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-