At a shareholders meeting of McHenry Sand & Gravel, an Illinois corporation, of March 1, 1976, the stockholders voted to form a subsidiary corporation for purposes of forming a Delaware corporation. A Certificate of Incorporation for Charles S & G Merging Corporation was issued by the State of Delaware on March 18, 1976. On March 19, 1976, at a first meeting of the directors of Charles S & G Merging Corporation, it was voted to merge the Illinois corporation, McHenry Sand & Gravel, into the Charles S & G Merging Corporation of Delaware.

The State of Illinois issued Articles of Merger to McHenry Sand & Gravel Co., Inc., an Illinois corporation, recognizing the merger with Charles S & G Merging Corporation and renaming Charles S & G Merging Corporation to McHenry Sand & Gravel, a Delaware corporation, on March 29, 1976. McHenry Sand & Gravel, an Illinois corporation, ceased to do business as of that date.

On May 1, 1976, all stockholders of McHenry Sand & Gravel, an Illinois corporation, exchanged all stock held in McHenry Sand & Gravel for stock in McHenry Sand & Gravel, a Delaware corporation. All stockholders in McHenry Sand & Gravel, an Illinois corporation, continued to be the stockholders of McHenry Sand & Gravel Co., Inc., a Delaware corporation. The board of directors and officers of the Illinois corporation immediately prior to merger were the same as those of the Delaware corporation immediately following the merger. The McHenry Sand & Gravel Co., Inc., an Illinois corporation, held the same assets and liabilities as the Delaware corporation.

The merging of the Illinois corporation with the Delaware corporation was the legally necessary process by which McHenry Sand & Gravel was allowed to move the entity to a more favorable tax climate than existed in Illinois.

The Commission held that for purposes of business loss carryforward under s. 71.06, Wis. Stats., the taxpayer, a Delaware corporation, was the same "corporation" as its Illinois predecessor which sustained the net business loss in 1974. Thus, it was entitled to offset such loss carryforward against its net business income in fiscal 1978 and 1979. The taxpayer's legal machinations in reorganizing as a Delaware corporation merely effected a change in domicile which does not defeat the carryforward.

The department has appealed this decision to the Circuit Court.

Milwaukee Seasoning Laboratories, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 10, 1986). The taxpayer is a Wisconsin corporation engaged in the custom blending of seasoning compounds and the sale of compounds and spices to the food processing industry. The taxpayer's sole plant and headquarters were throughout the period in question located in Germantown, Wisconsin.

The single issue raised by the taxpayer was whether its income for purposes of Wisconsin franchise taxation was subject to apportionment during the fiscal years 1977 through 1979 because of the taxpayer's business activities in the states of Michigan and Minnesota. The taxpayer first apportioned its income between the states of Wisconsin and Michigan on its return for the 1977 fiscal year, and Minnesota was added to its apportionment beginning with the 1978 fiscal year.

During the 1977 through 1979 fiscal periods, the sales activities of the taxpayer in Michigan were conducted directly through its Wisconsin headquarters by mail or telephone contacts with Michigan customers, or through one employe-sales representative who resided in Michigan and was employed by the taxpayer. For the 1978 and 1979 fiscal periods, its activities in Minnesota were likewise conducted directly from headquarters or through an employe-sales representative who resided in Minnesota. Each of these sales representatives was paid on a salaried basis. Their solicitation in such states was frequent.

By the department's audit dated May 19, 1980, the taxpayer's Michigan sales, which it had reported as apportionable for 1977 through 1979, were "thrown back" to Wisconsin under Wis. Adm. Code section Tax 2.39(5)(c)6 and employe compensation and car lease expenses in conjunction with the Michigan salesman's activities reported by the taxpayer as attributable to Michigan were assigned by the department to Wisconsin under Wis. Adm. Code section 2.39(3). Similar adjustments were made concerning Minnesota sales, property and payroll for 1978 and 1979. Property was reported as apportionable only in fiscal 1978.

