and deliver manholes to the job site or construction contractors engaged in real property construction activities. The taxpayers contend that they make unique custom-designed manholes and are engaged in real property construction activities. The department contends that they are retailers rather than contractors. During this period the taxpayers, Milwaukee Sewer Pipe & Manhole Co., Inc. and Advance Pipe & Supply, Co., Inc., were both Wisconsin corporations located in the County of Milwaukee, Wisconsin. The taxpayers and the department stipulated to the consolidation of the cases for the purpose of the hearing before the Commission.

Advance Pipe & Supply Co., Inc. is engaged in the business of constructing concrete manholes. The manholes are fabricated in component parts at Advance Pipe's plant in Pewaukee, Wisconsin, and later delivered to the job site. Advance Pipe sold approximately 50% of its manholes to sewer contractors and 50% to Milwaukee Sewer Pipe. Milwaukee Sewer Pipe sold the manholes built for it to its specifications to plumbing contractors, municipalities, and utilities.

The manholes are designed and constructed by Advance Pipe, either for its own account or that of Milwaukee Sewer Pipe, based upon the specific real property improvement being constructed. The manholes so designed and constructed are unique to the location for which they are designed and are not ordinarily usable at any other location.

A manhole consists of three large components plus three to eight adjusting rings. All these components, with the exception of some bases, are standardized according to code specifications and interchangeable. The bases were not interchangeable at that time because some of the steps were of different materials. The foundation of a manhole is standard, a precast concrete base set in the sand. Many of the components of a manhole are kept in inventory. A contractor is able to erect the manhole by using these precast components.

Advance Pipe delivers the component parts of the manhole it has fabricated off-site to the specific job site for which it was constructed with its own crane-mounted trucks and drivers. Milwaukee Sewer Pipe sales of manholes are delivered in an identical fasion by virtue of its subcontracts with Advance Pipe for delivery services. In most cases, Advance Pipe unloads the component parts at the manhole next to the pit itself in the appropriate sequence for installation. Advance Pipe's drivers are experienced in the installation of manholes and remain available to provide on-site assistance in assembling the manholes. Assembly of the manhole, however, is handled by the builder.

The customers of the taxpayers, Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Manhole Co., Inc., are either sewer contractors, plumbers, or municipalities, and the employes of the sewer or plumbing contractors that erect the delivered components as manholes are not associated with the taxpayers.

Advance Pipe and Milwaukee Sewer Pipe retain responsibility for a watertight manhole and must take whatever action is necessary to repair any defects in the manhole after installation, including patching, repairs to steps, sealing off pipes, removing and recasting the base, etc. Functioning of the manhole is a completed real property improvement.

In approximately 5% of the deliveries for Advance Pipe, the employes of Advance Pipe erected the components in place in the sewer. In other cases, the components are not attached but set next to trench. If the components are erected as a manhole by Advance Pipe, there is an additional charge. If the employe of Advance Pipe does not erect the manhole, the employe does not stay during the period of digging the hole or the actual erection of the manhole. Only about 25% of the components of the manhole are delivered after the ground level is prepared.

Advance Pipe delivers the building materials that Milwaukee Sewer Pipe sells to plumbing contractors. Approximately 25% of the dollar value of the component parts of manholes sold by Milwaukee Sewer Pipe are set in the hole by Advance Pipe. The remainder are placed next to the hole. The driver does not usually stay on the job site until the manhole is completed. Most of Milwaukee Sewer Pipe's materials were delivered after the ground level was prepared. The components may be selected from a stockpile of previously manufactured components.

The Commission ruled that Advance Pipe & Supply Co., Inc. and Milwaukee Sewer Pipe & Manhole Co., Inc. are not real property construction contractors engaged in construction activities while engaged in the business of designing and fabricating real property improvements, namely manholes, within the meaning of s. 77.51(4)(i) and s. 77.51(18), Wis. Stats. The Commission also found that the taxpayers' sales and deliveries of building materials to the job site were retail sales subject to the Wisconsin sales tax.

