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RICHARD CHAMPAGNE
CHIEF

May 22, 2015

MEMORANDUM

To: Representative Macco

From: Marc E. Shovers, Senior Attorney, (608) 266–0129

Subject: Technical Memorandum to **2015 AB 236** (LRB–1861/4) **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.

M E M O R A N D U M

May 21, 2015

AB 236

TO: Marc Shovers
Legislative Reference Bureau

FROM: Mike Wagner
Department of Revenue

SUBJECT: Technical Memorandum on LRB 1861/4: Relating to Tax-Exempt Accounts for Qualified Expenses Incurred by Individuals with Disabilities and Granting Rule-Making Authority

The Department has the following concerns related to the bill:

Section 16.643:

1. IRS Notice 2015-18 provides advance notification of anticipated guidance that the owner of an ABLE account is the designated beneficiary of the account. Additionally, a person other than the designated beneficiary with signature authority over the account may neither have nor acquire any beneficial interest in the account. Under this guidance, a parent or guardian cannot be the owner of an account as proposed in s. 16.643(a).

2. Section 529A(b)(1)(C) of the IRC provides a qualified ABLE program is a program that allows for the establishment of an ABLE account only for a designated beneficiary who is a resident of the state that establishes and maintains the program or a resident of a contracting state. To comply with this provision, a residency requirement should be incorporated into the provisions of s. 16.643.

3. Section 529A(c)(3)(B) of the IRC concerns a distribution to a "beneficiary" of an account upon the death of the "designated beneficiary" of the account. As s. 16.643(3)(a)3. and (d) only use the term "beneficiary" (defined as an eligible individual for whom an account is established), it is unclear what happens when the beneficiary dies. Also, as the owner of an account is the designated beneficiary (see item #1 above) the phrases should be revised: "if the account owner is not the beneficiary," and, "upon the death of the beneficiary who is the account owner". Finally, it is not clear who has first right to the balance in the account (another designated beneficiary to whom the account is transferred, the state, a beneficiary of the account other than the designated beneficiary, or the designated beneficiary's estate) when the beneficiary dies.

Chapter 71

1. Section 529A(c)(1) of the Internal Revenue Code (IRC) provides the earnings from an ABLE account are included in the income of the distibutee in the taxable year a distribution occurs. Exceptions are provided for:
   - Distributions for qualified disability expenses of the designated beneficiary;
   - Rollovers from one account to another;
   - A change in the designated beneficiary of an account; and

- The return of a contribution by the due date (including extensions) of the return for the taxable year in which the contribution is made.

Assuming section 529A of the IRC is adopted for Wisconsin purposes in the Governor's Budget Bill as proposed by DOR, the addition to income prescribed by s. 71.05(6)(a)27 should not be necessary.

2. The addition to income provided in s. 71.05(6)(a)27 only includes the earnings portion of nonqualified withdrawals from an account, which should not be necessary as described above. However, the IRC does not allow for a federal deduction for contributions while this bill allows a state deduction for contributions. As such Wisconsin should require an addition to income for the deductible contribution amount when a nonqualified withdrawal occurs.

3. The provisions of s. 71.05(6)(a)28 need clarification. See item #3 under "Section 16.643."

4. The current draft raises concerns with the subtraction under s. 71.05(6)(b)52:
   - It is not clear when a contribution must be made in order to be eligible for a subtraction.
   - The subtraction could be interpreted to apply to a deposit that is a rollover contribution or a transfer because of a change in beneficiary.
   - Under the IRC, accrued earnings on an account are not subject to tax; allowing a subtraction for accrued earnings provides a double benefit.
   - Part-year and nonresidents of Wisconsin are allowed the full amount of the subtraction.
   - The subtraction is allowed when income not taxable to Wisconsin is used to make a contribution.

   In response to the concerns above, DOR recommends that s. 71.05(6)(b)52 read as follows:

   71.05(6)(b) 52. An amount paid into a support account for an individual with a disability, as described in s. 16.643, in the taxable year in which the contribution is made, calculated as follows:

   a. Subject to the limits under s. 16.643 (3) (c) 1. and 2., an amount paid by an account owner or any other person into an account described under s. 16.643. This subdivision does not apply to any amount attributable to a rollover or transfer from an account described under s. 16.643 to another such account or from another state's qualified ABLE program, as described in 26 USC 529A (b), to an account described under s. 16.643.
   b. For an individual who is a nonresident or part-year resident of this state, multiply the amount calculated under subd. 52. a. by a fraction the numerator of which is the individual's wages, salary, tips, unearned income and net earnings from a trade or business that are taxable by this state and the denominator of which is the individual's total wages, salary, tips, unearned income and net earnings from a trade or business. In this subd. 52. b., for married persons filing separately "wages, salary, tips, unearned income and net earnings from a trade or business" means the separate wages, salary, tips, unearned income and net earnings from a trade or business of each spouse, and for married persons filing jointly "wages, salary, tips, unearned income and net earnings from a trade or business" means the total wages, salary, tips, unearned income and net earnings from a trade or business of both spouses.
   c. Reduce the amount calculated under subd. 52. a. or b. to the individual's aggregate wages, salary, tips, unearned income and net earnings from a trade or business that are taxable by this state.

5. Because qualified disability expenses include education expenses, an individual could receive a deduction for contributing to an account and a second deduction for tuition under s. 71.05(6)(b)28 when an amount is withdrawn from the account and used to pay tuition expenses. To prevent a double deduction, s. 71.05(6)(b)28h should be amended to include an amount withdrawn from an account described in s. 16.643 as a source of payment for which a tuition deduction may not be claimed.

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