

Clearinghouse Rule 06-063

PROPOSED ORDER OF THE DEPARTMENT OF REVENUE REPEALING, RENUMBERING AND AMENDING, AMENDING, AND REPEALING AND RECREATING RULES

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 2.39(6)(b)4.b. and (7); **renumber and amend** Tax 2.39(6)(b)4.c.; **amend** Tax 2.39(1), (2)(a), (b), and (e), and (6)(a) and (b)4.a.; and **repeal and recreate** Tax 2.39(3) and (6)(c); **relating to** the computation of the apportionment fraction of multistate businesses.

Analysis by the Department of Revenue

Statutes interpreted: ss. 71.04 (4), (4m), (5) (intro.), (6) (intro.), (7) (d), (df), and (dh), (8) (b), (8) (c), and (10) and 71.25 (6), (6m), (7) (intro.), (8) (intro.), (9) (d), (df), and (dh), (10) (c), (11), and (14), Stats.

Statutory authority: s. 71.80 (1) (c), Stats.

Explanation of agency authority: Under s. 71.80 (1) (c), Stats., the department may make such regulations as it shall deem necessary in order to carry out chapter 71 of the Wisconsin Statutes, relating to income and franchise taxes.

Related statute or rule: ss. 71.04 (4), (4m), (5) (intro.), (6) (intro.), (7) (d), (df), and (dh), (8) (b), (8) (c), and (10) and 71.25 (6), (6m), (7) (intro.), (8) (intro.), (9) (d), (df), and (dh), (10) (c), (11), and (14), Stats.

Plain language analysis: This proposed rule order prescribes the method to be used for apportioning the apportionable income of multistate businesses.

Section 1. Tax 2.39(1), is amended to clarify that the apportionment formula applies only to apportionable income and to conform language, style, and format to Legislative Council Rules Clearinghouse standards.

Tax 2.39 (2)(a), (b), and (e) are amended to conform language, style, and format to Legislative Council Rules Clearinghouse standards.

Section 2. Tax 2.39(3) is repealed and recreated to do all of the following:

a. Reflect the phase-in of an apportionment formula consisting solely of a sales factor, as provided by 2003 Wisconsin Act 37.

b. Prescribe the weight to be given to the other apportionment factors for taxable years beginning before January 1, 2008, if a factor is omitted.

c. Reflect the computation of the sales factor if the numerator or denominator of the factor is a positive number, zero, or a negative number, as provided by 2003 Wisconsin Act 37.

d. List specialized industries that are not subject to the standard apportionment formula, as provided by 2003 Wisconsin Act 37.

Section 3. Tax 2.39(6)(a) is amended to conform language, style, and format to Legislative Council Rules Clearinghouse standards.

Sections 4, 5, and 6. Tax 2.39(6)(b)4.a. is amended to remove obsolete language. Tax 2.39(6)(b)4.b. is repealed because it is no longer needed. Tax 2.39(6)(b)4.c. is renumbered Tax 2.39(6)(b)4.b. and amended to remove obsolete language.

Section 7. Tax 2.39(6)(c) is repealed and recreated to do all of the following:

a. Change the way that receipts from the use of computer software and from services are attributed to Wisconsin, as prescribed in 2005 Wisconsin Act 25, effective for taxable years beginning on or after January 1, 2005.

b. Clarify when receipts from the lease, rental, licensing, or other use of tangible personal property are attributed to Wisconsin.

c. Add a note about the Wisconsin Tax Appeals Commission's decision in *The Hearst Corporation vs. Wisconsin Department of Revenue*, Docket No. I-8511, May 15, 1990. The commission decided that the income producing activity with respect to certain income from broadcasting network programming and national advertising occurred in Wisconsin.

Section 8. Tax 2.39(7) is repealed because it is obsolete. The treatment of partnerships was revised by 2001 Wisconsin Act 16, which amended s. 71.22 (1r) and created s. 71.25 (15), Stats., effective for taxable years of partnership partners or limited liability company members beginning on or after January 1, 2001.