The taxpayers have appealed this decision to the Circuit Court.

City Of Racine vs. Wisconsin Department Of Revenue (Court of Appeals, District IV, October 4, 1983). The issue in this case is whether sales and use tax is due on fees charged by the city to individuals and teams for participation in city-sponsored athletic activities (see WTB #23 for a summary of the Wisconsin Tax Appeals Commission decision and WTB #31 for the Circuit Court decision).

The city administered leagues for sports activities. The facilities used by the leagues were mainly city-owned, although facilities such as gymnasiums and ball diamonds were sometimes rented from the local school district. To participate in league play, players and teams were required to pay fees to the city's Parks and Recreation Department. The income from the fees was used both for the rental of facilities and to defray administrative expenses. The city concedes liability for the tax on the portion of the fees used to rent facilities, but denies that the tax is applicable to the portion of the fees used to defray administrative expenses. It argues that s. 77.52(2)(a)2, Wis. Stats., which taxes amounts paid for "the privilege of having access to or the use of . . . athletic or recreational devices or facilities," imposes a tax only on the amount charged for the actual use of physical facilities.

The city's argument ignores the fact that sales taxation is not dependent on the seller's use of its gross receipts, but rather on whether a participant is required to pay to gain access to or use of the facility. The city's "no pay—no play" policy

clearly imposes a fee for "access to or the use of" recreational facilities.

The Court of Appeals affirmed the judgment of the Circuit Court that the fees charged by the city for participation in athletic activities were subject to the sales and use tax.

The taxpayer has not appealed this decision.

Johnson And Johnson, A Partnership (d/b/a Asphalt Products Co.), And Asphalt Products Co., Inc. vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, December 1, 1983). The issue in this case is whether the taxpayers are retailers making exempt sales of asphalt to governmental units or are contractors subject to the use tax on asphalt sprayed on roadways. The issues on appeal by each taxpayer were so similar that the two cases were consolidated.

The taxpayer, Asphalt Products Co., was engaged in the business of selling and/or applying emulsified asphalt products to various businesses and government entities. The taxpayer bought raw materials without tax, mixed the materials, and sold and/or applied the products to meet purchaser specifications and requirements. It sold emulsified asphalt products in two ways: (1) by sales delivered to the place specified by the purchaser, and pumped into the purchaser's holding tank or truck, or (2) by sales delivered to the place specified by the purchaser and sprayed onto the road or ground surface. There is no dispute over type (1) sales. However, the taxpayer did not pay sales tax on materials sprayed on roads by its trucks for exempt entities, and the department assessed tax on these purchases.

The taxpayer contends that its purchase of materials is exempt from sales tax by virtue of its resale exemption and the sale to the exempt entity is not subject to sales tax by virtue of the general exemption available to exempt entities. Accordingly, it contends that it is not a contractor or subcontractor engaged in real property construction activities when it delivers or applies emulsified asphalt products onto the road surface for an exempt entity at the supervision of the state inspector or county blacktop foreman.

The department's position is that a use tax is applicable with respect to raw materials purchased by the taxpayer and used in the emulsified asphalt products sprayed onto the road surface, and that such activity constitutes a real property construction activity by a contractor or subcontractor.

The asphalt emulsion is highly unstable, and will break down if it is too hot or too cold, or if it is contaminated with any substance or impurities with a different PH. Because they are unstable, the taxpayer offers to apply the emulsified asphalt with its equipment and operators. One of the most important pieces of equipment used is the asphalt distributor. Its function is to apply uniformly the asphalt emulsion over a surface at a specified rate.

