the taxpayer's method of accounting from a cash method to an accrual method was correct.

The taxpayer has not appealed this decision.

SALES/USE TAXES

Wisconsin Department of Revenue vs. Artex Corporation (Circuit Court of Dane County, June 11, 1985). Artex Corporation participated between December 1, 1979 and November 30, 1981 in the construction of a grain bin for the Dane County Farmers Union Cooperative. The Wisconsin Department of Revenue assessed sales and use tax totalling $24,939.33 on November 3, 1982 against the taxpayer for the above period under ss. 77.51(4)(i), 77.52(1) and 77.53(1), Wis. Stats. The Wisconsin Tax Appeals Commission reversed the department's tax assessment, concluding that the taxpayer's grain-drying operation constituted "manufacturing" under s. 77.51(27), Wis. Stats., and the taxpayer was therefore exempt from taxation under s. 77.54(6)(a), Wis. Stats.

The department raised the following issues under s. 227.20(5) and (6), Wis. Stats.:

A. Was the Commission's conclusion of law that the taxpayer's activities associated with the grain bin constituted "manufacturing" under s. 77.54(6)(a), Wis. Stats., erroneous?

B. Was the Commission's conclusion that the grain processing facility constituted "manufacturing" unsupported by substantial evidence in the record?

C. Did the Commission fail to interpret a provision of the law as to whether the grain bin amounted to a real estate improvement and was therefore subject to sales tax?

The department argued that only *storage* of grain takes place in the bin itself and that the bin, like the silo in *Dept. of Revenue v. Smith Harvestore Products,* 72 Wis. 2d 60 (1976), is a taxable real estate improvement under s. 77.51(4)(i), Wis. Stats.

Several recent Wisconsin cases have considered the application of s. 77.54(6)(a), Wis. Stats., to various business enterprises. In *Wis. Dept. of Rev. v. Bailey-Bohrman Steel Corp.,* 93 Wis. 2d 602 (1980), the Court identified six statutory elements of manufacturing under s. 77.51(27), Wis. Stats.: (1) production by machinery; (2) of a new article; (3) with a different form; (4) with a different use; (5) with a different name; and (6) by a process popularly regarded as manufacturing.

In this case, the department argued there is no production by "machinery", since the grain structure serves as a storage facility only. The department argued that the heating and flaking processes occur before the grain enters the bin itself and that the bin is, therefore, not a "machine". The Circuit Court concluded that there is "production by machinery", given the presence of aerating fans, ducts and thermocouples in the bin. Although the grain bin has certain features in common with buildings, it "performs an independent, essential function in the manufacturing process". The utility of the grain bin is to preserve the feed by controlling air flow and temperature.

The second *Bailey-Bohrman* element of "a new article" is also met in this case. Raw grain, a highly perishable product, is transformed through the Coop's processing into a "new article" which can be held indefinitely for feed purposes.

The Circuit Court looked to the entire grain processing system with regard to this third element, a different form. The feed held for preservation in the grain bin is smaller and dryer (by 15% moisture) than the virgin grain. The corn kernels are shrunk in the drying process and become dry to the touch. The significant biological effect of this change in form is to slow down the activity of bacteria, molds and fungi, which cause grain to rot if it is not processed.

The feed which is held in the taxpayer's grain tank meets the fourth and fifth *Bailey-Bohrman* elements because it has both a different use and a different name. The "feed" can be used for animals for up to several years or ultimately processed into other food articles, such as cornflakes. In contrast, the virgin corn, being a "living organism", can only be used as a food product for a few days.

For the sixth element, the record demonstrates the taxpayer's process is "popularly regarded as manufacturing".

The department raised an additional ground on review, that the Tax Appeals Commission erroneously failed to resolve this question: Whether the grain bin constitutes a real estate improvement and is therefore taxable under ss. 77.51(4)(i), 77.52(1) and 77.53(1), Wis. Stats. The Circuit Court held that the evidence in the record does not establish that a sales tax assessment was levied under that provision by the department. The Circuit Court concluded that all six elements regarding use tax exemption under s. 77.51(27), Wis. Stats., are supported by substantial evidence in the record. The Commissioner's conclusions that the taxpayer's activities associated with the grain bin constitute manufacturing and are therefore exempt from use taxation under s. 77.54(6)(a), Wis. Stats., are not erroneous. The Commission did not err in failing to reach the department's claim that s. 77.51(4)(i) applies to the facts of record.

