11.08	Medical appliances, prosthetic devices and aids-A, (2/1/83)
11.10	Occasional sales-A, (6/1/83)
11.12	Farming, agriculture, horticulture, and floriculture-A, (7-1-83)
11.14	Exemption certificates (including resale certificates)-A, (6/1/83)
11.16	Common or contract carriers-A, (2/1/83)
11.17	Hospitals, clinics and medical professions-A, (2/1/83)
11.26	Other taxes in taxable gross receipts and sales price-A, (2/1/83)
11.32(4) and (5)	"Gross receipts" and "sales price"-A, (2/1/83)
11.38	Fabricating and processing-A, (2/1/83)
11.39	Manufacturing-A, (7-1-83)
11.49	Service station and fuel oil dealers-A, (6/1/83)
11.51	Grocers' guidelist-A, (6/1/83)
11.57	Public utilities-A, (6/1/83)
11.66	Communications and CATV services-A, (2/1/83)
11.67	Service enterprises-A, (6/1/83)
11.69	Financial institutions-A, (2/1/83)
11.84	Aircraft-A, (6/1/83)
11.85	Boats, vessels, and barges-A, (2/1/83)
11.87	Meals, food, food products and beverages-A, (6/1/83)
11.93	Annual filing of sales tax returns-A, (2/1/83)
11.96	Interest rates-A, (6/1/83)
11.97	"Engaged in business" in Wisconsin-A, (2/1/83)
11.98	Reduction of delinquent interest rate under s. 77.62 (1), Stats.-A, (6/1/83)

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

John Gamerdinger vs. Wisconsin Department of Revenue

Edward Kraemer & Sons, Inc. vs. Wisconsin Department of Revenue

Joseph V. Lemberger, Jr. vs. Wisconsin Department of Revenue

NCR Corporation vs. Wisconsin Department of Revenue

Overly, Inc. vs. Wisconsin Department of Revenue

Topp Corporation vs. Wisconsin Department of Revenue

SALES/USE TAXES

Ibtisam Ahmad vs. Wisconsin Department of Revenue

A.F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue

Wisconsin Department of Revenue vs. Gene E. Greiling

Wisconsin Department of Revenue vs. Edward Kraemer & Sons, Inc.

Lerman Tire Service vs. Wisconsin Department of Revenue

Wisconsin Department of Revenue vs. Milwaukee Brewers Baseball Club

County of Racine, c/o Nick R. DeMark vs. Wisconsin Department of Revenue, and Grant Fuhrman, Custodian d/b/a Racine County Jail Concession Fund vs. Wisconsin Department of Revenue

HOMESTEAD CREDIT

Avis L. Blasch vs. Wisconsin Department of Revenue

INCOME AND FRANCHISE TAXES

John Gamerdinger vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). The issue in this case is the department's disallowance of taxpayer's 1974 through 1977 farm losses, based upon the determination that the taxpayer's farming operation was not an activity engaged in for profit within the meaning of section 183(a) of the Internal Revenue Code. The department allowed deductions of farm expenses only to the extent of income. The taxpayer, John Gamerdinger, asserted that his farming operation was engaged in for profit and that he should be permitted to deduct his farm expenses in their entirety.

Taxpayer acquired his farm in 1967. The farm consists of twenty acres; ten acres are suitable for planting crops. Prior to moving to the farm Gamerdinger and his family lived in an urban location. Taxpayer had no farming background.

During the years involved (1974-1977) the taxpayer planted oats, timothy and alfalfa. Gamerdinger made no sales of crops during these years. The grains raised were used to feed and bed his livestock. Taxpayer employed no outside services to help him with planting and taking care of his crops.

Gamerdinger raised cattle during the years involved. In 1975 he owned a total of 3 holsteins and 2 angus. In 1976 one holstein was butchered, and Gamerdinger and his family consumed the meat themselves. He then sold the remaining holsteins for cash and traded the 2 angus for 2 horses.

In 1974 it was the taxpayer's intention to begin breeding holsteins rather than angus. His decision was based on advice from his neighbor that he could get more money for holsteins and holsteins were more tame than angus.

In 1976 he decided to change from holsteins to horses. Taxpayer planned to sell the horses for $500 in a year or one and a half years. At the time of the hearing before the Commission, Gamerdinger still had the same three horses, a pony and one boarded horse.