The taxpayer's sales representative for Michigan, David Mott, was assigned territory including Michigan, northern Indiana and Phoenix, Arizona pursuing sales leads and servicing existing accounts. He resided in Michigan where he maintained a small office which he had rented prior to his employment by the taxpayer and which he continued to rent without reimbursement from the taxpayer during the period in question. He used that office as his base of operations and paid Michigan tax upon the furnishings. Other than Mott's business card placed on the door for convenience of the postman, there was no logo or other indicia identifying the taxpayer. The office was used solely for the taxpayer's business.

The taxpayer's sales representative for Minnesota, Urban Gaida, resided in Minnesota. His assigned territory included Minnesota, and various points in Washington, Oregon, California, Arizona, Utah, South Dakota, Nebraska, Arkansas and North Dakota. He operated from an office in his home used solely for the taxpayer's business and the expenses for which were borne by him without reimbursement from the taxpayer. He stored large bags of sausage compound or bags or barrels of phosphate for the poultry industry in his garage, but was unsure as to the amount kept during the period in question.

The taxpayer leased cars for the use of these sales representatives which were used in Michigan and Minnesota. The locale in which the car leases were executed was not established.

The two sales representatives had limited authority to deviate from listed prices, primarily in the case of custom blends or to meet a competitor's price or the customer's cost parameters. Orders solicited by the sales representa-

tives were not required to be approved by the home office but were honored as placed. They verified and picked up damaged products from customers on occasion. They also from time to time collected customer payments where collection problems occurred. Some technical assistance concerning product use or development of blends was given by them at the customer's place of business. They provided such credit information as was derived by the taxpayer which lacked any apparent credit policy or investigative procedures.

The taxpayer shipped all ordered products from Wisconsin to the customers with the possible exception of some of Mr. Gaida's product and occasionally delivered the products in these states by its own truck, but common carrier was the usual method.

The taxpayer's two sales representatives in question did not perform services in this state.

The taxpayer filed income, franchise or similar business tax returns with Michigan and Minnesota and based upon the taxpayer's statements rather than their own audits and investigations, each state issued determinations that the taxpayer had "nexus" therein during the periods in question.

The Commission held that the sales activities of the taxpayer in the states of Michigan and Minnesota during the period in question exceeded "solicitation" and created "nexus" in such states as those terms are used in Wis. Adm. Code section Tax 2.39(5)(c)6 and 15 U.S.C. Section 381. (See also Wis. Adm. Code section Tax 2.82(1)(b), (3)(b) and (4)(a).) Those states had "jurisdiction to impose an income tax or a franchise tax measured by net income" and the taxpayer was "subject to taxation by this state and at least one other state" within the meaning of Wis. Adm. Code section Tax 2.39(2) and was "engaged in business within and without the state" within the meaning of s. 71.07(2), Wis. Stats., and was therefore entitled to apportion its income.

The taxpayer's sales shipped from Wisconsin destined for Michigan and Minnesota were within the income tax jurisdiction of such states and were not Wisconsin sales for purposes of computing the sales factor under s. 71.07(2)(c)1 and 2, Wis. Stats., and Wis. Adm. Code section Tax 2.39(5)(c)1 and 6.

The compensation of the taxpayer's sales representatives during the period in question was not "paid in this state" so as to be includable as Wisconsin payroll in the numerator of the payroll factor under s. 71.07(2)(b)1 and 4, Wis. Stats.

The taxpayer's rental of automobiles assigned to its traveling employes was therefore not "included in the numerator of the property factor" because the compensation was not "assigned to this state under the payroll factor" within the meaning of Wis. Adm. Code section Tax 2.39(3)(a).

The department has not appealed this decision.

Pabst Brewing Company vs. Wisconsin Department of Revenue (Court of Appeals, District IV, March 25, 1986). The Wisconsin Department of Revenue appealed from a judgment reversing the Tax Appeals Commission's decision upholding the department's assessment of additional franchise tax against Pabst Brewing Company. The issue was whether Pabst's sales of beer to out-of-state wholesalers who pick up the beer at its Milwaukee plant for out-of-state distribution are sales "in this state" under s. 71.07(2)(c)2, Wis. Stats.