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

Wisconsin Department of Revenue vs. First National Leasing Corporation (Court of Appeals, District IV, July 16, 1985). The Wisconsin Department of Revenue appealed a Circuit Court judgment affirming an order by the Wisconsin Tax Appeals Commission. The department contended that the Commission lacked authority to grant relief from a stipulation made between the First National Leasing Corporation and the department. Because First National stipulated to the correctness of the assessment and did not timely appeal the stipulation, the Commission improperly granted relief.

On March 7, 1979, the department assessed delinquent taxes against First National after a field audit. First National petitioned the department for redetermination of the assessment on April 5, 1979. First National disputed liability for sales and use taxes assessed on equipment it leased to Sargento Cheese Company, Inc. First National and the department reached an agreement concerning the assessment on October 15, 1979. First National did not appeal the field audit assessment nor the stipulated settlement to the Commission.

On May 30, 1980, the department cancelled an assessment of sales and use taxes against Sargento on

the equipment leased from First National. The basis for the cancellation was that the lessee used the leased equipment in manufacturing. Equipment used in manufacturing is exempt from sales and use taxes. First National already had paid sales and use taxes on the same leased equipment, pursuant to its previous stipulation. First National then filed an amended sales and use tax return seeking a refund of the taxes paid on the leased manufacturing equipment. The department denied a refund for taxes paid before the stipulation.

First National appealed the department's denial of the petition for redetermination to the Commission on September 4, 1980. The department objected to the Commission's jurisdiction because First National did not timely appeal the field audit determination. The Commission ruled that it could grant relief from the stipulation because First National filed the petition for relief within one year of the stipulation. The Commission relied on s. 806.07(2), Wis. Stats., which provides that a Circuit Court may grant relief from a stipulation based on mistake if relief was sought within one year of the stipulation. The Commission applied this rule because Wis. Adm. Code section TA 1.39 (1983) provides that the practice and procedures before the Commission shall substantially follow the practice and procedures before Circuit Courts. Applying the s. 806.07 rule, the Commission ordered relief from the stipulation because First National and the department mistakenly believed that the leased equipment was subject to sales and use taxes. The department then sought judicial review of the Commission's decision. The Circuit Court affirmed the Commission's order.

The only issue is whether the Commission may order relief from the stipulated settlement of tax liability. The Court of Appeals noted that the Commission has no common law powers. It has only the powers that are either expressly conferred or necessarily implied from the four corners of the statutes under which it operates. Such statutes are strictly construed to preclude the exercise of powers not expressly granted.

Section 77.59(2), Wis. Stats., provides that the department's field audit determination becomes final at the expiration of the appeal periods in subsection (6), and the tax liability of the taxpayer may not be subsequently adjusted except in cases of fraud. Section 77.59(6), Wis. Stats., provides that the department's determination is final unless the taxpayer petitions the department for a redetermination within sixty days. Section 77.59(6)(a), Wis. Stats., provides that a redetermination becomes final after sixty days unless the taxpayer appeals to the Commission. Finally, s. 77.59(6)(c), Wis. Stats., provides that a taxpayer may pay any portion of a deficiency determination admitted to be correct, and the payment shall be considered an admission of the validity of that portion of the deficiency determination and may not be recovered in an appeal.

The Court of Appeals concluded that the Commission lacked authority to grant relief from the stipulation. First National timely petitioned the department for a redetermination of the field audit determination, thereby preventing it from becoming final. The subsequent stipulation, however, constituted an admission by First National of the validity of the taxes assessed and subsequently collected. As a result, First National is prevented by s. 77.59(6)(c) from recovering the taxes agreed to in the stipulation. Moreover, even if the Court considers the stipulation to be an appealable redetermination, First National did not appeal that decision within sixty days. The assessment therefore became final, and the Commission lacked authority to later order a refund.

The taxpayer has appealed this decision to the Supreme Court.

F.W. Boelter Co., Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 31, 1985). This is a timely filed appeal to the Commission for review of the department's decision on the taxpayer's claim for refund of sales and use taxes for the period from January 1, 1978 through February 28, 1980.

