sessment constitutes machines and specific processing equipment used exclusively and directly by a manufacturer, the Cooperative, in manufacturing tangible personal property (s. 77.54(6)(a), Stats.).

The Court of Appeals concluded that under s. 77.54(6)(a), Stats., Artex is not exempt from paying a use tax on the materials used in the construction of the grain bins, and reversed the decision of the trial court. Artex' argument overlooks two important facts:

A. Artex was assessed a use tax on materials purchased from out-of-state firms to construct the grain bin and not a sales tax on the sale of a piece of machinery used in the manufacturing process.

B. Artex is merely the contractor who constructed the bin, and not the manufacturer who is using the bin in its manufacturing process.

The taxpayer has appealed this decision to the Supreme Court.

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Computer and data processing— programs. *International Business Machines Corporation vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 23, 1987). The principal issues as presented for decision are the following:

A. Taxability for Wisconsin sales tax purposes of the taxpayer's licensing of what it now calls "feature" computer programs to Wisconsin customers during the period in question;

B. If not taxable in whole or in part, the proper amount of refund to which the taxpayer is entitled; and

C. Whether the taxpayer's amendment of the claims for refund before this Commission was permitted for the period covered by field audit.

The taxpayer was at all relevant times a corporation organized and existing under the laws of the State of New York with its corporate headquarters at Old Orchard Road in the Village of Armonk, Westchester County, New York State. Among other items, the taxpayer is engaged in the manufacture of computer programs. It manufactures two general classes of programs: standard programs (also called "build to plan") and non-standard programs (also called "build to order"). No standard programs are involved in this case. There are two kinds of non-standard programs: "custom programs" and "feature programs". There are no "custom programs," as IBM uses that term, involved in this case.

Feature programs are manufactured by the taxpayer to customer requirements specific to a unique customer and a unique customer's computer. Feature programs are made one at a time to the special order of the customer. A feature program as finally built for the customer does not exist as such before the customer orders it. The taxpayer does not sell feature programs, but rather grants the customer a "license" to use them, for which it charges a fee. The terms of the license are stated in a standard form of written agreement between the taxpayer and the customer.

IBM grants the customer a non-transferrable and non-exclusive license to use the programs on the customer's computer designated in a written supplement to the agreement. The charges applicable to each program consist of monthly charges (or a one-time charge in lieu thereof) and any initial charge and/or process charge. Most commonly, the customer pays a monthly license charge. Depending on the program, there may also be an initial license charge, typically three to four times the monthly license charge. Other forms of charges are a "paid-up" license, where if the customer makes a certain number of monthly payments, the customer continues to use the program without making additional payments, and a "one-time" charge, where a customer for one initial payment can continue to use the program as long as desired. IBM provides the same services to licensees of feature programs no matter what pricing mechanism is used. The pricing mechanism selected is typically a matter of economics so that IBM does not wind up billing very small amounts to customers. The charges depend on the nature of the program and the time the customer has the right to use the program, not the physical attributes of the magnetic tape or diskette or the time the customer has physical possession of the magnetic tape or diskette.

The customer agrees to pay amounts equal to any taxes, other than property and income taxes. IBM has stated that if it successfully obtains a refund in this case, it will be passed on to its customers. IBM has not stated what it intends to do with what would amount to substantial interest due on any refund.

The licensing agreement states that IBM "will notify the Customer of the type of program storage media required for shipment," and that "unless returnable or disposable media are used, the program storage media must be provided by the Customer or ordered from IBM at the applicable charge." The diskettes and tapes IBM ordinarily uses to transmit programs are returnable media.

IBM does not charge the customer for tapes or diskettes used to transmit the feature program and agrees to replace the program and program storage media without charge if they are lost or damaged during the shipment from IBM. If they are lost or damaged while in the customer's possession, IBM agrees to replace them "at the applicable charges, if any, for processing, distribution and/or program storage media." If the customer receives the program and loses the storage media before the program is installed, there is no additional charge for replacing the program and the media.

The feature program is IBM's property, and is never sold to the customer outright. It is copyrighted in IBM's name, and IBM never sells or transfers the copyright. Notice of copyright is not filed on each feature program, but rather on each program module which constitutes a prewritten segment of a program.