Pabst operates a brewery in Milwaukee. Because it sells beer to in-state and out-of-state wholesalers, Pabst apportions its net income for Wisconsin tax purposes on the basis of property, payroll and sales factors established in s. 71.07(2), Wis. Stats. The sales factor is a fraction. The numerator is the taxpayer's total sales in Wisconsin, and the denominator is its total sales everywhere. Sales of tangible personal property are "in this state" and included in the numerator if "the property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale . . ." When computing its sales factor between 1973 and 1977, Pabst excluded from the numerator all beer sold to out-of-state wholesalers. The department subsequently assessed Pabst an additional $707,729.71 in taxes for these years. The assessment resulted from the department's treating beer pickups in Wisconsin by out-of-state wholesalers as Wisconsin sales and adding those sales to the numerator. Pabst challenged the resulting assessment before the Tax Appeals Commission and Circuit Court. The Commission upheld the department's determination and the Circuit Court reversed. (See WTB #35 and #37 for summaries of the prior decisions.)

The Court of Appeals concluded s. 71.07(2)(c)2, Wis. Stats., ambiguously treats out-of-state purchasers. Two reasonable readings are possible. The phrase "within this state" may be read to modify "delivered or shipped." That reading makes the purchaser's physical possession of the product in Wisconsin the condition for a Wisconsin sale. The department and Commission read the statute that way to conclude that Pabst's sales to out-of-state wholesalers who pick up the product in Milwaukee are sales "in this state." Alternatively, the phrase "within this state" may be read to modify "purchaser" rather than "delivered or shipped." If that is the reading, the purchaser's business location controls. Pabst argued and the Circuit Court accepted this position.

The Court of Appeals concluded that the Legislature intends "within this state" to modify "purchaser." Section 71.07(2)(c)2, Wis. Stats., provides that whether a sale occurs in this state is unaffected by "f.o.b. point or other conditions of the sale." The Legislature's intent regarding the effect of those two factors is beyond dispute. Yet the department's approach makes a condition of the sale, the method of delivery, the central factor when determining Wisconsin sales, notwithstanding the contrary legislative intent expressed in s. 71.07(2 (c)2. The Court therefore concluded that the location of the purchaser controls. That out-of-state wholesalers pick up Pabst's beer in Wisconsin rather than having it delivered is therefore immaterial. The department incorrectly relied on this distinction to impose additional franchise tax on Pabst.

The Court of Appeals concluded that because the location of the purchasing wholesaler rather than the pickup controls whether the sales are in this state,

the beer pickups are not sales "in this state." The Court therefore affirmed the judgment of the Circuit Court.

The department appealed this decision to the Supreme Court, which denied its petition for review. Therefore, the decision of the Court of Appeals is binding on the department.

Schumacher, Nelson, Grambo & Associates, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, November 1, 1985). The issue for the Commission to determine is whether the taxpayer may take a deduction for loss of clients previously purchased in the acquisition of an accounting practice under Section 165(a), Internal Revenue Code or whether the files are depreciable under Section 167, Internal Revenue Code.

Schumacher, Nelson, Grambo & Associates, Inc. is an accounting firm in the Eau Claire/Altoona area actively engaged in business. In 1976 the taxpayer entered into an agreement to purchase the accounting practice of Jerald Nelson. The purchase consisted of goodwill $9,000, specified client list $8,765, and office equipment.

On January 1, 1981, the taxpayer purchased the accounting practice of Daniel T. Mayer in Medford, Wisconsin. The purchase agreement between the taxpayer and Mayer was $5,000 for physical assets, $34,282 for client list and $6,668 for goodwill.

On July 21, 1981, the taxpayer purchased the accounting practice of Karl F. Miller of Medford, Wisconsin. The purchase agreement between the taxpayer and Miller was client list $9,067.50, goodwill $432.50 and equipment $500.

Each client list purchased in the transactions was a list of "regular" clients. The list did not include annual tax clients which did not need monthly or continuous contact with the firm. The values assigned client lists, goodwill and equipment were determined in each purchase by independent negotiations and were arrived at in a reasonable manner. Each client within each list was assigned a specific value based on a determinable figure from past billing revenue.

In the Nelson and Miller purchases, the taxpayer already had an active practice in the cities in which the purchases took place. The taxpayer's interest in those purchases was the acquisition of accounts or client files for the purpose of increased revenue. In the Mayer purchase, the taxpayer wanted to expand the geographical base of service and purchase revenue producing accounts.