Taxpayer purchased, updated, repaired and added extensively to the farm improvements and equipment.

He had the concrete in the barn redone, updated the water system in the barn, reroofed the milk house, replaced siding, replaced ramp for barn cleaner, constructed a 40' by 90' pole building used as a machine shop, purchased a new baler, crimper and hay rake, repaired fencing, etc.

During the years involved Gamerdinger was employed full-time as a supervisor at Evinrude Motors. He worked on his farm after work, 25-30 hours per week. He took no extended vacations, using his vacation time to work on the farm.

The Commission held that during the years 1974 through 1977, Gamerdinger's farming operation was an activity not engaged in for profit within the meaning of section 183 of the Internal Revenue Code. Taxpayer was allowed to take a deduction of his farming expenses only to the extent of the income derived from the farming operation.

The taxpayer has not appealed this decision.

Edward Kraemer & Sons, Inc. vs. Wisconsin Department Of Revenue (Circuit Court of Sauk County, January 4, 1983). Edward Kraemer & Sons, Inc. is a Wisconsin corporation with its principal offices in Plain, Wisconsin. It is engaged principally in road and bridge construction and rock crushing operations, both in and out of Wisconsin. For its fiscal years ending March 31, 1969, and March 31, 1970, Kraemer sustained a Wisconsin net business loss for each year. These Wisconsin losses were computed using the separate accounting method, as authorized by s. 71.07(2), Wis. Stats. (1969). Beginning with its taxable year ending March 31, 1971, Kraemer changed its method of computing Wisconsin income from the separate accounting method to the apportionment method, permitted by s. 71.07(2), Wis. Stats. (1971).

The issue in this case is whether Kraemer's 1969 and 1970 net business losses, computed under the separate accounting method, can be used to offset Kraemer's 1971 and 1972 net business income, computed under the apportionment method. In other words, may a taxpayer change its method of reporting for franchise tax purposes and still carry forward its net business losses?

The Tax Appeals Commission held that s. 71.06, Wis. Stats., does not provide for a corporate taxpayer on the apportionment method of reporting income to carry forward Wisconsin losses and offset them against Wisconsin income. Losses, if any, must be applied forward on a company-wide basis subtracted from company-wide income before the apportionment ratio is applied in determining Wisconsin taxable income. (See WTB #30).

The Circuit Court held in favor of the taxpayer. The Court found no language in the statute to suggest that a net business loss, which is otherwise entitled to be carried forward, is no longer a net business loss because the taxpayer changes its method of reporting. Nor is there language in the statute which would require a taxpayer who changes its method of reporting to recompute its taxes for the prior years to determine whether a business loss exists under both methods of reporting. Further, the statute does not provide that if a taxpayer computes its income under one method it cannot then offset its income with losses computed under another method.

The department has not appealed this decision.

Joseph V. Lemberger, Jr. vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). The issue in this case is the department's disallowance of the taxpayer's 1978 and 1979 federal Schedule C deductions for wages he paid to his wife. Mrs. Lemberger worked in her husband's appraisal business on the average of 15 to 16 hours a week, 52 weeks a year. Her duties were basically secretarial. The business was operated in the Lembergers' home. There was a separate office area, the fourth bedroom of their home which was used as an office. There was no special business phone. The family had one telephone. During the time, the couple had a joint checking account, and all receipts and checks that they received from the business and otherwise went into this joint checking account.

There were no checks made out directly to Mrs. Lemberger for her services nor regular payroll checks. There was no written or oral agreement for the number of hours worked or the amount to be paid. There were no payroll deductions, no social security, federal or state withholding, worker's compensation, or unemployment taxes. There were no estimated payments made for Mrs. Lemberger. The amount deducted as wages each year was determined by their accountant, Bob Dahlman, after the tax year closed. They determined what the amounts would be based on about $5 an hour for 800 hours in 1978 and $5 an hour for 900 hours in 1979.

Mrs. Lemberger stated she was compensated through checks made out to cash from the joint checking account. There were checks made out by Mr. and Mrs. Lemberger to cash which were cashed whenever they needed cash and generally cashed at the bank or grocery store.They did not keep a separate tally or record of the amount of checks that were made out to cash. Both before and after she did work for her husband in his business, she had the same sort of arrangement with the checking account, i.e., it was joint, she would make out checks for cash, and the checks were used basically for living expenses.