The activities performed by the exempt entity and the taxpayer in conjunction with the application of its emulsified products to roads are described as follows:

1. Patching the potholes and repairing damaged areas in existing pavements.
2. Cleaning the surface to be covered with a rotary broom or by other approved means.
3. Spraying the asphalt emulsion binder at a specified rate.
4. Spreading cover aggregate (gravel or chips) at specified rates immediately behind the asphalt spray application while the emulsion is still brown in color, to achieve the maximum possible chip wetting.
5. Rolling the aggregate cover to seal particles in asphalt membranes. This is done with a large metal water-filled roller.
6. Brushing the excess aggregate off the road after approximately 48 hours have passed.

The exempt entity is responsible for all of the above steps except number 3. The exempt entity sets the time, rate and amount of emulsified asphalt to be applied by taxpayer's equipment and operators. Some of the applications of emulsified products are slightly different, but are so similar that they are not described in this case summary.

The exempt entity has complete responsibility for the direction and rerouting of the traffic on the road, having other components of the job on the work site and ready to go, and for employing the necessary personnel to complete the numerous steps. The exempt entity is responsible for any risk or loss as a result of delays or if rain washes the asphalt product off the road. The taxpayer did not own any equipment or machinery to do any of the numerous steps required in the seal coating process, except using its asphalt delivery truck with distributor. The State of Wisconsin requires the taxpayer to use pre-printed contracts which consistently refer to the taxpayer as a "vendor" and do not mention "contractor" or "subcontractor".

In competitive bidding, the taxpayer submitted bids to the exempt entity, that included, at option of the entity, application or non-application. It had no way of knowing at that time whether it would be requested to deliver the product and pump it into a holding tank or government truck, or whether it would be requested to deliver the product and pump it onto the road surface. The "pumped onto the road" price was approximately two cents higher due to the fact that the truck which made the delivery must have a spray mechanism attached to the back of the truck.

The Commission ruled that the taxpayer was not a contractor or subcontractor within the intent and meaning of s. 77.51(18), Wis. Stats. In addition, the Commission found that a person who holds a seller's permit and is in the business of selling tangible personal property may use a resale certificate to purchase property which is resold in the ordinary course of business, including the materials used to make emulsified asphalt products which it later sold (sprayed on roads) to tax exempt municipalities.

The department has appealed this decision to the Circuit Court.

Wisconsin Telephone Company, Et. Al. vs. Wisconsin Department Of Revenue (Circuit Court of Dane County, December 30, 1983). The plaintiffs asked the court by motion for summary judgment to find that the imposition of the sales tax on the sale or use of interstate telephone services which originate from and are charged to telephones located in the State of Wisconsin violates the Commerce Clause of the United States Constitution. The Department of Revenue opposed plaintiffs' motion and moved for summary judgment in its own behalf declaring the sales tax imposed by s. 77.52(2)(a)4. Wis. Stats., to be valid.

Interstate telephone services are provided by means of an integrated nationwide network owned and operated by American Telephone and Telegraph Company ("AT&T"), the AT&T Long Lines Departments, its twenty-two operating telephone companies, and by over 1400 independent telephone companies. The Bell System owns and operates the largest portion of this network. The network consists of telephones (terminal equipment) located on customer premises, connections (local loops) to local switching machines (central offices), connections between local switching machines, connections between local switching machines and toll (long distance) switching machines and circuits connecting the toll switching machines.

A typical interstate telephone call made by a customer of Wisconsin Telephone will usually utilize plant and facilities of three or more different companies: Wisconsin Telephone, AT&T's Long Lines Department, and the telephone company which provides service to the person receiving the call. The charges for such telephone calls are computed and billed in a variety of ways.

Although interstate long distance telephone service generally requires the use of telephone plants of at least three companies located in two or more states, the entire cost of each call is billed by only one telephone company to one customer. A system exists for sharing the billed revenues with the companies providing telephone plants used in the completion of the call. Such telephone plant is not utilized exclusively for interstate long distance service, and the operating expenses incurred by each telephone company in the course of providing interstate services cannot be directly identified, because each telephone company also provides intrastate toll and local telecommunications services interchangeably with interstate services.