As purchased, these client files do have an ascertainable cost basis separate and distinct from goodwill. These specific files are a wasting asset and have a limited useful life of 5 1/2 years measurable by the testimony of the taxpayer that the client list turns over in 5 1/2 years.

The Commission concluded that the taxpayer did purchase client files which were capital expenditures under Section 263, Internal Revenue Code, and those assets may be depreciated under Section 167(a).

The department has not appealed this decision.

Suburban Beverages, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, January 21, 1986). The issue for resolution was whether the $88,761.66 of interest paid on a promissory note to Pabst Brewing Company is "interest paid on money borrowed or interest on notes or securities issued by a corporation to purchase its own capital stock" and thus nondeductible under s. 71.04(2), Wis. Stats.

On June 4, 1979, Pabst Brewing Company (Pabst) purchased from Michael J. Moriarty all of the issued and outstanding capital stock of Suburban Beverages, Inc. (Suburban), a Wisconsin corporation, which was at that time wholly owned by Michael J. Moriarty. In payment for the 720 shares of common stock of Suburban, Pabst paid to Moriarty the sum of $1,119,378.61.

Suburban was at the time of the purchase a wholesale distributor of Pabst products. Pabst and Suburban were engaged in a dispute over Pabst's attempts to terminate Suburban as its distributor. To end that dispute, Pabst entered the agreement to purchase all of the stock of Suburban.

On the same date, June 4, 1979, Pabst sold to S-B of Milwaukee, Inc. (S-B), a Wisconsin corporation wholly owned by David A. and Sunny C. Schultz, the common stock of Suburban which Pabst had on that date purchased from Moriarty. S-B paid $1,119,378.61 for such stock (the exact purchase price which Pabst had paid to Moriarty) with a promissory note payable in certain installments designated therein. The principal balance outstanding bore interest at the rate of 9% per annum payable quarterly on September 1, December 1, March 1 and June 1 of each year commencing September 1, 1979.

Effective August 31, 1979, S-B, the parent of Suburban and the holder of all of its issued and outstanding capital stock, was merged with and into Suburban. The stock of Suburban held by S-B was cancelled and one share of Suburban common stock was issued to David A. and Sunny C. Schultz for each of the 1,000 shares of S-B held by them.

The merger of S-B and Suburban was undertaken to eliminate the additional burden and expense of maintaining an extra layer of corporate administration. Suburban, rather than S-B, was continued in existence as the surviving corporation in order to avoid upsetting Suburban's licensing and the contractual and the other business relationships it had as a wholesale distributor of Pabst's products (including its wholesaler's license, its distributor's agreement, and its relationships with its customers).

As a result of the merger, the taxpayer, as the surviving corporation, succeeded to all of the assets and assumed all of the liabilities of S-B, its former parent.

The taxpayer deducted the interest paid on the promissory note to Pabst on its Wisconsin corporation franchise tax return for the year ending June 30, 1980, in the amount of $88,761.66.

On September 8, 1981, the department sent a Notice of Amount Due to the

taxpayer, denying the deduction of interest paid to Pabst on the note issued by S-B for the purchase by S-B of Suburban, which purchase occurred before the two corporations merged.

The Commission concluded that interest paid by the taxpayer during the taxable year ending June 30, 1980 on a note issued by S-B of Milwaukee, Inc. to purchase the stock of the taxpayer was not "interest paid on money borrowed or interest on notes or securities issued by a corporation to purchase its own capital stock" under s. 71.04(2)(a)3, Wis. Stats.

The department has not appealed this decision.

SALES/USE TAXES

Anderson Laboratories, Inc. vs. Wisconsin Department of Revenue (Wisconsin Tax Appeals Commission, December 2, 1985). The issues being raised by the taxpayer were as follows:

A. Whether the taxpayer has incurred a liability for payment of use tax by reason of purchases from out-of-state vendors of machinery and equipment, chemicals and testing supplies, and office supplies used in the performance of metallurgical testing and analysis.

B. If it is determined that a use tax liability exists, then whether imposition of penalties, in addition to interest, is justified.

The taxpayer was a metallurgical testing laboratory which performed testing services for its customers which were foundries, fabricators and forging houses. The taxpayer's customers provided it with metal samples for testing. The purpose of the tests was a quality control check for the taxpayer's customers in order to assure that their products met specifications.