The Commission held that the taxpayer had not established an employer-employe relationship with his wife. The relationship was too informally structured; there was no employment agreement established; no employe-type deductions were taken from Mrs. Lemberger's "wages"; and the amounts which she received in each year were estimated at the end of each year. Therefore, the amounts deducted by the taxpayer as wages or salary paid to Mrs. Lemberger are not properly so characterized and the department was correct in denying the deductions.

The taxpayer has not appealed this decision.

NCR Corporation, vs. Wisconsin Department Of Revenue (Court of Appeals, District IV, March 28, 1983). The issue in this case is whether Appleton Papers' deduction from its gross income on its Wisconsin franchise tax return was properly taken in 1972. Appleton Papers, a Delaware corporation, was merged into NCR Corporation, a Maryland corporation. The articles of merger provide that the merger was effective January 1, 1973. Section 71.04(15)(c), Wis. Stats., provides that if a corporation's Wisconsin adjusted basis for depreciable assets exceeds its federal adjusted basis for

depreciable assets as of the end of its 1971 taxable year, the difference may be amortized over five years beginning in 1972. If the corporation is dissolved, merged or consolidated before the end of the five-year period, the remaining balance of that difference "shall be deducted from gross income or used to reduce otherwise allowable deductions from gross income, as the case may be, in the year of dissolution, merger or consolidation."

Appleton Papers reported its income on a calendar year basis. As of December 31, 1972 the remaining balance of the amount of the deduction available to the company under s. 71.04(15)(c), Wis. Stats., was $1,947,303. Appleton Papers deducted the entire balance from its gross income for 1972 in its state franchise tax return for that year.

The Circuit Court held in favor of the taxpayer (see WTB #29 for a summary of the decision). The Circuit Court held that s. 71.04(15)(c), Wis. Stats., contemplates mergers taking place within some taxable or income year. The Court held that "year of . . . merger" in the statute means the year of the final tax return, in this case 1972.

The Court of Appeals held in favor of the department. The Court held that the year of merger was 1973 and the deduction allowable under s. 71.01(15)(c), Wis. Stats., may only be deducted in 1973.

The taxpayer has not appealed this decision.

Overly, Inc. vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, March 10, 1983). The issue in this case is whether life insurance policy proceeds received by Overly, Inc. constitute "other items of Wisconsin income" (as that term is used in s. 71.06(1), Wis. Stats.) which must be applied to reduce a net business loss carryforward.

The Commission concluded that life insurance proceeds do not constitute "other items of Wisconsin income" within the intent and meaning of s. 71.06(1), Wis. Stats., and are not required to be setoff against a net business loss.

The department has appealed this decision to the Circuit Court.

Topp Corporation vs. Wisconsin Department Of Revenue (Court of Appeals, District I, February 17, 1983). The Wisconsin Department of Revenue appealed a judgment and an order which were entered by the Circuit Court on February 25, 1982, and March 18, 1982, respectively, reversing an order of the Wisconsin Tax Appeals Commission and awarding costs and attorney fees to Topp Corporation.

The issues presented on appeal are: (1) whether the Circuit Court erred in holding that the department was estopped from assessing an additional franchise tax and interest thereon against Topp based on its agreement to hold Topp's redetermination request in abeyance pending resolution of another case; (2) whether Topp was entitled to carry forward losses incurred in 1970 by Topp Oil and Chemical Company for purposes of determining the tax liability of T.F.E., Inc. for 1971; and (3) whether the trial court erred in awarding costs, disbursements and attorney fees against the department.

The Court of Appeals held that the department was not estopped from assessing franchise tax and interest against Topp. The defense of equitable estoppel requires action or inaction on the part of the one against whom estoppel is asserted which induces reliance thereon by another. The reliance must be reasonable and must cause detriment to the person asserting the estoppel. These elements are not present in this case. Pursuant to the terms of a stipulation and agreement signed by the department and Topp, the department simply agreed to postpone a decision on Topp's petition for redetermination pending a decision in Hall Chevrolet Co. v. Department of Revenue, 81 Wis. 2d 477, 260 N.W.2d 706 (1978), a case involving a similar legal issue. The extension agreement was made following receipt of a letter from Topp which argued that no assessment should be made pending resolution of the Hall Chevrolet case. It did not constitute a unilateral decision by the department. Since the agreement was nothing more than an extension agreement and since its terms were fulfilled by the department, Topp could not reasonably rely on it as an inducement to alter its position in a way that was harmful to it. Moreover, Topp failed to demonstrate that it suffered any legal detriment as a result of entering into the agreement. Legal expenses would have been incurred in challenging the assessment regardless of when the petition for redetermination was considered by the department. Since Topp had the use of the assessed tax money during the period the agreement was in effect, assessment of interest thereon does not constitute a detriment for purposes of estoppel.