Summary of, and comparison with, existing or proposed federal regulation: There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

Comparison with rules in adjacent states:

- Illinois' apportionment formula consists solely of a sales factor. Sales of tangible personal property are sourced on a destination basis. If the taxpayer is not subject to tax in the destination state, a throwback rule applies. Generally, sales of services are attributed to the state where the income-producing activity occurred. If the income-producing activity occurred in more than one state, the sale is attributed to the state with the greater costs of performance. Gross receipts from the sale, lease, rental, or licensing of real property are attributable to Illinois if the property is located in Illinois. Gross receipts from the rental, lease, or licensing of tangible personal property are attributable to Illinois if the property is located in Illinois, or based on the ratio of the time the property was used in Illinois to the total time the property was used everywhere. Gross receipts from services are attributable to Illinois based on the ratio of the time spent performing the services in Illinois to the total time spent performing services everywhere.
- Iowa's apportionment formula consists solely of a sales factor. Sales of tangible personal property are sourced on a destination basis. If the taxpayer is not subject to

tax in the destination state, a throwout rule applies. Sales of services are sourced where the benefit of the service is received. Gross receipts from rents, royalties, or other fees received for the use of real property are attributable to Iowa if the property is located in Iowa. Gross receipts from rents, royalties, license fees, or other fees received for the use of tangible personal property are attributable to Iowa if the property is located in Iowa, or based on the ratio of the time the property was used in Iowa to the total time the property was used everywhere. Royalty income from intangible property is attributable to Iowa if the taxpayer's commercial domicile is in Iowa.

- Michigan's apportionment formula for 2006 consists of a three-factor formula with sales weighted 92.5%, and property and payroll each weighted 3.75%. Sales of tangible personal property are sourced on a destination basis. Michigan does not have a throwback rule. Sales of services are sourced where the income-producing activity occurred. If the income-producing activity occurred in more than one state, the sale is attributed to the state with the greater costs of performance.
- Minnesota's apportionment formula consists of a three-factor formula with sales weighted 75%, and property and payroll each weighted 12.5%. Sales of tangible personal property are sourced on a destination basis. Minnesota does not have a throwback rule. Sales, rents, royalties, or other income received in connection with real property are attributable to Minnesota if the property is located in Minnesota. Receipts from the lease or rental of tangible personal property are attributable to Minnesota if the property is located in Minnesota, or based on the extent to which the property was used in Minnesota. Royalties or other income from intangible property is attributable to Minnesota based on the portion of use in the state. If the portion of use in and outside Minnesota cannot be determined, the sales are excluded from the numerator and denominator of the sales factor. Sales of services are sourced where the benefit of the service is received, where the service was ordered, or where the service was billed, depending on the circumstances.

Summary of factual data and analytical methodologies: 2003 Wisconsin Act 37 changed the apportionment formula used by multistate businesses for determining the income taxable by Wisconsin. As a result of this legislation, single sales factor apportionment will be phased in for most businesses. The phase-in of single sales factor apportionment begins for taxable years beginning on January 1, 2006. 2005 Wisconsin Act 25 changed how gross receipts from the use of computer software and from services are sourced for purposes of the apportionment formula. Receipts from the use of computer software are sourced to the location where the software is used. Receipts from services are sourced where the benefit of the service is received. The change in the sourcing rules first applies to taxable years beginning on January 1, 2005. 2001 Wisconsin Act 16 created ss. 71.22 (1r) and 71.25 (15), Stats., effective for taxable years beginning on or after January 1, 2001. These provisions specify that a general or limited partner's share of a partnership's apportionment factors are included in the numerator and denominator of the partner's apportionment factors. Similar treatment applies to members of limited liability companies that are treated as partnerships. The department has determined that it is necessary to revise s. Tax 2.39 to reflect these law changes.

Analysis and supporting documents used to determine effect on small business: The department has determined that there is not a significant fiscal effect on small business. This proposed rule order will only apply to large, multistate companies that are required to determine their Wisconsin income using the apportionment method. Therefore, this proposed rule order does not have a significant effect on small business.

Anticipated costs incurred by private sector: This rule order does not have a significant fiscal effect on the private sector.

Effect on small business: This rule order does not have a significant fiscal effect on small business.

Agency contact person: Please contact Dale Kleven at (608) 266-8253 or dkleven@dor.state.wi.us, if you have any questions regarding this rule order.

Place where comments are to be submitted and deadline for submission: Comments may be submitted to the contact person shown below no later than one week after the public hearing on this proposed rule order is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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SECTION 1. Tax 2.39(1) and (2)(a), (b), and (e) are amended to read:

Tax 2.39(1) GENERAL. Except as provided in sub. (3), any person, except resident individuals, resident estates and resident trusts, engaged in business both in and outside this state shall apportion its apportionable income using the statutory apportionment method as provided in s. 71.04 (4) or 71.25 (6), Stats., when the person's business in this state is an integral part of a unitary business unless the department, in writing, allows reporting on a different basis. Nonapportionable income shall be allocated as provided in s. 71.25 (5) (b), Stats.

