

## Clearinghouse Rule 13-078

### PROPOSED ORDER OF THE DEPARTMENT OF REVENUE AMENDING AND CREATING RULES

The Wisconsin Department of Revenue proposes an order to: **amend** Tax 2.61 (7) (a) 4., (b) 4., and (g) (intro.) and 1., 2.62 (2) (d) 1., and 2.64 (2) (a), (b) 7., (c), and (e) 3. and **create** Tax 2.465; **relating to** apportionment of apportionable income of interstate air freight forwarders affiliated with a direct air carrier.

The scope statement for this rule, SS 044-13, was approved by the Governor on April 17, 2013, published in Register No. 689 on May 14, 2013, and approved by the Secretary of Revenue on May 24, 2013.

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#### *Analysis by the Department of Revenue*

**Statutes interpreted:** ss. 71.04 and 71.25, Stats.

**Statutory authority:** ss. 71.04 (8) (c) and (11) and 71.25 (10) (c) and (12), Stats.

**Explanation of agency authority:** Sections 71.04 (8) (c) and 71.25 (10) (c), Stats., provide "[t]he net business income of railroads, sleeping car companies, car line companies, pipeline companies, financial organizations, telecommunications companies, air carriers, and public utilities requiring apportionment shall be apportioned pursuant to rules of the department of revenue, but the income taxed is limited to the income derived from business transacted and property located within the state."

Sections 71.04 (11) and 71.25 (12), Stats., provide "[i]f the income...properly assignable to the state of Wisconsin cannot be ascertained with reasonable certainty by the methods under this section, then the same shall be apportioned and allocated under such rules as the department of revenue may prescribe."

**Related statute or rule:** Section Tax 2.45 interprets s. 71.25 (12), Stats., and provides for apportionment in special cases.

Section Tax 2.46 prescribes the method of apportionment to be used by interstate air carriers.

Section Tax 2.47 prescribes the method of apportionment to be used by interstate motor carriers.

**Plain language analysis:** The proposed rule prescribes the method of apportionment to be used by air freight forwarders.

**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 proposed rule.

**Comparison with rules in adjacent states:** The department is not aware of a similar rule in an adjacent state.

**Summary of factual data and analytical methodologies:** The department knows of a type of entity, an "air freight forwarder," which is engaged in the facilitation of transportation of property by air, does not itself operate aircraft, and is affiliated with a direct air carrier. The income of this type of entity properly assignable to Wisconsin cannot be determined with reasonable certainty under s. Tax 2.46, which prescribes the method of apportionment to be used by interstate air carriers, or s. Tax 2.47, which prescribes the method of apportionment to be used by interstate motor carriers. Therefore, the department finds it necessary to create a rule that prescribes the method of apportionment to be used by this type of entity.

**Analysis and supporting documents used to determine effect on small business:** Based on the nature and scope of its activities (the facilitation of the transportation of property by air between states), the type of entity this proposed rule affects would not be a small business as defined in s. 227.114 (1), Stats.

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

**Effect on small business:** This proposed rule order does not affect small business.

**Agency contact person:** Please contact Dale Kleven at (608) 266-8253 or [dale.kleven@revenue.wi.gov](mailto:dale.kleven@revenue.wi.gov), if you have any questions regarding this proposed 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 the date on which 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 2.465 is created to read:

**Tax 2.465 Apportionment of apportionable income of interstate air freight forwarders affiliated with a direct air carrier. (1) GENERAL.** The apportionable income of a qualified air freight forwarder affiliated with a direct air carrier and engaged in business in and outside this state shall be apportioned to Wisconsin as described in this section, except if the qualified air freight forwarder is in a combined group, its Wisconsin share of the combined group's apportionable income is computed as provided in s. 71.255 (5), Stats., and further detailed in s. Tax 2.61 (7).

**Note:** A qualified air freight forwarder that is a corporation may be in a combined group for taxable years beginning on or after January 1, 2009. See s. Tax 2.61 (2) for a description of corporations required to use combined reporting.

**(2) DEFINITIONS.** In this section:

(a) An air freight forwarder is "affiliated" with a direct air carrier if all of the following apply:

1. The air freight forwarder owns or controls either directly or indirectly at least 80% of the ownership interests of the direct air carrier, or at least 80% of the ownership interests of the air freight forwarder is owned or controlled either directly or indirectly by the direct air carrier, or at least 80% of the ownership interests of both the air freight forwarder and the direct air carrier is owned or controlled either directly or indirectly by the same interests.

2. The air freight forwarder is principally engaged in the business of air freight forwarding.

3. The air freight forwarder's air freight forwarding business is carried on principally with the direct air carrier.

(b) "Combined group" has the same meaning as in s. Tax 2.60 (2) (a).

(c) "Direct air carrier" means a business entity principally engaged in air transportation through the direct operation of aircraft under a certificate issued by the federal aviation administration.

(d) "Engaged in business in and outside this state" has the same meaning as in s. Tax 2.39 (2) (b).

(e) "Originating revenue in this state" means all revenue derived from shipments that were first physically consigned to a qualified air freight forwarder in this state for transportation, regardless of the method or methods of transportation.