Each member of the Bell System providing toll services participates in a monthly pooling and division of revenue from toll services. On the basis of studies made periodically, each company determines the interstate portion of its total investment in plant and its total operating expenses. From this monthly "pool" of revenues, each telephone company recovers its interstate operating expenses, and any excess of revenue over expenses is allocated among the telephone companies. The expenses and revenues recovered by the members of the Bell System also include expenses and revenues which are to be settled with the independent telephone companies. This "division of revenues" determines each company's "booked revenues." There is no necessary relationship between the "billed revenues" and the "booked revenues" of a particular telephone company.

On April 29, 1982, the Wisconsin Legislature enacted chapter 317, Laws of 1981, effective May 1, 1982. Section 62 of the chapter amended section 77.52(2)(a)(4), Stats., to impose a retail sales tax on interstate phone calls originating in Wisconsin and billed to Wisconsin telephones.

In addition to the above sales tax on certain interstate telephone service, Wisconsin Telephone and each of the Independent Companies are subject to an annual license fee (i.e., gross receipts tax) based upon gross revenues derived from toll services which are attributable to equipment located in Wisconsin. Section 76.38(5), Stats. Wisconsin Telephone utilizes the Division of Revenues to determine its gross revenues subject to the license fee.

Court's Decision Summarized

Complete Auto Transit v. Brady, 430 U.S. 274, 97 S. Ct. 1076 (1977), sets forth a four-factor test that a state tax must meet in order to withstand a challenge under the Commerce Clause. Under this test, a state tax is valid if it (1) is applied to an activity with a substantial nexus within the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to services provided by the State.

A statute is presumed constitutional unless proven otherwise beyond a reasonable doubt by the party attacking the statute. Since the court in Complete Auto Transit does not hold that the burden of proof falls on the defender of the statute, the Court concluded that the burden remains on the challenger to show beyond a reasonable doubt that the four-factor test has not been met. This interpretation is consistent with the rules of statutory construction.

A. Substantial Nexus With Wisconsin

The sales tax in question is imposed only on sales of calls originating in Wisconsin and billed to Wisconsin telephones. Although included in these sales are services provided outside the state, the transactions have more contacts with Wisconsin than with any other state. "The fact that a tax is contingent upon events brought to pass without a state does not destroy the nexus between such a tax and transactions within a state for which the tax is an exaction." Therefore, there is sufficient nexus in this case between Wisconsin and the interstate telephone service originating from and charged to Wisconsin telephones.

B. Fair Apportionment and Risk of Multiple Taxation

While the sales tax challenged herein is not apportioned, there appears to be no risk of multiple taxation. Plaintiffs maintain that when a Wisconsin customer originates a long distance call to a person residing in a state which imposes a gross receipts tax, the measure of which includes interstate revenues, the revenues generated by that call are subject to at least three separate taxes. First, a license fee (i.e., gross receipts tax) imposed by s. 76.38(5), Stats., on the revenues of Wisconsin Telephone and AT&T's Long Lines Department which are attributable to equipment located in Wisconsin. Second, the revenues of the local telephone company on the receiving end of the call which are attributable to the receiving state will be subject to such state's gross receipts tax. And third, the entire unapportioned revenues which are billed to the customer of Wisconsin Telephone are subject to the 5% sales tax at issue herein.

However, the three taxes cited by plaintiffs are not in fact cumulative, inasmuch as they are imposed on different privileges or transactions. Clearly, the sales and gross receipt taxes are imposed upon different "levels" of taxpayers. The distinguishing characteristic of a retail sales tax is that it is triggered by the ultimate consumption of the goods or services and is not imposed on an intermediary who resells the goods or processes the goods for resale—such as the local company servicing the receiving telephone. In contrast, the gross receipts tax is not limited to retail sales and is imposed on the

company, not the consumer. While the burden on plaintiffs herein is only to show a constitutionally significant risk of multiple taxation, plaintiffs have made no such showing on this record.

