



2017 SENATE BILL 203

April 20, 2017 - Introduced by Senators MARKLEIN, CRAIG, KAPENGA, NASS, OLSEN and STROEBEL, cosponsored by Representatives KATZMA, MACCO, BERNIER, E. BROOKS, R. BROOKS, DUCHOW, GANNON, HUTTON, JACQUE, JARCHOW, KOOYENGA, KREMER, KUGLITSCH, KULP, MURPHY, NEYLON, RIPP, SKOWRONSKI and TAUCHEN. Referred to Committee on Revenue, Financial Institutions and Rural Issues.

1 **AN ACT** *to repeal* 20.566 (1) (hn) and 73.03 (28d); *to amend* 71.10 (1m) (c), 71.30
2 (2m) (c), 71.80 (1m) (c) and 73.16 (3) (b); and *to create* 71.98 (8) of the statutes;
3 **relating to:** the length of the recognition period for built-in gains tax; the
4 evidentiary standard for proving a transaction has economic substance;
5 participation by the Department of Revenue in the Multistate Tax Commission
6 Audit Program; and reliance by a taxpayer on past audits by the Department
7 of Revenue.

Analysis by the Legislative Reference Bureau

This bill makes the following tax law changes: 1) changes the length of the recognition period for built-in gains tax; 2) changes the standard of proof a taxpayer must meet to establish that a transaction has economic substance for income and franchise tax purposes; 3) eliminates the Department of Revenue's obligation and authority to participate in the Multistate Tax Commission Audit Program; and 4) eliminates an exception to current law that allows a taxpayer to rely on past audits to avoid tax liability in later audits.

Length of recognition period for built-in gains tax

The bill changes the period of time after a corporation elects tax-option corporation status, called a recognition period, during which a tax-option corporation that sells certain assets for a profit must pay income or franchise taxes

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on the profit as though the tax-option corporation were a regular corporation. That tax is commonly called a built-in gains tax.

Under current law, the term “recognition period” is defined by reference to federal law, but the definition is not automatically updated to reflect changes to federal law. The federal Protecting Americans from Tax Hikes Act of 2015 makes permanent a reduction in the recognition period under federal law from ten years to five years. The bill provides that the recognition period for purposes of Wisconsin law is the same as under federal law, as federal law is amended from time to time.

Evidentiary standard to prove transaction has economic substance

The bill changes the standard of proof a taxpayer must meet to establish that a transaction has economic substance for income and franchise tax purposes.

Under current law, if a taxpayer engages in a transaction without economic substance to create a loss, to reduce taxable income, or to increase credits allowed in determining Wisconsin income or franchise tax, DOR may disregard the transaction for purposes of calculating the taxpayer’s tax liability. Under current law, there is a rebuttable presumption that transactions between members of a controlled group lack economic substance.

The bill changes the evidentiary standard for a taxpayer to rebut the presumption from “clear and convincing evidence” to “a preponderance of the evidence.”

Multistate Tax Commission Audit Program

The bill eliminates DOR’s obligation and authority to participate in the Multistate Tax Commission Audit Program.

Reliance by taxpayer on past audits

The bill eliminates an exception to current law that allows a taxpayer to rely on past audits to avoid tax liability in later audits. Under current law, a taxpayer subject to an audit determination by DOR is not liable for amounts asserted by DOR if the following conditions are met:

1. The tax issue giving rise to the liability was present during a period of time for which the taxpayer was previously audited.
2. DOR identified the tax issue during the prior audit.
3. DOR did not assert any liability for the tax issue during the prior audit.

Current law provides certain exceptions to a taxpayer’s ability to rely on past audits to avoid liability in later audits.

The bill eliminates an exception that provides that, if a taxpayer did not give DOR adequate and accurate information regarding the tax issue during the prior audit or if the taxpayer and DOR settled the tax issue in the prior audit by a written agreement, the taxpayer cannot rely on the prior audit to avoid liability for the tax issue in a later audit. Under the bill, a taxpayer can rely on a prior audit even if the taxpayer provided inadequate or inaccurate information during the prior audit or settled the same tax issue with DOR during the prior audit.

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For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 20.566 (1) (hn) of the statutes is repealed.

2 **SECTION 2.** 71.10 (1m) (c) of the statutes is amended to read:

3 71.10 **(1m)** (c) With respect to ~~transactions~~ a transaction between members of
4 a controlled group, as defined in section 267 (f) (1) of the Internal Revenue Code, ~~such~~
5 ~~transactions~~ the transaction shall be presumed to lack economic substance, and the
6 taxpayer shall bear the burden of establishing by ~~clear and convincing a~~
7 preponderance of the evidence that ~~a~~ the transaction or ~~a~~ the series of transactions
8 between the taxpayer and one or more members of the controlled group has economic
9 substance.

10 **SECTION 3.** 71.30 (2m) (c) of the statutes is amended to read:

11 71.30 **(2m)** (c) With respect to ~~transactions~~ a transaction between members of
12 a controlled group, as defined in section 267 (f) (1) of the Internal Revenue Code, ~~such~~
13 ~~transactions~~ the transaction shall be presumed to lack economic substance, and the
14 taxpayer shall bear the burden of establishing by ~~clear and convincing a~~
15 preponderance of the evidence that ~~a~~ the transaction or ~~a~~ the series of transactions
16 between the taxpayer and one or more members of the controlled group has economic
17 substance.

18 **SECTION 4.** 71.80 (1m) (c) of the statutes is amended to read:

19 71.80 **(1m)** (c) With respect to ~~transactions~~ a transaction between members of
20 a controlled group, as defined in section 267 (f) (1) of the Internal Revenue Code, ~~such~~
21 ~~transactions~~ the transaction shall be presumed to lack economic substance, and the

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1 taxpayer shall bear the burden of establishing by ~~clear and convincing a~~
2 preponderance of the evidence that ~~a the~~ transaction or ~~a the~~ series of transactions
3 between the taxpayer and one or more members of the controlled group has economic
4 substance.

5 **SECTION 5.** 71.98 (8) of the statutes is created to read:

6 71.98 (8) RECOGNITION PERIOD FOR BUILT-IN GAINS TAX. For taxable years
7 beginning after December 31, 2017, and for purposes of determining the recognition
8 period for tax imposed on certain built-in gains, section 1374 (d) (7) of the Internal
9 Revenue Code means section 1374 (d) (7) of the federal Internal Revenue Code in
10 effect on the date the recognition period of the corporation begins.

11 **SECTION 6.** 73.03 (28d) of the statutes is repealed.

12 **SECTION 7.** 73.16 (3) (b) of the statutes is amended to read:

13 73.16 (3) (b) This subsection does not apply to any period associated with an
14 audit determination, if the period begins after the promulgation of a rule,
15 dissemination of written guidance to the public or to the person who is subject to the
16 audit determination, the effective date of a statute, or the date on which a tax appeals
17 commission or court decision becomes final and conclusive and if the rule, guidance,
18 statute, or decision imposes the liability as a result of the tax issue described in par.

19 ~~(a) 1. This subsection does not apply to any period associated with an audit~~
20 ~~determination if the taxpayer did not give the department employee adequate and~~
21 ~~accurate information regarding the tax issue in the prior audit determination or if~~
22 ~~the tax issue was settled in the prior audit determination by a written agreement~~
23 ~~between the department and the taxpayer.~~

24 **SECTION 8. Nonstatutory provisions.**

