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

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

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

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

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

The taxpayer has not appealed this decision.

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

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

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

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

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

The taxpayer has appealed this decision to Circuit Court.

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

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

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

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

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

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

Issues for determination in this case:

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

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

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

The department has appealed this decision to Circuit Court.

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

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

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

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

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

The taxpayer has appealed this decision to Circuit Court.

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

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

1. Must be used for commercial purposes;

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

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

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

The taxpayer has not appealed this decision.

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

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

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

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

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

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

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

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

The department has not appealed this decision.

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

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

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

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

The department has not appealed this decision.

GIFT TAX

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

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

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

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

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

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

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

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

The department has appealed this decision to Circuit Court.