The Court of Appeals reversed the Circuit Court's judgment and remanded the matter with instructions to the Circuit Court to address the merits of the case.

SALES/USE TAXES

Ibtisam Ahmad vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 10, 1983). This is an appeal of the department's notice to the taxpayer that she was a successor under s. 77.52(18), Wis. Stats., to a tavern business previously operated on the same premises by Virginia Erdmann.

On July 20, 1980, the taxpayer purchased and was a successor to the business of Virginia Erdmann of operating a tavern in Milwaukee, Wisconsin. The purchase price of the business was $13,500. This amount was in excess of the sales tax assessment at issue, which is $3,194.54.

On June 30, 1980, prior to consummating the purchase of the Erdmann tavern, the taxpayer, on the advice of her attorney, and Mrs. Erdmann came to the offices of the department to file an application for a seller's permit. At that time, the new owner paid $1,700 as a security deposit with the seller's permit application. A discussion was then held with the taxpayer, Mrs. Erdmann and an employe of the department concerning a sales tax delinquency against Mrs. Erdmann for the period June 1979 to September 1979.

The taxpayer testified that the department employe indicated Mrs. Erdmann had a $900 sales tax delinquency, not specifying the period of time it related to. The taxpayer understood this to be the total amount of all delinquent sales taxes owed by Mrs. Erdmann, although additional taxes were owing because certain returns had not been filed. The taxpayer's husband then presented a check for $900 to the department, supposedly to eliminate Mrs. Erdmann's sales tax delinquency.

The taxpayer indicated that the department employe did not say Mrs. Erdmann had any additional sales tax liability. She also did not recall if he had said that certain other sales tax returns had not been filed, though he may have said so; and that she did not remember if any department employe said anything about sales tax returns not having been filed by Mrs. Erdmann.

The taxpayer had another meeting in her attorney's office for the closing on the tavern purchase, at which time all money that she believed to be due on the purchase price was paid to Mrs. Erdmann, after deducting the $900 which her husband had paid to the department. As far as the taxpayer was concerned, she felt that her obligation to the department for delinquent sales taxes of the previous owner was fulfilled.

At the time of the taxpayer's purchase of the tavern from Mrs. Erdmann, on July 20, 1981, she did not obtain a receipt from Mrs. Erdmann issued by the department indicating that no sales taxes were due. Neither did she file a written request with the department for a certificate issued under s. 77.52(18), Wis. Stats., saying that there was no sales tax owed by Mrs. Erdmann pertaining to the business purchased. The taxpayer did not withhold from the purchase price at closing any amount to cover the then remaining sales tax liability of the former owner.

The sole issue for the Commission to decide was whether under the facts presented, the taxpayer was a successor under s. 77.52(18), Wis. Stats., so that the sales tax liability of the prior owner, Mrs. Erdmann, is the liability of the taxpayer. The Commission found that:

1. The taxpayer was a successor to the seller's business under s. 77.52(18), Wis. Stats., and section Tax 11.91(1)(a), Wis. Adm. Code.

2. At the time of sale of the business to the taxpayer, the seller was liable for additional sales tax for the period October 1979 to June 1980. Not having received from the seller a receipt from the department that all amounts of sales tax had been paid, or a certificate stating that no amount was due pursuant to s. 77.52(18), Wis. Stats., taxpayer's failure to withhold from the purchase price an amount sufficient to cover this liability renders her liable for that amount.

3. Absent a "written" request from the taxpayer for a certificate stating that no amount was due from the seller, the department was not required under s. 77.52(18)(a), Wis. Stats., to either issue the certificate or mail notice to the purchaser of the amount which must be paid as a condition of issuing the certificate within 90 days. Taxpayer was not released by the department's failure to issue a notice of potential liability until January 1981 from further obligation to withhold the purchase price, under s. 77.52(18), Wis. Stats.