A copy of the program is transmitted to the customer, typically using magnetic tape or diskettes, but telephone, microwave and satellite transmission can be used. The program is installed and tested, usually being changed to take into account the customer's environment. The customer is given documentation, training and testing so the program can be used effectively and efficiently. At the end of the installation and test period, there may be significant differences between the program as originally received by the customer and the program as it then exists. The customer is provided updating and maintenance services to keep the program up to date and resolve problems.

If the taxpayer separately priced the maintenance and updating services provided with the licensing of a feature program, the value of these services would account for approximately 35% of the license fee.

Tangible personal property in the form of magnetic tapes and diskettes was transferred by the taxpayer to its customers as part of its licensing of feature programs. The cost of blank tapes and diskettes which are subsequently used as the medium for copies of the feature programs is minimal in comparison to the license charge. However, the customer did not receive or license blank tape or diskettes, but rather tapes or diskettes enhanced with coded programming information.

When a customer obtains a feature program, what the customer receives is the coded information included in the program, in machine readable form, plus the documentation and installation instructions included in the program or provided separately, all of which allow the computer to perform a certain function such as doing a payroll. That is the object of the transaction of ordering the feature program — to obtain a machine readable copy of a program designed for use in a certain computer environment. The coded information included in the program is in the form of electronic or magnetic impulses, but could have been in the form of punch cards, compact disk, laser disk of some other form capable of retaining information in binary machine language readable by the computer regardless of whether the information is data or instructions. There are various ways other than physical possession of a tape or diskette to make a program accessible to a computer, including transmission over a telephone line.

The Commission concluded:

A. The taxpayer's gross receipts from the licensing of feature programs were not derived from the transfer of tangible personal property, described in s. 77.51 (4)(h), Wis. Stats., or the furnishing of services described in s. 77.52(2)(a)11, Wis. Stats., and are therefore not taxable under the provisions of s. 77.52, Wis. Stats.

B. The burden of proving the department's determination of a refund due to be incorrect is generally on the taxpayer. However, the department did not make an administrative determination as to the correct amount of sales tax refund pertaining to the program licenses in question in the proceedings before it, has been unable or prevented from obtaining information to enable it to do so from the taxpayer, and has not conceded the correctness of the amount of the taxpayer's claim. Therefore, the Commission lacks any power of review of the amount at this time.

C. Since the additional amount claimed by the taxpayer is based upon a recomputation of the claim originally submitted, rather than on a new claim for refund of a different type of transaction from that covered by the original claim, the field audit assessment is not, under s. 77.59(4), Wis. Stats., a bar to such amendment since it did exempt from finality the original claim for refund.

D. This decision is rendered by this Commission in accordance with s. 73.01 (4)(e), Stats. Therefore, that department's determination that the taxpayer's licensing of feature programs was taxable under s. 77.52, Wis. Stats., is reversed. This matter is remanded to the department for a determination of the amount of refund to which the taxpayer is entitled, not to exceed the amount of $961,072.14, plus interest.

The department has appealed this decision to the Circuit Court.

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Water conditioners. *Irvin Kozlovsky vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 15, 1987). The primary issue before this Commission is whether the taxpayer provided a nontaxable water conditioning service or rented tangible personal property subject to sales and use tax. A secondary issue is whether the salt sold and delivered by the taxpayer to his customers is the sale of tangible personal property subject to sales and use tax. During the period involved the taxpayer owned and operated, as a sole proprietor, a business known as Culligan Water Conditioning of Waupaca.

During the period involved the taxpayer provided water purification and conditioning, i.e., water softening for his customers, by two means: portable exchange units and automatic water conditioning systems.

The portable exchange units consist of a self-contained tank that when installed by the taxpayer, at his customer's location, purifies, conditions and softens the water it is connected to, through an ionic exchange, which removes calcium and replaces it with sodium. This tank is replaced by the taxpayer periodically, normally every 28 days, when its cycle is completed or when it loses its effectiveness. The old tank or unit is then cleaned, sterilized, and regenerated by the taxpayer and used again. This method was only available on a rental basis.

The second means used by the taxpayer to provide soft water to his customers was the installation, by the taxpayer at his customer's location, of a more permanent automatic water conditioning system which utilized the same ionic exchange but consisted of one tank that removed minerals and another to store salt. It was completely maintained and serviced by the taxpayer and was available on either a rental or purchase basis.