(f) "Qualified air freight forwarder" means a person to whom all of the following apply:

1. The person is engaged primarily in the facilitation of the transportation of property by air.

2. The person does not operate aircraft.

3. The person is in the same combined group as an affiliated direct air carrier.

**(3) APPORTIONMENT FORMULA COMPUTATION.** For taxable years beginning on or after January 1, 2014, a qualified air freight forwarder that is engaged in business in and outside this state shall apportion its apportionable income to this state on the basis of the ratio obtained by taking the arithmetical average of the following 3 ratios:

(a) The ratio which aircraft arrivals and departures within this state scheduled by the affiliated direct air carrier during the calendar or fiscal year bears to the total aircraft arrivals and departures within and without this state scheduled by such direct air carrier during the same

period; provided that if the affiliated direct air carrier conducts nonscheduled operations all arrivals and departures shall be substituted for scheduled arrivals and departures.

(b) The ratio which the revenue tons handled by the affiliated direct air carrier at airports within this state during the calendar or fiscal year bears to the total revenue tons handled at airports within and without this state during the same period.

(c) The ratio which such qualified air freight forwarder's originating revenue in this state for the calendar or fiscal year bears to the total revenue of such qualified air freight forwarder within and without this state for the same period.

**SECTION 2.** Tax 2.61 (7) (a) 4., (b) 4., and (g) (intro.) and 1. are amended to read:

Tax 2.61 (7) (a) 4. For combined group members that are required to apportion their income using more than one factor under s. 71.25 (10), Stats., and ss. Tax 2.46, 2.465, 2.47, 2.475, 2.48, 2.50, or 2.502, the numerator of the member's modified sales factor is determined as provided in par. (g).

(b) 4. For combined group members that are required to apportion their income using more than one factor under s. 71.25 (10), Stats., and ss. Tax 2.46, 2.465, 2.47, 2.475, 2.48, 2.50, or 2.502, the member's separate company denominator for purposes of the modified sales factor is determined as provided in par. (g).

(g) (intro.) *Multiple factor formulas.* If a combined group member is required under s. 71.25 (10), Stats., to use an apportionment formula prescribed in ss. Tax 2.46, 2.465, 2.47, 2.475, 2.48, 2.50, or 2.502, the member's modified sales factor is computed as follows:

1. The numerator of the modified sales factor is the product of the member's apportionment percentage computed under ss. Tax 2.46, 2.465, 2.47, 2.475, 2.48, 2.50, or 2.502, as applicable, as if the member were not a member of a combined group except as provided in subds. 3. to 5., and the member's separate company denominator determined in subd. 2.

**SECTION 3.** Tax 2.62 (2) (d) 1. is amended to read:

Tax 2.62 (2) (d) 1. For any participant in the unitary business that is not a member of a commonly controlled group of corporations as provided in s. Tax 2.61 (3), the participant's income from the unitary business is generally apportioned in the manner provided by ss. Tax 2.39, 2.395, 2.45, 2.46, 2.465, 2.47, 2.475, 2.48, 2.49, 2.495, 2.50, or 2.502, as applicable. However, the participant may be required to apportion its income under the combined reporting rules provided in s. Tax 2.61 if certain conditions apply, as further explained in s. Tax 2.61 (2) (f).

**SECTION 4.** Tax 2.64 (2) (a), (b) 7., (c), and (e) 3. are amended to read:

Tax 2.64 (2) (a) *Qualifying combined group.* A qualifying combined group is a combined group for which 30 percent or more of the combined unitary income would, in the absence of combined reporting, be required to be apportioned using more than one factor under a method described in ss. Tax 2.46, 2.465, 2.47, 2.475, 2.48, 2.50, or 2.502.

(b) 7. A calculation of each combined group member's tax liability for the first taxable year to which the petition applies and for the previous taxable year, similar to the calculations in subds. 5. and 6., computed as if each corporation were not a member of the combined group and using the method prescribed by ss. Tax 2.39, 2.395, 2.45, 2.46, 2.465, 2.47, 2.475, 2.48, 2.49, 2.495, 2.50, or 2.502, as applicable to each corporation.

(c) *Limitation.* The department may not grant a taxpayer's petition for an alternative apportionment method if the alternative method would result in a lower tax liability than the sum of the tax liabilities of the combined group members computed as if they were not members of a combined group and using the apportionment method prescribed by ss. Tax 2.39, 2.395, 2.45, 2.46, 2.465, 2.47, 2.475, 2.48, 2.49, 2.495, 2.50, or 2.502, as applicable to each corporation.

(e) 3. A calculation of each combined group member's tax liability for the taxable year included in the combined return computed as if each corporation were not a member of the combined group and using the apportionment method prescribed by ss. Tax 2.39, 2.395, 2.45, 2.46, 2.465, 2.47, 2.475, 2.48, 2.49, 2.495, 2.50, or 2.502, as applicable to each corporation.

**SECTION 5.** Effective date. This rule 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.

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DEPARTMENT OF REVENUE

Dated: \_\_\_\_\_

By: \_\_\_\_\_  
Richard G. Chandler  
Secretary of Revenue