On May 2, 1980, as a result of a field audit covering the period from March 1, 1975 through February 29, 1980, a sales and use tax determination was issued by the department, resulting in an assessment of $20,816.44 ($14,180.61 in sales and use taxes, plus $3,090.68 interest and $3,545.15 penalty).

On June 5, 1980, the taxpayer paid the assessment in full, instead of depositing it pursuant to s. 77.59(6)(c), Wis. Stats., pending ultimate determination of the taxpayer's liability.

On August 19, 1983, the taxpayer filed a claim for refund of these taxes (in the amount of $22,781.22) for the period from January 1, 1978 through December 31, 1982 "under the 'Rause' decision under which certain single service items were ruled to be tax exempt" (*Rause Enterprises, et al. v. Wisconsin Department of Revenue,* Docket No. S-8003, decided January 29, 1982, by the Wisconsin Tax Appeals Commission).

The department denied in part the taxpayer's claim for refund of the taxes paid for the period before March 1, 1980, but conceded $18,113.67 (plus accruing interest) in refunds for the period from March 1, 1980 through February 28, 1983.

The Commission held that it cannot consider the applicability of the *Rause* decision cited by the taxpayer since it had already paid the assessment in full, instead of depositing it pursuant to s. 77.59(6)(c), Wis. Stats. Since the department had field audited the taxpayer for the periods involved, but the taxpayer paid its assessment instead of depositing it in accordance with the statute, the Commission lacks the authority to order a refund of the sales and use taxes, interest and penalty for the periods before March 1, 1980.

The taxpayer has not appealed this decision.

Iverson, Rundell and Stewart, a partnership vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, May 13, 1985). During the period under review, July 1981 to May 1982, the taxpayers, Iverson, Rundell and Stewart, were doing business in Rewey, Wisconsin in a business known as Last Chance Saloon. The issues for this Commission to determine are whether the taxpayers have successor liability for unpaid sales tax under provisions of s. 77.52(18), Wis. Stats., and whether the department is estopped from assessing such tax.

On June 30, 1982, Robert F. Nyman and Betty Nyman, d/b/a Nyman & Nyman, sold the business located at 323 Main Street, Rewey, Wisconsin to Lisa R. Iverson, Linda L. Rundell and Deena C. Stewart. At the closing, the Nymans were represented by Attor-

ney Ronald Walker and Iverson, Rundell and Stewart were represented by the law offices of Morrow & Pope.

Prior to the closing, Attorney Ronald Walker, representing the Nymans, telephoned the Wisconsin Department of Revenue and requested the payoff for delinquent tax warrants issued against the partnership known as Nyman & Nyman. Attorney Ronald Walker testified that he received from the department (over the phone) the amount of $214.03 which would satisfy the delinquent tax warrants against the Nymans.

Attorney Ronald Walker, representing the Nymans, conveyed to Attorney J. Paul Morrow's office that the sum of $214.03 would satisfy the tax warrants. This sum was withheld at the closing and a check was sent in the amount of $214.03 to the department, which issued the satisfaction. The three warrants satisfied were for a September 1981 delinquency.

Robert and Betty Nyman, d/b/a Nyman & Nyman, had outstanding sales tax assessments against them for July, August, October and November 1981 and March, April and May 1982. Their attorney, Ronald Walker, testified that he had no knowledge of these outstanding assessments except as to the warrants for September 1981 which were paid and satisfied. No one requested a clearance certificate pursuant to s. 77.52(18), Wis. Stats.

The Commission held that the taxpayers were successors to the seller's business under s. 77.52(18), Wis. Stats., and section Tax 11.91(1)(a), Wis. Adm. Code. At the time of sale of the business to the taxpayers, the seller was liable for unpaid sales tax for the period under review. 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., the taxpayers' failure to withhold from the purchase price an amount sufficient to cover this liability renders them liable for that amount. The department is not estopped from assessing such tax.

The taxpayers have not appealed this decision.

Security Savings and Loan Association vs. Wisconsin Department of Revenue (Court of Appeals, District I, June 21, 1985). The Wisconsin Tax Appeals Commission issued a decision upholding two tax assessments against Security Savings and Loan Association (Security). (See WTB #32 for a summary of the Wisconsin Tax Appeals Commission's decision.) Security petitioned for judicial review of the decision pursuant to ch. 227, Wis. Stats. The Circuit Court held that the assessments were proper, but that the Wisconsin Department of Revenue was estopped from collecting the tax from Security. The department appealed from the Circuit Court's judgment, contending that the doctrine of equitable estoppel is not applicable in this case. Security cross-appealed, contending that it has no use tax liability for items it gave away as premiums.