(2)(a) "Apportionable income" has the meaning given in s. 71.25 (5) (a), Stats.

(2)(b) "Engaged in business in and outside this state" means having business activity which is sufficient to create nexus in this state and at least one other state or foreign country.

(2)(e) "Nonapportionable income" has the meaning given in s. 71.25 (5) (b), Stats.

SECTION 2. Tax 2.39(3) is repealed and recreated to read:

(3) APPORTIONMENT FRACTION. (a) For taxable years beginning before January 1, 2006, persons engaged in business in and outside this state, except direct air carriers, financial organizations, telecommunications companies, pipeline companies, public utilities, railroads, and

sleeping car companies, as defined in ss. 71.04 (8) (a) and (b) 1. and 71.25 (10) (a) and (b) 1., Stats., and corporations that are authorized to use an alternative method of apportionment under s. 71.25 (14), Stats., shall use an apportionment fraction as described in s. 71.04 (a) or 71.25 (6) (a), Stats. Property, payroll, or sales related to the production of nonapportionable income may not be included in either the numerator or the denominator of any of the apportionment factors.

1. If one of these factors is omitted pursuant to s. 71.04 (10) or 71.25 (11), Stats., the percentages of the fraction represented by the remaining factors shall be adjusted as follows:

a. If either the property factor or payroll factor is omitted, the other factor shall represent 33.3333 percent of the fraction and the sales factor shall represent 66.6667 percent of the fraction.

b. If the sales factor is omitted, the property factor and the payroll factor shall each represent 50 percent of the fraction.

2. If either the numerator or the denominator of the sales factor is zero or a negative number, the sales factor shall be determined as described in s. 71.04 (4m) (a) 1., (b) 1., or (c) 1. or 71.25 (6m) (a) 1., (b) 1., or (c) 1., Stats.

(b) For taxable years beginning after December 31, 2005, and before January 1, 2007, persons engaged in business in and outside this state, except direct air carriers, financial organizations, telecommunications companies, pipeline companies, telecommunications companies, railroads, and sleeping car companies, as defined in ss. 71.04 (8) (a) and (b) 2. and 71.25 (10) (a) and (b) 2., Stats., and corporations that are authorized to use an alternative method of apportionment under s. 71.25 (14), Stats., shall use an apportionment fraction as described in s. 71.04 (b) or 71.25 (6) (b), Stats. Property, payroll, or sales related to the production of nonapportionable income may not be included in either the numerator or the denominator of any of the apportionment factors.

1. If one of these factors is omitted pursuant to s. 71.04 (10) or 71.25 (11), Stats., the percentages of the fraction represented by the remaining factors shall be adjusted as follows:

a. If either the property factor or payroll factor is omitted, the other factor shall represent 25 percent of the fraction and the sales factor shall represent 75 percent of the fraction.

b. If the sales factor is omitted, the property factor and the payroll factor shall each represent 50 percent of the fraction.

2. If either the numerator or the denominator of the sales factor is zero or a negative number, the sales factor shall be determined as described in s. 71.04 (4m) (a) 1., (b) 1., or (c) 1. or 71.25 (6m) (a) 1., (b) 1., or (c) 1., Stats.

(c) For taxable years beginning after December 31, 2006, and before January 1, 2008, persons engaged in business in and outside this state, except direct air carriers, financial organizations, telecommunications companies, pipeline companies, telecommunications companies, railroads, and sleeping car companies, as defined in ss. 71.04 (8) (a) and (b) 2. and 71.25 (10) (a) and (b) 2., Stats., and corporations that are authorized to use an alternative method of apportionment under s. 71.25 (14), Stats., shall use an apportionment fraction as described in s. 71.04 (c) or 71.25 (6) (c), Stats. Property, payroll, or sales related to the production of nonapportionable income may not be included in either the numerator or the denominator of any of the apportionment factors.

1. If one of these factors is omitted pursuant to s. 71.04 (10) or 71.25 (11), Stats., the percentages of the fraction represented by the remaining factors shall be adjusted as follows:

a. If either the property factor or payroll factor is omitted, the other factor shall represent 11.1111 percent of the fraction and the sales factor shall represent 88.8889 percent of the fraction.

b. If the sales factor is omitted, the property factor and the payroll factor shall each represent 50 percent of the fraction.

2. If either the numerator or the denominator of the sales factor is zero or a negative number, the sales factor shall be determined as described in s. 71.04 (4m) (a) 1., (b) 1., or (c) 1. or 71.25 (6m) (a) 1., (b) 1., or (c) 1., Stats.