4. The department's action in assessing taxpayer for the former owner's sales tax liability as a successor under s. 77.52(18), Wis. Stats., is timely, within 4 years of the time the seller sells out its business, and is correct.

The taxpayer has not appealed this decision.

A.F. Gelhar Co., Inc. vs. Wisconsin Department Of Revenue (Circuit Court of Dane County, December 15, 1982). In WTB #32 it was indicated that the department appealed the Circuit Court's December 15, 1982 decision on A.F. Gelhar Co., Inc. vs. Wisconsin Department of Revenue to the Court of Appeals. The department has since withdrawn this appeal.

Wisconsin Department Of Revenue vs. Gene E. Greiling (Wisconsin Supreme Court, June 1, 1983). The issue in this case is whether a greenhouse with shading, irrigation and ventilation systems is a machine used in floriculture thereby qualifying its components for an exemption from the use tax under s. 77.54(3), Wis. Stats. The taxpayer, Gene E. Greiling, contended that a modern, commercial greenhouse is a machine and therefore, his purchases of shaped metal tubing and polyethylene film from out-of-state retailers to construct a greenhouse are exempt from the use tax under the farm machine exemption (s. 77.54(3), Wis. Stats.).

Greiling owns and operates a wholesale bedding and potted plant business in Wisconsin. He produces potted plants and bedding plants, both flower and vegetable, which are then sold to other greenhouses, commercial farmers or retailers.

The plant material sold by the taxpayer is produced in a commercial greenhouse which extends over an area of approximately nine acres of land. The greenhouse consists of an enclosure constructed out of metal tubing and polyethylene film with shading, irrigation and ventilation systems which operate together to provide the optimum environment for plant production. It closely monitors and controls the temperature, humidity, airflow and sunlight to enable maximum plant growth. No retail selling is done out of the greenhouse and employe work areas and storage areas are located in the permanent buildings which are adjacent to the greenhouse.

The department issued a use tax assessment against the taxpayer based on the precut, shaped metal tubing and polyethylene film (that formed the framework for the greenhouse) purchased from out-of-state retailers during the years 1972 through 1976. The Court of Appeals upheld the department's assessment and concluded that Greiling did not clearly establish that the farm machine exemption applies to his greenhouse. (See WTB #31 for a summary of the Court of Appeals' decision.)

The Supreme Court applied the following definitions of "machine" and concluded that Greiling's greenhouse is a machine:

1. "a structure consisting of a framework and various fixed and moving parts, for doing some kind of work." Webster's New World Dictionary Second College Edition (1980).

2. "every mechanical device or combination of devices to perform some function and produce a certain effect or result." 69 C.J.S. *Patents*, sec. 10 at 183 (1951).

The greenhouse actively produces the artificial environment necessary to produce plants for commercial use and as such the Court considered it a machine.

Since the Court found that the greenhouse is a machine under s. 77.54(3), Wis. Stats., and since the parts of an exempted machine are also exempted from the use tax, the polyethylene film and metal tubing

used in the greenhouse's construction are exempted.

Wisconsin Department Of Revenue vs. Edward Kraemer & Sons, Inc. (Circuit Court of Dane County, March 17, 1983). The issue in this case is whether the taxpayer's purchases of equipment and machinery, including repair parts and replacement parts thereof, used in its plant production of rock-based products are exempt from the use tax under the terms of the manufacturing exemption provided in s. 77.54(6)(a), Wis. Stats. The Wisconsin Tax Appeals Commission held that the taxpayer did produce, by the use of machinery, a new article with a different form, use and name, from existing materials by a process popularly regarded as manufacturing. (See WTB #30 for a summary of the Commission's decision.)

The Circuit Court reversed in part and affirmed in part the Commission's decision. The Circuit Court held that the extracting of stone from the ground is not manufacturing. The Court concluded that mining ceases when, and only if, the raw materials mined by Kraemer are processed via activities which satisfy all the elements of "manufacturing" within the meaning of ss. 77.54(6)(a) and 77.51(27), Wis. Stats.

The department has not appealed this decision.