Prior to 1972, Security began to give away various premiums to attract new depositors. Security bought the premiums from both in-state and out-of-state vendors. Security also purchased various nonpremium items, such as office supplies, from in-state and out-of-state vendors. In September of 1972, Security was audited by the Department of Revenue. Security received a copy of the auditor's report, which stated "[a] review of the taxpayer's operations indicated that there was no liability for sales or use tax, nor were any sales or use tax returns filed." Security did not file use and sales tax returns until 1976 when the department advised Security that it was incorrectly reporting its tax liability.

On December 17, 1976, Security was assessed additional taxes for the first three quarters of 1976. On May 26, 1977, the department issued another assessment for additional taxes for the period beginning January 1, 1971 and ending June 30, 1976. Security petitioned for redetermination of both the assessments.

At the hearing before the Commission, Security conceded liability for use tax for the nonpremium items purchased from out-of-state vendors. Security contested its tax liability for the premium items purchased in-state or out-of-state on the ground that the depositor, not Security, was the "user" of the premiums within the meaning of s. 77.53, Wis. Stats., the use tax statute.

Security also contested its tax liability for premium and nonpremium items purchased from in-state vendors. Security objected to the assessment on the ground that the burden of taxation for in-state sales is on the vendor. The department ordinarily taxes retail transactions by collecting from vendors. In instances where collection of sales tax from a vendor is impossible, the department collects use tax from the vendee instead. At the hearing, a representative of the Department of Revenue testified that the department was barred by the statute of limitations from collecting from Security's vendors and, therefore, assessed use tax against Security.

Although it noted in its opinion that there was a possibility that the assessment would result in a double tax for Security, the Commission nonetheless upheld the department's assessments. The Circuit Court also affirmed the assessments, but held that the department was estopped from collecting from Security.

Security contends that it was not the "user" of the premiums as that term is employed in ch. 77, Wis. Stats. and, therefore, has no use tax liability.

The person who acquires the property to give it away is a user or consumer rather than a reseller, and is liable for the use tax *(Department of Revenue v. Milwaukee Brewers Baseball Club,* 111 Wis. 2d 571, 576 (1983)). The acquisition of promotional items which are not for resale is a taxable event. Therefore, Security is subject to the use tax on the premiums that it purchased to give away to its customers.

The other issue presented by this appeal is whether the department is estopped from collecting the taxes in question as a result of the audit report transmitted to Security in 1972. Estoppel should be applied against the government with utmost caution and restraint *(Department of Revenue vs. Moebius Printing Co.,* 89 Wis. 2d 610, 638 (1979)). Nevertheless, a governmental agency may be estopped even when it acts in its governmental capacity. The defense of equitable estoppel consists of action or non-action by one against whom estoppel is asserted that induces reasonable reliance thereon by the other, either in action or non-action, to his detriment. The department contends that application of the doctrine is inappropriate because Security suffered no detriment, and its reliance on the 1972 audit was unreasonable.

The facts in this case parallel those in *Moebius*. The Court of Appeals concluded that it was reasonable for Security to rely on the auditor's report which stated that Security had no liability for sales or use tax. Furthermore, Security's reliance was to its detriment. Because Security no longer had recourse to the seller due to the lapse in time between the transactions and the redetermined assessment, Security was forced to accept the department's determination that the seller did not remit the sales tax at the time of the purchases. The Commission itself conceded that the department's failure to collect the tax from the seller before the statute of limitations ran may have subjected Security to double taxation. The Circuit Court correctly decided that the department is estopped from collecting the additional tax assessments from Security.

The department has appealed this decision to the Supreme Court.

Wisconsin Telephone Company, et al. vs. Wisconsin Department of Revenue and Mark Musolf, as Secretary of the Wisconsin Department of Revenue (Court of Appeals, District IV, June 25, 1985). Wisconsin Telephone Company and others appeal from a summary judgment which held s. 77.52(2)(a)4, Wis. Stats., constitutional. The issue is whether the sales tax imposed by s. 77.52(2)(a)4 on interstate telephone calls originating in Wisconsin and billed to Wisconsin telephones impermissibly burdens interstate commerce in violation of the commerce clause, U.S. Const. art. I, sec. 8, cl. 3. (See WTB #37 for a summary of the Circuit Court's decision.)

