foundry sand is "manufacturing" as defined in s. 77.51 (27), Wis. Stats., so that a company engaged in this business is exempt from the sales and use tax under s. 77.54 (6) (a), Wis. Stats., on its purchases. The Commission concluded that under these statutes, and based on the facts presented, purchases made by the taxpayer are exempt from the sales and use tax.

The taxpayer, A. F. Gelhar Co., Inc., a Wisconsin corporation, and its predecessor sole proprietorship, have been in the business of mining and processing foundry sand since 1919. The taxpayer's operation is a three-step process. The first step is the blasting of the sand pit to loosen material so that it may be removed by the use of a front-end loader. The sand is then transported to a hopper, where by agitation it is then broken up according to size by process on belts and screens. The material in excess of one-half to one-quarter inch is rejected.

Since 1977 the material from the hopper screens has been run through washing equipment which removes extraneous materials and impurities, such as wood chips, dirt, stones and trace elements of calcium oxide, titanium oxide, magnesium oxide, iron oxide and clays. After screening and washing the sand is dried and further screened into bins, according to grain fineness. The taxpayer's finished product is graded and blended according to specifications published by the American Foundryman's Society, a national trade organization.

All of the equipment used by the taxpayer in its operation is located and operated within the confines of its pits. The Standard Industrial Classification of the U.S. Office of Management and Budget classifies the taxpayer's business as "mining".

The Commission concluded that the taxpayer's finished product is a new article with a different form, use and name, produced by a process regarded as manufacturing. It also ruled the taxpayer's sand operation is considered "manufacturing" as defined in s. 77.51 (27), Wis. Stats., so it is entitled to an exemption from tax under s. 77.54 (6) (a), Wis. Stats., for its purchases of machines, supplies and repairs.

The department has appealed this decision to the Circuit Court.

Marquette University vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, April 23, 1982). The issue in this case was whether the department's sales and use tax deficiency determination against the taxpayer for the fiscal year ending June 30, 1974 was timely under s. 77.59 (3), 1975 Wis. Stats., as amended by Chapter 186, Laws of 1975, effective April 1, 1976.

Marquette University is a non-profit, non-stock corporation organized under the laws of the State of Wisconsin and is subject to the sales and use tax provisions of Chapter 77 of the Wisconsin Statutes. On July 21, 1978, the department issued a notice of sales and use tax deficiency determination against the University in the amount of $32,803.64 covering the years 1974-1977 and the periods of July 1, 1973 to December 31, 1973 and January 1, 1978 to March 31, 1978.

On October 15, 1979 the department acted on the taxpayer's appeal granting in part and denying in part said petition, reducing the deficiency amount to $3,158.17 plus interest of $1,377.75, totaling $4,535.92. On November 12, 1979 the taxpayer filed an appeal with the Tax Appeals Commission as to the period July 1, 1973 to June 30, 1974 in the amount of $4,535.92, on the basis that the statute of limitations for the above period had expired.

The taxpayer's monthly sales and use tax returns, Form ST-12, for the months July 1973 through June 1974 were filed timely. Its Wisconsin Sales and Use Tax Annual Information Return, ST-12a, for the fiscal year 1973-1974 was dated August 13, 1974.

The Commission ruled that the department's notice of sales and use tax deficiency determination of July 21, 1978 against Marquette University for the fiscal year 1973-1974 (the period July 1, 1973 through June 30, 1974) was not timely under the provisions of s. 77.59 (3), Wis. Stats.

The department has not appealed but has adopted a position of non-

acquiescence in regard to this decision.

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

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

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

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

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

The issues for the Commission to determine were as follows:

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

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

The department has appealed this decision to the Circuit Court.

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

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

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

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

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

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

The taxpayer has not appealed this decision.

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

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

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

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

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

The department has appealed this decision to the Circuit Court.

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

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

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

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

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

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

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

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

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

WITHHOLDING

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

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

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

The taxpayer has not appealed this decision.

GIFT TAX

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

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

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

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

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

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

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

The department has not appealed this decision.

TAX RELEASES

("Tax Releases" are designed to provide answers to the specific tax questions covered, based on the facts indicated. However, the answer may not apply to all questions of a similar nature. In situations where the facts vary from those given herein, it is recommended that advice be sought from the Department. Unless otherwise indicated, Tax Releases apply for all periods open to adjustment. All references to section numbers are to the Wisconsin Statutes unless otherwise noted.)

INCOME TAXES

1. Prepayment of Mortgage Loan for Discount Considered Income

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

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

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

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

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

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

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

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

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

FARMLAND PRESERVATION CREDIT

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

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

adopted and certified by the county in which the farmland is located.

If a county has not adopted a certified plan by September 30, 1982 but does adopt a plan by December 31, 1982, would the claimant be able to convert the initial agreement to a long-term agreement after September 30, 1982 but before December 31, 1982 and in this way remain eligible to claim farmland preservation credit for 1982?

Answer: No. The initial farmland preservation agreement entered into under Subchapter III of Chapter 91, Wis. Stats., would have expired on September 30, 1982. Effective October 1, 1982, there would no farmland preservation agreement of any kind in effect to which the provisions of ss. 71.09 (11) (a) 3.cm and 91.41, Wis. Stats., could be applied. Therefore, no farmland preservation credit would be available for 1982 to a claimant under these conditions.

2. Depreciation Add Back for Farmland Credit When Net Operating Loss Sustained

Facts and Question: Beginning with farmland preservation credit claims filed for the taxable year 1981, the law (s. 71.09 (11) (a) 6.a, Wis. Stats.) permits only the first $20,000 of depreciation claimed in determining Wisconsin adjusted gross income to be recognized in computing household income on a farmland credit claim. In a situation where a claimant has a net operating loss in the year for which a claim is being filed, how is this depreciation limitation to be applied? (Note: For 1982 taxable year and thereafter the depreciation limitation under s. 71.09 (11) (a) 6.a, Wis. Stats., is $25,000 rather than $20,000.)

Example: Mr. X operates a farm and has gross receipts of $200,000 for 1981. Depreciation of $35,000 is claimed in 1981 and other farm business expenses are $185,000 for total expenses of $220,000. Mr. X therefore computes a net operating loss of $20,000 for 1981 ($200,000 less $220,000=$20,000 loss). Mr. X has no other income.

Answer: The entire amount of depreciation claimed in the year of loss (1981) must be considered for purposes of applying the $20,000 depreciation deduction limitation for such year. In the above example, Mr. X would add back $15,000 ($35,000 less $20,000) of depreciation in determining his 1981 household income for Farmland Credit purposes.

When the net operating loss incurred in 1981 is claimed as a carryforward loss by Mr. X in subsequent years, no depreciation will be considered to be a part of such carryforward loss. For purposes of the depreciation add back to household income under s. 71.09 (11) (a) 6.a, Wis. Stats., depreciation claimed in computing a net operating loss is considered *only* in the original year of loss (e.g., 1981 in the above example).