Lerman Tire Service vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, June 2, 1983). Taxpayer, Lerman Tire Service, is in the business of tire retreading. Taxpayer's retreading process begins with a worn out but useable tire carcass. Excess rubber is buffed off the tire carcass. Rubber and cement are applied with a heat application to vulcanize the new rubber to the old tire carcass and imprint the desired tread design thereon. The tire is then cleaned, trimmed, painted, tested, and sold as a retreaded tire. Taxpayer contended that the process of retreading tires constitutes manufacturing and therefore, it is entitled to the exemption from sales and use tax provided in s. 77.54(6)(a), Wis. Stats., on its machinery used in the retreading process.

Lerman Tire Service contended that the retreading operation constitutes the production by machinery of a new article with a different form, use and name. Taxpayer further indicated that the federal government considers taxpayers manufacturers for federal excise tax purposes.

The Tax Appeals Commission held that the taxpayer's retreading process constitutes manufacturing under s. 77.51(27), Wis. Stats., and therefore, the taxpayers qualify for the manufacturing exemption provided in s. 77.54(6)(a), Wis. Stats.

The department has not appealed this decision.

Wisconsin Department Of Revenue vs. Milwaukee Brewers Baseball Club (Wisconsin Supreme Court, March 29, 1983). This case involves two issues: (1) Does the sales or use tax apply to the purchase by the Milwaukee Brewers Baseball Club of the tickets which when purchased by the customer give him or her the right to enter the stadium to view the game? and (2) Does the sales or use tax apply to the baseball club's purchase of promotional items distributed to a class of ticket holders on special occasions?

The Court of Appeals held that the club's purchase and use of the tickets is subject to the use tax and the promotional items distributed are subject to the sales tax. (See WTB #31 for a summary of the decision.)

The Supreme Court affirmed the Court of Appeal's decision. The tickets are transferred for use of consumption but not for resale, the tickets are not included in the admission price charged customers and therefore, the club's purchase and use of tickets is subject to the use tax under s. 77.51(24), Wis. Stats. The promotional items are taxable under s. 77.51(4)(k), Wis. Stats., which provides that a sale to a purchaser who distributes an article "gratuitously apart from the sale of other tangible personal property or service" is taxable as a sale.

County Of Racine, c/o Nick R. DeMark vs. Wisconsin Department Of Revenue, And Grant Fuhrman, Custodian d/b/a Racine County Jail Concession Fund vs. Wisconsin Department Of Revenue (Circuit Court of Racine County, Branch 7, July 1, 1983). The County asked for judicial review of orders of the Wisconsin Tax Appeals Commission entered on January 14, 1983 in each of the above cases. The first assessment of sales tax resulted from an audit of the County's sales of merchandise, charges for golf, and similar charges collected by the County's Park Department for use of its facilities. The County had filed returns and paid sales taxes as computed by it on these charges. The Department of Revenue determined that taxes had not been paid on gross sales as required by statute. It was the County's practice to charge a flat fee for merchandise and charges for use of the park privileges. It then paid 4% of those charges as sales taxes. This did not comport with the statutory requirement that tax be added to the gross sale amount.

The second assessment resulted from the fact that the jail's concession fund had sold cigarettes, candy and toiletries to inmates in the Racine County Jail, and had not reported or paid sales tax on these sales.

The County's primary concern upon appeal in these cases has to do with the State's insistence that it receive interest for the period commencing September 25, 1980 and continuing to January 1983. The Commission hearing was held on September 25, 1980 and its decision was rendered January 14, 1983, more than two years later. It is the County's assertion that they should not be penalized by payment of interest for this substantial period during which the Commission failed to act on the question before it. The argument advanced is that it is unjust for the Commission to hold captive a decision for a period of over two years, and then require that interest be paid for the long period resulting from its failure to act promptly on the issue before it.

The Commission has responded by asserting that it has no authority under the statutory provisions to do other than require payment of interest for the period in question. Sec. 77.60(1), Wis. Stats., governs interest and penalties on delinquent sales taxes. This statutory provision can only be read as a mandatory direction that interest such as here concerned, must be paid.

The County further asserts that it offends a sense of justice that it be required to pay interest for this long period of time when in fact it had no control over the matter. The Circuit Court noted, however, that the County was not without control. A taxpayer may make a deposit of the amounts assessed while awaiting a

determination. This will stay the recovery of interest if the ruling is against the taxpayer. If the taxpayer prevails on the requested redetermination, it is entitled to receive repayment of his or her money with interest at the rate of 9% for the period during which those funds were on deposit. For reasons not explained, the County did not make such deposit. Under the statutory requirement the Circuit Court determined that the interest for the period in question is a proper charge in each of the above cases.