The taxpayers argue that the tax violates the commerce clause because (a) the interstate telephone "activity" lacks a sufficient nexus with Wisconsin; (b) the tax is not apportioned to activity solely in Wisconsin and therefore creates the risk of multiple taxation of the interstate telephone activity outside Wisconsin; (c) the tax discriminates against interstate commerce; and (d) the tax is not fairly related to services provided by Wisconsin to the taxpayers.

Complete Auto Transit v. Brady, Inc., 430 U.S. 274, *reh. denied*, 430 U.S. 976 (1977), established the standard for determining the constitutionality of a state tax which affects interstate commerce. To withstand a challenge under the commerce clause a tax must (a) apply to an activity having a substantial nexus with the taxing state; (b) be fairly apportioned; (c) not discriminate against interstate commerce; and (d) be fairly related to the services provided by the state.

A. Substantial Nexus

The taxpayers contend that an interstate phone call originating from and billed to a telephone in Wisconsin does not have a sufficient nexus with Wisconsin to justify the tax. They rely on *Midwestern Gas Transmission Co. v. Revenue Dept.*, 84 Wis. 2d 261, 271 (1978), which struck down a use tax on gas consumed by two compressor stations because the consumption was an integral part of interstate commerce that did not have a substantial nexus with the state. The taxpayers argued that *Midwestern Gas* is on point because the interstate telephone call passing through Wisconsin, like the gas transmission, is taxed midstream in the process of interstate commerce before it has terminated, and without realistic separation from the process.

The Court rejected this argument. The s. 77.52(2)(a)4, Wis. Stats., tax is not imposed on interstate activity midstream, but on the sale at the call's origin, an activity which occurs in Wisconsin. The sellers and buyers of the telephone services are located in Wisconsin. The placing of the telephone call and subsequent billing occur in Wisconsin. These factors sufficiently establish Wisconsin's nexus with these telephone service sales. The same factors establish that the sale of service is a local incident that is separate from the interstate process.

B. Fair Apportionment and Risk of Multiple Taxation

The taxpayers contend that the tax is not fairly apportioned and that it poses the risk of multiple taxation. Fair apportionment requires the avoidance of any unfair burden on interstate commerce resulting from more than one jurisdiction imposing the same tax on the same activity.

While s. 77.52(2)(a)4, Wis. Stats., is an unapportioned tax, no risk of multiple taxation has been shown. An unapportioned tax, while suspect, is not per se unconstitutional *(General Motors Corp. v. Washington*, 377 U.S. 436, 448 (1964)).

The taxpayers argue that the existence of a gross receipts tax, which is found in eight other states and the District of Columbia, presents a risk of multiple taxation. They contend that revenues transferred from their telephone companies to telephone companies in those jurisdictions, pursuant to the pooling and division of revenues from interstate calls, will be subject to a gross receipts tax in those jurisdictions in addition to the Wisconsin sales tax.

Wisconsin also imposes a gross receipts tax on telephone companies (s. 76.38(5), Wis. Stats.). The tax is based on gross revenues derived from toll services which are attributable to Wisconsin. The gross receipts tax and sales tax, however, are imposed on different transactions and property. The sales tax is imposed on the privilege of making retail sales of service to Wisconsin consumers. The gross receipts tax is a surrogate property tax, which taxes equipment and property as valued by revenue.

The taxpayers have not shown how another jurisdiction might tax the sale of telephone services so as to establish a significant risk of multiple taxation. Practicalities appear to preclude the possibility. The seller is located in Wisconsin; the call originates from and is billed in Wisconsin. No similar sales tax can be practically imposed on the receiving or nonbilled telephone equipment because no sale is made there. The Supreme Court of Alaska reached a similar conclusion in *Douglas v. Glacier State Tel. Co.*, 615 P. 2d 580, 588 (Alaska 1980).

In addition, no other state would appear to have a legal right equal to Wisconsin's to impose a tax on the sale of telephone service originating and billed in Wisconsin because of the lack of a comparable nexus. The taxpayers have not shown a significant risk of multiple taxation.