(d) For taxable years beginning after December 31, 2007, persons engaged in business in and outside this state, except direct air carriers, financial organizations, telecommunications companies, pipeline companies, telecommunications companies, railroads, and sleeping car companies, as defined in ss. 71.04 (8) (a) and (b) 2. and 71.25 (10) (a) and (b) 2., Stats., and corporations that are authorized to use an alternative method of apportionment under s. 71.25 (14), Stats., shall use an apportionment fraction as described in s. 71.04 (d) or 71.25 (6) (d), Stats. Sales related to the production of nonapportionable income may not be included in either the numerator or the denominator of the sales factors. If either the numerator or the denominator of the sales factor is zero or a negative number, the sales factor shall be determined as described in ss. 71.04 (4m) (a) 2., (b) 2., or (c) 2. or 71.25 (6m) (a) 2., (b) 2., or (c) 2., Stats.

Note: See ss. Tax 2.46, 2.47, 2.475, 2.48, 2.49, 2.495, 2.50, 2.502, and 2.505 for special apportionment fractions of interstate direct air carriers, motor carriers, railroads, sleeping car companies, pipelines, financial institutions, broker-dealers, investment advisers, investment companies, underwriters, public utilities, telecommunications companies, and professional sports clubs.

(e) The apportionment method may be used only if the taxpayer is engaged in business both in Wisconsin and at least one other state or foreign country and its business in Wisconsin is an integral part of a unitary business.

Note: Refer to ss. 71.04 (4) and 71.25 (6), Stats., as amended by 2003 Wis. Act 37.

Note: See s. Tax 2.395 for an alternative method of apportioning the income of certain corporations.

SECTION 3. Tax 2.39(6)(a) is amended to read:

(6) SALES FACTOR. (a) *Numerator; denominator.* The numerator of the sales factor shall include the gross receipts from sales that are in this state and the denominator shall include the taxpayer's gross receipts from sales everywhere during the taxable year. Gross receipts that are not derived in the production of apportionable income and items described in ss. 71.04 (7) (f) and 71.25 (9) (f), Stats., may not be included in the sales factor.

SECTION 4. Tax 2.39(6)(b)4.a. is amended to read:

Tax 2.39(6)(b)4.a. Gross receipts from the sales of tangible personal property are in Wisconsin if the property is shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and delivered to the federal government, including its agencies and instrumentalities, in Wisconsin regardless of the f.o.b. point or other conditions of sale. For purposes of this section, only sales for which the federal government makes direct payment to the seller pursuant to the terms of its contract constitute sales to the federal government. Thus, sales by a subcontractor to the prime contractor, the party to the contract with the federal government, do not constitute sales to the federal government.

SECTION 5. Tax 2.39(6)(b)4.b. is repealed.

SECTION 6. Tax 2.39(6)(b)4.c. is renumbered Tax 2.39(6)(b)4.b. and amended to read:

Tax 2.39(6)(b)4.b. Gross receipts from the sales of tangible personal property are in Wisconsin if the property is shipped from an office, store, warehouse, factory or other place of storage in Wisconsin and delivered to the federal government, including its agencies and instrumentalities, outside Wisconsin and the taxpayer does not have nexus in the destination state. The amount included in the numerator of the sales factor shall be 50% of the sale.

Note to Revisor: Remove the note at the end of Tax 2.39(6)(b)4.b. as renumbered.

SECTION 7. Tax 2.39(6)(c) is repealed and recreated to read:

(c) Sales other than sales of tangible personal property attributable to Wisconsin. 1. Except as provided in ss. 71.04 (7) (df) and (dh) and 71.25 (9) (df) and (dh), Stats, gross receipts from transactions other than sales of tangible personal property shall be included in the numerator of the sales factor if the income producing activity which gave rise to the receipts is performed wholly within this state during the taxable year. If the income producing activity is performed partly in and partly outside this state during the taxable year, receipts shall be assigned to this state based upon the ratio of direct costs of performance in this state to the direct costs of performance in all states having jurisdiction to tax the business during the taxable year.

2. For purposes of this paragraph, “income producing activity” means the act or acts engaged in by the taxpayer for the ultimate purpose of obtaining gains or profit.

3. For purposes of this paragraph, “costs of performance” means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

4. The numerator of the sales factor includes gross receipts from the sale, lease, rental, licensing, or other use of real property owned by the taxpayer if the real property is located in this state and gross receipts from the sublease of real property if the real property is located in this state.

