



State of Wisconsin

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STEPHEN R. MILLER
CHIEF

February 25, 2009

MEMORANDUM

To: Representative Strachota

From: Joseph T. Kreye, Sr. Legislative Attorney, (608) 266-2263
Marc E. Shovers, Managing Attorney, (608) 266-0129

Subject: Technical Memorandum to **2009 AB 38** (LRB-0038/2) by **DOR**

We received the attached technical memorandum relating to your bill. This copy is for your information and your file.

If you wish to discuss this memorandum or the necessity of revising your bill or preparing an amendment, please contact me.

MEMORANDUM

February 19, 2009

TO: Joseph Kreye
Marc Shovers
Legislative Reference Bureau

FROM: Rebecca Boldt
Department of Revenue

SUBJECT: Technical Memorandum on Assembly Bill 38 (LRB 0038/2): Capital Gains from a Wisconsin Business

The Department has the following concerns related to the bill:

Section 71.05(24)(a)3. "Long-term capital gain" means the gain realized from the sale of any asset held more than one year..." It is not clear if this refers to both capital assets and assets used in a trade or business. If it applies to assets used in a trade or business, the bill should clarify whether it applies to the portion of the gain that is treated as ordinary income as well as to the portion treated as capital gain.

If deferral applies to both capital and business assets, the bill should clarify whether it applies to the sales of items that do not get capital gain treatment for federal purposes unless held for longer periods of time (e.g., the dairy cattle that must be held more than 24 months before the gain is treated as long-term capital gain.)

Allowing the deferral of gain on assets used in a trade or business will add a great deal of complexity and record keeping for the taxpayer. For example, for federal tax purposes, the gain on the sale of an asset used in a trade or business may be treated as ordinary income, capital gain income, or it may offset losses on other assets used in a trade or business. If the gain is deferred due to the purchase of another depreciable asset used in a trade or business, the taxpayer will have a different basis for federal and Wisconsin tax purposes. This means separate depreciation schedules will be needed for Wisconsin. When this asset is later sold, the taxpayer will have to determine the portion of the gain that was previously treated as ordinary income or used to offset losses as this portion would not qualify for the 60% capital gain exclusion. (Sec. 71.05(6)(b)9 provides the capital gain exclusion for capital gain as computed under the IRC. The amount treated as ordinary income or used to offset losses is not capital gain as computed under the IRC.)

A definite time should be specified in 71.05(24)(b)1 and 3 instead of "immediately." It would be better to say within 2 days, 5 days, etc., to avoid disagreement as to what is "immediately." The

form the claimant uses to notify the department could be attached to the Wisconsin income tax return for the year instead of "immediately" notifying the department.

The initial applicability date would pose a problem if this proposal were enacted late in 2009 after forms had been finalized for printing. It would be better if enacted after July 31, 2009, that it would first apply to taxable years beginning on January 1 after the date of enactment.

If you have any questions regarding this technical memorandum, please contact Brad Caruth at (608) 261-8984 or bradley.caruth@revenue.wi.gov.

cc: Representative Strachota