The customer had no control over the operation of the water conditioning equipment including the replacement of salt. He instructed his customers not to touch the equipment and provided a Watts telephone line in the event problems arose. None of his customers were provided a service manual. If a customer rented an automatic unit he or she was required to purchase and use the taxpayer's salt. There was no separate charge for the brine used to regenerate the portable units.

The Commission concluded that the use of a properly generated and efficiently functioning water softening apparatus (not the taxpayer's personal services) was the primary motivation of the taxpayer's customers and thus the providing of portable exchange units and automatic water softeners to those customers for a monthly fee is the rental of tangible personal property within the intent and meaning of s. 77.51(4)(j), Wis. Stats. The gross receipts received from the rental of tangible personal property at retail are subject to taxation under the provisions of s. 77.52(1), Wis. Stats. The salt sold and delivered to customers constitutes the sale of tangible personal property and is subject to taxation under the provisions of s. 77.52(1), Wis. Stats.

The taxpayer has appealed this decision to the Circuit Court.

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HOMESTEAD CREDIT

Property taxes accrued—joint ownership. *Myrtle Berglin vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 26, 1987). The issue pending before the Commission is whether the department was correct in making the adjustment to the amounts allowed for property taxes accrued and rent constituting property taxes accrued for the claimant's 1985 homestead credit claim.

During the entire year of 1985, Myrtle L. Berglin and Gustav Berglin (her brother) were listed on the title to the real estate located at 921 Ellis Avenue, Ashland, Wisconsin 54806, as the owners of record in joint tenancy. This property is the property on which the claimant's homestead credit claims are based. The real estate tax bills for the homestead for the year in question show the property owners as Myrtle and Gustav Berglin. The claimant paid all of the real estate taxes on the real property during the period in question.

In the notice explaining the adjustment in the amount of the claimant's 1985 homestead credit claim, the department adjusted the amount shown on the homestead credit claim form for taxes and rent paid by reducing the property tax amount to one-half of the net general tax paid. The department also allowed the claimant to claim an additional 25% of the real estate taxes paid as rent constituting property tax accrued for 1985 because Gustav Berglin did not reside in the homestead.

The Commission concluded that during the period under review, the claimant was deemed to have an ownership interest of only 50% in the homestead in question, as record title to the homestead was held jointly by her with her brother. Even though the claimant paid the entire 1985 property tax bill, as one of the two joint owners on the homestead, under the provisions of s. 71.09(7)(a)8, Stats., she was entitled to claim as her 1985 property taxes accrued only 50% of the 1985 taxes, rather than 100% of the 1985 taxes. The department acted properly when it adjusted the claimant's 1985 property taxes accrued to 50% of the tax bill on the homestead plus 25% of the remaining 50% of the 1985 tax bill as rent constituting property taxes accrued.

The claimant has not appealed this decision.

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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.)

The following Tax Releases are included:

Individual Income Taxes

Corporation Franchise/Income Taxes

Sales/Use Taxes

County Sales/Use Taxes

INDIVIDUAL INCOME TAXES

1. Limitations on Farm Losses

Statutes: Section 71.05(1)(a)26, 1985 Wis. Stats.

Note: This Tax Release applies only with respect to taxable years 1986 and thereafter.

Background: Section 71.05(1)(a)26 was created by 1985 Wisconsin Act 29. The new add modification limits the amount of combined net losses, exclusive of net gains, from farming businesses which may be claimed on the Wisconsin income tax return. Losses under sections 1211 (capital losses) and 1231 (loss on the sale or other disposition of property used in a trade or business) of the Internal Revenue Code are disregarded. Farm losses will be added back to arrive at Wisconsin taxable income to the extent:

a) farm losses are greater than $20,000 if nonfarm Wisconsin adjusted gross income is greater than $55,000 but not greater than $75,000, or
b) farm losses are greater than $17,500 if nonfarm Wisconsin adjusted gross income is greater than $75,000 but not greater than $100,000, or
c) farm losses are greater than $15,000 if nonfarm Wisconsin adjusted gross income is greater than $100,000 but not greater than $150,000, or
d) farm losses are greater than $12,500 if nonfarm Wisconsin adjusted gross income is greater than $150,000 and not greater than $200,000, or