C. Discrimination Against Interstate Commerce

A sales tax does not discriminate against interstate commerce if it places intrastate and interstate telephone calls on equal footing. Plaintiffs assert that Wisconsin's sales tax discriminates against interstate commerce by exposing the out-of-state portion of the taxed phone call to the risk of multiple taxation in a manner that local commerce is not exposed. However, the Wisconsin retail sales tax, confined to long distance phone calls originating in Wisconsin and billed to a Wisconsin phone, does not expose interstate commerce to such a burden.

D. Fair Relationship to Services Provided by the State

This final prong of the Complete Auto Transit test requires that the measure of the tax be reasonably related to the extent of the taxpayer's contact with the state, since it is the activities or presence of the taxpayers in the state that may properly be made to bear a just share of the state tax burden.

The taxpayers in question originate and bill the long distance calls to Wisconsin phones. This presence and activity in the state means that each taxpayer enjoys "the only benefit to which the taxpayer is constitutionally entitled. . .that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes." In exchange, Wisconsin is entitled to tax the long distance calls in question.

The Court ruled that based on the entire record in the case, section 77.52(2)(a)4, Wis. Stats., which imposes the sales tax on interstate telephone service, is constitutional and does not violate the Commerce Clause of the United States Constitution.

The taxpayers have appealed this decision.

CIGARETTE TAX

George R. Elliott vs. Wisconsin Department Of Revenue (Wisconsin Tax Appeals Commission, January 27, 1984). The issue in this case is whether or not the department under s. 139.33(3), Wis. Stats., properly assessed a penalty and interest against the taxpayer for his failure to timely declare and pay the cigarette use tax imposed.

On July 2, 1981, the taxpayer purchased and requested shipment of 63 cartons of cigarettes from a company known as Tobacco Land USA, Inc. of Four Oaks, North Carolina. The 63 cartons of cigarettes requested were received by George R. Elliott on July 7, 1981. The cigarettes did not bear the proper withholding tax stamp of the State of Wisconsin. The taxpayer relied on the purchase of the cigarettes from an ad that he had found in a newspaper, the National Enquirer, dated October 13, 1981 as follows:

> "CIGARETTES $5.35 per CARTON And the price includes UPS delivery and state tobacco tax. Order direct from the North Carolina tobacco wholesaler. For Consumer Savings membership, volume prices and order form, send $2.00 to Dept. NE, TOBACCO LAND, USA, INC., P.O. Box 758, Four Oaks, NC 27524. Satisfaction Guaranteed or Money Back."

The occupational tax under s. 139.31, Wis. Stats., had not been imposed upon the seller of these cigarettes. Under federal law, Tobacco Land USA, Inc., notified the Wisconsin Department of Revenue of this shipment of tax free cigarettes on August 10, 1981. On August 14, 1981, the department requested additional information from the taxpayer. Upon receipt of this request, the taxpayer promptly contacted the Department of Revenue and learned of the tax liability. On August 27, 1981, the taxpayer remitted $100.80 to the department regarding the cigarette use tax. Under date of August 28, 1981, the taxpayer was assessed by the department the amount of $1,649.65 as follows:

> "Accordingly the use tax of $1.60 per carton became delinquent on July 22 and a penalty of $25 per carton is due for failure to file the declaration. Interest on the delinquent tax and penalty accrues at the rate of 1.5% per month or each fraction of a month until paid as shown on the attached schedule."

The taxpayer does not dispute the fact that the tax was properly assessed. He does dispute that the delinquent interest and penalty of $25 per carton assessed was not proper. He contends, based on the newspaper ad in the National Enquirer, that all state taxes were paid by Tobacco Land USA, Inc.

The Commission held that the department under s. 139.33(3), properly imposed the cigarette tax penalty and interest against the taxpayer for his failure to timely declare and remit the use tax. If the use tax imposed is not declared or remitted to the department within 15 days, the penalty section becomes applicable and the Commission has no discretion but to affirm the penalty imposed by s. 139.33(3).

The taxpayer has appealed this decision to the Circuit Court.