The taxpayer has appealed this decision.

HOMESTEAD CREDIT

Avis L. Blasch vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, October 15, 1982). On June 16, 1980 the department issued an income tax assessment against the taxpayer, disallowing the amounts of Homestead Credit issued to Avis Blasch in the years 1976, 1977, and 1978 on the grounds that by including the gross amount of Blasch's pension income in total household income in those years, Blasch's total income was over the allowable income levels for eligibility for homestead credit. On the original returns Avis Blasch filed for the years involved, she did not include in total household income on her Homestead Credit Claim, Schedule H, amounts she had received as a disability retiree under a Federal Civil Service pension.

Blasch filed amended returns for 1977 and 1978. For 1977 Blasch added to her Wisconsin total income $1,681 representing her employer's contribution to the gross amount of disability pension she received in that year. For 1978 she added to her Wisconsin total income $5,445 representing the gross amount of disability pension, includable because she had attained age 65. Blasch did not claim homestead credit on these amended returns.

The Commission held in favor of the department. Section 71.09(7)(a)1, Wis. Stats., provides that the term "income" for purposes of homestead credit includes "the gross amount of any pension of annuity." The gross amount of disability pension payments received by Avis Blasch in the years at issue should have been included in her total household income. Blasch's total household income was over the limit for each of the years at issue and, therefore, she was not entitled to homestead credit for the years at issue.

The taxpayer 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.)

INDIVIDUAL INCOME TAXES

1. Treatment for Capital Gain Portion of a Lump-Sum Distribution from a Retirement Plan or Profit Sharing Plan

FRANCHISE TAXES

1. Wisconsin Corporate Tax Treatment of Foreign Dividend Gross-Up
2. Does a Certificate of Authority Create Wisconsin Nexus?
3. Effect of a Certificate of Authority on Apportionment

SALES/USE TAXES

1. Interstate Telephone Service
2. New 12% U.S. Retail Excise Tax on Heavy Trucks And Trailers
3. Burglar And Fire Alarm Systems

INDIVIDUAL INCOME TAXES

1. Treatment for capital gain portion of a lump-sum distribution from a retirement plan or profit sharing plan

Facts and Question: A taxpayer receives a lump-sum distribution from a qualified retirement plan. Under the provisions of the Internal Revenue Code (IRC) the taxable part of this distribution is divided into two parts (1) income taxable as a long-term capital gain, and (2) income taxable as ordinary income. For purposes of computing federal income tax under a special 10-year averaging method, section 402(e)(4)(L) of the IRC permits a taxpayer to elect to treat the entire taxable part of a lump-sum distribution as ordinary income. When this election is made, the entire taxable portion of the lump-sum distribution is computed on Form 4972. The tax payable on the lump-sum distribution is computed on Form 4972 and then the amount of tax is transferred to line 39 of a federal 1982 Form 1040.

Section 71.05(1)(a)8 of the Wisconsin Statutes provides that any portion of a lump-sum distribution which is excluded from federal adjusted gross income under section 402(e) of the IRC must be added back for purposes of determining a taxpayer's Wisconsin taxable income.

If the amount of lump-sum distribution excluded from federal adjusted gross income is added back (pursuant to s. 71.05(1)(a)8) to determine Wisconsin taxable income, does the portion of the distribution which is identified as capital gain income retain its character for purposes of qualifying for the capital gain exclusion in s. 71.05(1)(a)2, Wis. Stats.?

Answer: Yes. Even though a taxpayer has elected for federal income tax purposes to treat the capital gain portion of a lump-sum retirement plan distribution as ordinary income in computing tax under the federal 10-year averaging method, a different election may be made for Wisconsin purposes. Wisconsin law does not allow the use of the 10-year averaging method of computing tax provided by section 402(e) of the IRC. Therefore, for Wisconsin purposes there is no tax advantage to treating the capital gain portion of a lump-sum distribution as ordinary income.

The manner in which the federal-Wisconsin difference in the treatment of a lump-sum distribution should be accounted for on the Wisconsin return depends on whether or not the taxpayer has other capital gain and loss income