The taxpayer performed chemical analysis (either analyzing metal samples for components using either acid and chemicals or spectrographic instruments) or physical analysis (utilizing tensile testing equipment and Charpy impact machines to test hardness of the samples). After completion of the analysis, the taxpayer prepared standard reports on each test according to specifications, such as those of the Society of Automotive Engineers or American Standards for Testing Materials.

At least two foundries, Grede Foundry and Wisconsin Centrifugal, have similar in-house laboratories which are considered as part of the manufacturing process for sales and use tax purposes.

During the years at issue, the taxpayer purchased machinery and equipment and supplies utilized in its operations ex-tax. The department assessed use tax on these purchases after determining that the taxpayer was not entitled to the manufacturer's exemption under s. 77.54(6)(a), Wis. Stats. The taxpayer did not file any sales and use tax returns for the period January 1, 1970 through December 31, 1979. The taxpayer employed a certified public accounting firm to prepare its tax returns and this accounting firm did not recommend the filing of sales and use tax returns during the period at issue. No evidence was presented to show the reason for the failure of the accounting firm to recommend filing of sales and use tax returns.

The Commission held that during the period at issue, the taxpayer's operations did not come within the definition of "manufacturing" as provided in s. 77.51(27), Wis. Stats., but rather the taxpayer was engaged in providing a service to manufacturers. The taxpayer was subject to use tax on the purchase of machinery and equipment and supplies used in its operations. The taxpayer has not shown that its failure to file sales and use tax returns for the period at issue was due to good cause and not neglect, and therefore, the department's imposition of the negligence penalty under s. 77.60(4), Wis. Stats., was proper.

The taxpayer has not appealed this decision.

Wisconsin Department of Revenue vs. Johnson and Johnson, a partnership, d/b/a Asphalt Products Co., and Asphalt Products Co., Inc. (Court of Appeals, District IV, March 6, 1986). The Department of Revenue appealed from an order affirming a decision of the Tax Appeals Commission. The Commission concluded that purchases of raw materials by Asphalt Products Company (APC) were exempt from the sales tax under ss. 77.52(13) and (14) and 77.51 (18), Wis. Stats. The sole issue was whether APC is a real property construction contractor within the meaning of s. 77.51(18).

APC purchases raw materials from suppliers for use in the manufacture of emulsified asphalt products. The end product is sold to local units of government for road repair and construction. Generally, under s. 77.52(13) and (14), Wis. Stats., APC's purchases would be exempt from the sales tax if the materials were simply resold to the ultimate consumers. If, however, APC is a "contractor" as that term is defined in s. 77.51(18), Wis. Stats.—if it is a "consumer" of the purchased materials in that its resale to the ultimate customer involves the "performance of real property construction activities" by APC—the exemption is unavailable. The Commission and the Circuit Court concluded that APC's activities did not fit the statutory definition and that APC was entitled to the benefits of the "resale exemption." (See WTB# 41 for a summary of the Circuit Court's decision.)

APC manufactures emulsified asphalt products from materials purchased from suppliers. It then sells these products to tax-exempt entities, primarily towns, municipalities and counties, for use in road construction and repair. APC's sales involve more than simple delivery; it surfaces the road with the product as part of a "seal coating" process—one of several steps in highway construction or repair. The purchaser prepares the road for APC's spraying operations and reroutes traffic during the application period. When APC's operations are completed, the purchaser completes the overall project with its own personnel.The purchaser controls the method, time and date of delivery and specifies the amount of asphalt to be applied. It designates the thickness, width and number of applications. The overall project is under the supervision of a state inspector or county foreman.

APC uses its own distribution equipment, expertise and personnel to apply the asphalt. It insures that the asphalt

meets specific tolerances for purity, temperature and composition in conformance with the purchaser's requirements. When spraying the asphalt, APC uses its own transport truck which is fitted with attached spray bars and nozzles. To insure uniformity of application, APC calibrates pressure gauges, meters and controls so that the angle of the spray nozzle and the height of the spray bar are properly adjusted. APC also maintains appropriate temperatures for various types and grades of asphalt and, in general, monitors and controls the spraying so as to meet the purchaser's specifications.