5. Except as described in subd. 6., the numerator of the sales factor includes gross receipts from the lease, rental, licensing, or other use of tangible personal property owned by the taxpayer and the sublease of tangible personal property if the property is located in this state during the entire period of lease, rental, licensing, sublease, or other use. If the property is used in and outside this state during the period of lease, rental, licensing, or sublease, gross receipts are included in the numerator of the sales factor to the extent that the property is used in this state. The proportion of use in this state is determined by multiplying the gross receipts from the lease, rental, licensing, sublease, or other use of the property by a fraction having as a numerator the number of days the property is in this state while leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of days that the property is leased, rented, licensed, or subleased in all states having jurisdiction to tax the taxpayer during the taxable year.

6. Gross receipts from the lease, rental, or licensing of moving property, including motor vehicles, rolling stock, aircraft, vessels, or mobile equipment, owned by the taxpayer and the sublease of moving property are included in the numerator of the receipts factor to the extent that the property is used in this state. The proportion of use of moving property in this state is determined as follows:

a. The proportion of use of a motor vehicle or rolling stock in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the motor vehicle or rolling stock by a fraction having as a numerator the number of miles traveled within this state by the motor vehicle or rolling stock which leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of miles traveled by the motor vehicle or rolling stock while leased, rented, licensed, or subleased in the taxable year.

b. The proportion of use of an aircraft in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the aircraft by a fraction having as a numerator the number of takeoffs and landings of the aircraft in this state while leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of takeoffs and landings of the aircraft while leased, rented, licensed, or subleased in the taxable year.

c. The proportion of a vessel or mobile equipment in this state is determined by multiplying the gross receipts from the lease, rental, licensing, or sublease of the vessel or mobile equipment by a fraction having as a numerator the number of days that the vessel or mobile equipment is in this state while leased, rented, licensed, or subleased in the taxable year and having as a denominator the total number of days that the vessel or mobile equipment is leased, rented, licensed, or subleased in the taxable year.

d. If the taxpayer is unable to determine the use of moving property under subdivision paragraphs a., b., or c. while the property is leased, rented, licensed, or subleased in the taxable year, the moving property is conclusively deemed to be used in the state in which the property is located at the time that the lessee, licensee, or sublessee takes possession of the property.

7. The numerator of the sales factor includes gross receipts from the sale, licensing the use of, or other use of intangible property, including, but not limited to, patents, copyrights, trademarks, trade names, service names, franchises, licenses, plans, specifications, blueprints, processes, techniques, formulas, designs, layouts, patterns, drawings, manuals, technical know-how, contracts, and customer lists, if the income producing activity occurs in this state during the taxable year. If the income producing activity occurs in and outside this state, the gross receipts shall be allocated between those states having jurisdiction to tax the taxpayer based on the direct costs of performance. For purposes of this subdivision, intangible property excludes securities.

Note to Revisor: Insert the following notes at the end of Tax 2.39(6)(c)7. as repealed and recreated:

Note: Refer to ss. 71.04 (7) (d), (df), and (dh) and 71.25 (9) (d), (df), and (dh), Stats., as affected by 2005 Wis. Act 25.

Note: In *The Hearst Corporation vs. Wisconsin Department of Revenue*, Wisconsin Tax Appeals Commission, Docket No. I-8511 (May 15, 1990), the taxpayer received income from the television network for broadcasting network programming in Wisconsin and income from the sale of national advertising time. The Commission held that the network income is a result of the income producing activity of broadcasting the network programming in Wisconsin and is includable in full in the numerator of the sales factor. The national advertising income is a result of the income producing activity of broadcasting in Wisconsin and the income is includable in full in the sales factor numerator.

8. The provisions of this paragraph shall also apply to sales, other than sales of tangible personal property, to the federal government.

SECTION 8. Tax 2.39(7) is repealed.

Note to Revisor: Replace the note at the end of Tax 2.39 with the following:

Note: Section Tax 2.39 interprets ss. 71.04 (4), (4m), (5), (6), (7), (10), and (11) and 71.25 (5), (6), (6m), (7), (8), (9), (11), and (15), Stats.

Note: The provisions of s. Tax 2.39 first apply for taxable years beginning on January 1, 2005.

The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

Initial Regulatory Flexibility Analysis

This proposed rule order does not have a significant economic impact on a substantial number of small businesses.

DEPARTMENT OF REVENUE

Dated: _____

By: _____

Michael L. Morgan
Secretary of Revenue

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