C. Discrimination Against Interstate Commerce

A tax does not discriminate against interstate commerce if it places interstate and intrastate activities on an equal footing *(McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 48-49 (1940)). Section 77.52(2)(a)4, Wis. Stats., taxes equally each telephone call originating in Wisconsin and billed to a Wisconsin phone, whether the call is interstate or intrastate. The tax,

therefore, does not discriminate against interstate commerce.

The taxpayers contend the tax discriminates against interstate commerce because it creates multiple burdens to which local commerce is not exposed. The Court rejected the multiple burden argument when discussing apportionment.

D. Fair Relationship to Services Provided by the State

The test of the tax's fair relationship to the benefits enjoyed is whether the state has given anything for which it can ask for something in return *(Wisconsin v. J.C. Penney Co.,* 311 U.S. 435, 444 (1940)). This test is closely related to whether the interstate activity has a substantial nexus with the state *(Commonwealth Edison Co. v. Montana,* 453 U.S. 609, 625-26 (1981)). The measure of the tax must be reasonably related to the extent of the contact with the state because the activity and its participants may properly be made to bear a just portion of the tax burden.

The measure of the tax — the percentage of Wisconsin sales — need not be in precise proportion to the services provided in Wisconsin. A reasonable relation is required, and that standard is met here. The tax is imposed on calls originating from and billed in Wisconsin. The taxpayers are all incorporated, organized, or doing a substantial share of their business in Wisconsin. They enjoy police and fire protection and other benefits of doing business within the state. Deference is accorded the legislature's determination of the appropriate level of taxation. The tax is assessed in proportion to the companies' sales in Wisconsin. The Court concluded the sales tax is reasonably related to the services provided by Wisconsin.

Use Tax

Lastly, the taxpayers argue that "the use tax, which would be imposed in the absence of a sales tax, is invalid for the same reasons that the sales tax is invalid." Section 77.52(3), Wis. Stats., provides that "[t]he taxes imposed by this section may be collected from the consumer or user." The Court has concluded that their attack on s. 77.52(2)(a)4 is without merit and therefore rejects their challenge to s. 77.52(3).

The taxpayers have not met their burden of proving s. 77.52(2)(a)4, Wis. Stats., unconstitutional beyond a reasonable doubt. The Court of Appeals therefore affirmed the decision of the Circuit Court.

The taxpayers have appealed this decision to the Supreme Court.

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. Allocation of Death Benefit Exclusion Between Capital Gain and Ordinary Income Parts of a Lump-Sum Distribution
2. Credit for Taxes Paid to Other States- New York Minimum Income Tax
3. Section 179 Deduction Available for Married Persons
4. Using the Section 179 Deduction to Create the Same Depreciable Basis for Wisconsin and Federal Purposes for Individuals

Corporation Franchise/Income Taxes

1. Accounting for Accrued Expenses of a Corporation
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3. Certificate of Authority and Nexus
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7. Wisconsin Treatment of Government-Owned and Company-Operated Plants for Property Factor Purposes
8. Taxability of ACT (Advance Corporation Tax) Refunds
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Homestead Credit

1. Alien Student's Qualification for Homestead Credit

Farmland Preservation Credit

1. "Property Taxes Accrued" for the Year Farmland Is Inherited

INDIVIDUAL INCOME TAXES

1. Allocation of Death Benefit Exclusion Between Capital Gain and Ordinary Income Parts of a Lump-Sum Distribution

Statutes: section 71.05(1)(a)8, 1983 Wis. Stats.

Note: See the Tax Release titled "Treatment for Capital Gain Portion of a Lump-Sum Distribution From a Retirement Plan or Profit Sharing Plan" in *Wisconsin Tax Bulletin* #34.

Facts and Question: During 1984, Taxpayer A received a lump-sum distribution from her deceased spouse's qualified retirement plan. The 1984 Form 1099-R issued to Taxpayer A reported $16,000 of the distribution as taxable income: $12,000 allocated to ordinary income and $4,000 allocated to capital gain income. Taxpayer A elected to figure her federal tax on the distribution using the 10-year Averaging Method (Internal Revenue Code (IRC) Section 402(e)(4)(L)). On federal Form 4972, "Special 10-year Averaging Method", she elected to report the entire $16,000 as ordinary income and deducted the $5,000 death benefit exclusion against the $16,000.