APC argued that the word "contractor," as it appears in s. 77.51(18), Wis. Stats., is ambiguous and that the Court of Appeals should define it, as the Circuit Court did, as requiring "control [over] the details of the work." The Court's definition is inapposite. It is taken from *Bond v. Harrel*, 13 Wis. 2d 369, 374 (1961), where the Court was defining the term for only a very limited purpose: to distinguish between an independent contractor and an agent in the context of vicarious tort liability. Section 77.51(18) specifically defines the term for purposes of the sales tax exemption; and when the Legislature has undertaken to define a term for a specific application, the Court will not add to or expand that definition.

Applying emulsified asphalt is one of six major steps in highway surface treatment. APC is responsible for accomplishing its particular task according to established specifications. It performs a distinct part of the on-site road construction and repair work for the projects in which it participates. In this light, APC becomes the ultimate consumer of the purchased materials in the statutory sense: it "consume[s] and use[s] the[m] . . . in creating a new and different product"—the finished roadway.

The Court of Appeals held that APC is a consumer of tangible personal property used by it in real property construction activities within the meaning of s. 77.51 (18), Wis. Stats. As a result, it may not avail itself of the "resale exemption" provided by s. 77.52(13) and (14) with respect to its purchases of raw materials.

The taxpayer appealed this decision to the Supreme Court, which denied its petition for review.

Wisconsin Department of Revenue vs. Thiry Daems Cheese Factory, Inc. (Circuit Court of Dane County, January 20, 1986). This matter was before the Circuit Court for judicial review under ch. 227, Wis. Stats., of an oral decision and order of the Wisconsin Tax Appeals Commission. On July 13, 1978, Thiry Daems purchased a 20-gauge, 20,000 gallon silo-type storage tank from Hercules Incorporated, a Minnesota corporation, for $24,400. No sales or use tax was paid in connection with this purchase. The tank was purchased for use in Thiry Daems' cheese processing business.

The cheese factory dispatches various trucks, throughout the day, which collect milk from farms. The trucks dump the collected milk in one of the two tanks Thiry Daems owns (one of those tanks being the subject of the tax disputed here), and go back out for successive loads. Having two such tanks allows Thiry Daems to clean the alternate tank not in use. The tanks are made of stainless steel, and the new tank is insulated in order to keep the milk cool. If Thiry Daems owned no such tanks, each truck would only be able to make one collection trip each day since on return to the cheese factory, there would be no place to dump the milk.

There is an agitator attached to the tank which stirs the milk to counter separation of the milk and cream. No additions or adulterations are made of the milk while it is in the storage tank. From the storage tank, the milk is pumped through the pasteurizer, into the cheese-making vat. Only as much milk as will be used the next day, starting at 3:00 a.m. when the day's cheese processing begins, is put in a tank; that is, the tank is completely emptied each day. If the cheese processing were begun with less than a full day's supply of milk, and milk were added to the vat throughout the day—e.g., if the storage tank was not used—the resulting cheese product would be off-grade cheese, ineligible for the state brand, and therefore non-competitive on the cheese market.

The Commission found Thiry Daems' tank purchase to be exempt from taxation because, in the Commission's view, the tank is the beginning of the process of manufacturing and is exclusively and directly used in the manufacturing of the cheese production within the intent and meaning of s. 77.54(6)(a), Wis. Stats.

This case involved two issues:

A. What is the appropriate scope of review?

B. Whether the tank purchased by Thiry Daems qualifies for tax exemption, as "machines and specific processing equipment . . . exclusively and directly used" in the manufacturing of cheese. Or, if instead, the tank is strictly a means of storage and therefore subject to taxation pursuant to section Tax 11.39(2)(b), Wis. Adm. Code, which states that "manufacturing does not include storage."

The Commission's interpretation of s. 77.54(6)(a), Wis. Stats., and ruling that the tank in question is exempt from taxation, can stand without upsetting the purpose of the Legislature, as evidenced by the review and formal promulgation of section Tax 11.39(2)(b), Wis. Adm. Code.

The Legislature plainly intended to tax the means of transportation and storage of the cheese and its ingredients, before and after its manufacture, while exempting from taxation the components of the actual manufacturing process of the cheese. While the tank in this case has the external appearance of storage, the Commission has found, and the Circuit Court agreed, that the tank functions directly and exclusively in the manufacture of cheese. The milk tank is used exclusively and directly in collecting enough milk, and maintaining its condition, to produce grade cheese on a daily production schedule. The milk tank is not only essential to the operation of the plant, but also an actual part of the operation of the plant. The tank is a piece of equipment used to make grade cheese.

The determination that the tank is part of the cheese manufacturing process and exempt from taxation under s. 77.54(6)(a), Wis. Stats., is not incon-

sistent with section Tax 11.39(2) (b) and 11.40(2)(c) and (3)(d), Wis. Adm. Code, since both the Commission and the Circuit Court have concluded that Thiry Daems' milk tank is *not* used as a means of storage as contemplated by the Legislature. Therefore, the decision and order of the Wisconsin Tax Appeals Commission were affirmed.

The department has not appealed this decision.

Wisconsin Department of Revenue vs. Vita Plus Corporation (Circuit Court of Dane County, March 13, 1986). This was an action to review a decision of the Wisconsin Tax Appeals Commission which reversed the department's action disallowing a tax exemption under s. 77.54(6)(a), Wis. Stats., claimed by Vita Plus Corporation (Vita Plus) and reversed the department's action denying a reduction to Vita Plus' franchise tax under s. 71.043(2), Wis. Stats., on property used in connection with the blending and secondary cleaning operations which are performed in the production of Vita Plus' finished product.

It was the department's position that the blending and secondary cleaning operations do not constitute "manufacturing" within the intent and meaning of s. 77.51 (27), Wis. Stats. The department contended that the manufacturing process terminates at the time the grain is placed into the conditioning bins, and therefore the property at issue does not qualify for the sales and use tax or franchise tax exemptions. Specifically, the department argued that because the Commission failed to make a legal distinction between "storage" and "manufacturing": (1) the Commission's conclusions of law are based on an erroneous view of the law and (2) Findings of Fact Nos. 14-28 are not supported by the record.

The basic issue for the Circuit Court to resolve is whether the blending and secondary cleaning operations constitute "manufacturing" under s. 77.51 (27), Wis. Stats.

First, the Court found that the Commission's conclusions of law were not based upon an erroneous view of the law. The Court found that the Commission did not fail to make a legal distinction between "storage" and "manufacturing." Accordingly, the Commission's Findings of Fact Nos. 14-28 are supported by substantial evidence in the record. For these reasons, it was the view of the Circuit Court that the Commission's decision and order dated August 16, 1985 be affirmed in all respects.

The department 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. Taxability of Railroad Unemployment Insurance Benefits
2. Taxing Supplemental Unemployment Benefits to Nonresidents
3. Wisconsin Tax Treatment of Distributions Received Upon the Termination of a Disqualified Employe Savings Trust
4. Exception to the Penalty for Underpayment of Estimated Tax Based on a Return for the Preceding Taxable Year
5. Interest Allowable in Computing the Wisconsin Itemized Deduction Credit

Income, Franchise or Sales/Use Taxes

1. Application of $20 Late Filing Fee
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Corporation Franchise/Income Taxes

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1. Nexus for State and County Sales/Use Taxes

Farmland Preservation Credit

1. Proration of Property Taxes Between Buyer and Seller

INDIVIDUAL INCOME TAXES

1. Taxability of Railroad Unemployment Insurance Benefits

Statutes: section 71.05(1)(b)4, 1983 Wis. Stats.

Facts and Question: For federal income tax purposes, Section 85 of the Internal Revenue Code provides that all or a portion of unemployment benefits which are received from the U.S. Railroad Retirement Board - Bureau of Unemployment and Sickness Insurance are subject to federal income tax. Can Wisconsin impose an income tax on amounts of railroad unemployment insurance benefits which are taxable for federal income tax purposes?

Answer: No, railroad unemployment insurance and sickness benefits are exempt from Wisconsin income tax. Section 352(e) of the United States Code bars state and local taxation of railroad unemployment insurance benefits. On a 1985 Form 1, railroad unemployment insurance and sickness benefits included in federal adjusted gross income are subtracted from federal income on line 34.