

Clearinghouse Rule 17-019

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

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 2.02 (10) (b) and 3.095 (4) (a) 2.; **amend** Tax 1.11 (2) and (5) (a) 2., 1.13 (1) (b) and (4) (b), 2.02 (4) (a) 4. and (9) (a) and (10) (a), 2.12 (5) (b), 2.31 (1) (**Note**), 2.39 (3) (a) 1. and (b) 1. and (c) 1. and (d) and (d) (**Note**), 2.475 (title) and (1) and (1) (**Note**) and (2) and (2) (b) (**Note**) and (4) (**Note**), 2.955 (3) (a), 3.01 (7) (b) 1., 3.05 (3), and 9.69 (5) (intro.); and **create** Tax 1.11 (4) (cm) and (gm), 2.955 (4) (e) and (f), and 3.095 (4) (a) 22.; **relating to** income, franchise, and excise tax provisions.

The scope statement for this rule, SS 082-16, was approved by the Governor on September 13, 2016, published in Register No. 729B on September 26, 2016, and approved by the Secretary of Revenue on October 14, 2016.

Analysis by the Department of Revenue

Statutes interpreted: ss. 71.02, 71.04 (1) (a), (4), and (8) (c), 71.05 (1) (c) 6p., (2), (6) (a) 1., (6) (b) 1. and 47m., 71.07 (7), 71.25 (6) and (10) (c), 71.255 (7), 71.26 (1) (h), 71.45 (1) (c), 71.64 (8), 71.75, 71.78, 71.80 (23) (a) 3. b., 139.82, and 995.12 (2) and (4), Stats.

Statutory authority: ss. 77.65 (3) and 227.11 (2) (a), 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. This provision applies to the revision of ss. Tax 2.02, 2.12, 2.955, and 3.05.

Sections 139.38 (1) and 139.82 (1), Stats., provide the records of cigarette manufacturers and tobacco products manufacturers, respectively, shall be kept in a manner prescribed by the department. These provisions apply to the revision of s. Tax 9.69 (5) (intro.).

Related statute or rule: There are no other applicable statutes or rules.

Plain language analysis: The rule (1) reflects various law changes, (2) clarifies a rule, and (3) corrects errors in current rule provisions.

- Revise s. Tax 1.11 and 1.13 to remove reference to gift and inheritance tax and revise the special situations of who may examine tax returns to include persons who have a material interest in property subject to a tax warrant, as provided by 2015 Wis. Act 216, and for the State Auditor and the employees of the legislative audit bureau as provided by 2013 Wisconsin Act 8.
- Revise ss. Tax 2.02, 2.31, and 2.955 to reflect there is no longer a reciprocity agreement between Wisconsin and Minnesota.

- Revise s. Tax 2.12 to reflect that, for taxable years beginning on or after January 1, 2015, Form 1X is no longer available to file a claim for refund.
- Revise ss. Tax 2.39 and 2.475 to remove reference to sleeping car companies as provided by 2015 Wis. Act 216.
- Amend s. Tax 2.955 to clarify that, under s. 71.07 (7), Stats., a partner in a partnership or member of a limited liability company treated as a partnership who is a resident of Wisconsin may claim the credit for taxes paid to other states.
- Correct a reference in s. Tax 3.01 (7) (b) 1.
- Revise s. Tax 3.05 to reflect the repeal by 2015 Wis. Act 55 of the job creation deduction under ss. 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., for taxable years beginning on or after January 1, 2015.
- Delete s. Tax 3.095 (4) (a) 2., reference to higher education bonds. Create s. Tax 3.095 (4) (a) 22. to reflect an exemption under s. 71.05 (1) (c) 6p., Stats., as created by 2015 Wis. Act 60, for interest received on bonds or notes issued by a sponsoring municipality to assist a local exposition district created under subch. II of ch. 229, Stats.
- Amend s. Tax 9.69 (5) (intro.) to be consistent with s. 995.12 (2) and (4), Stats., which require records be kept for 5 years.

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: The department is not aware of a similar rule in an adjacent state.

Summary of factual data and analytical methodologies: 2013 Wisconsin Act 8 and 2015 Wisconsin Acts 55, 60, and 216 have made changes to Wisconsin's income, franchise, and excise tax laws. The department has created this proposed rule order to reflect these statutory changes, as well as provide needed clarification and correction as described above. No other data was used in the preparation of this proposed rule order or this analysis.

Analysis and supporting documents used to determine effect on small business: This rule order makes changes to reflect current law and current department policy. It makes no policy or other changes having an effect on small business.

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

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

Agency contact person: Please contact Jen Chadwick at (608) 266-8253 or jennifer.chadwick@wisconsin.gov, if you have any questions regarding this proposed rule.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to the contact person shown below no later than Tuesday, April 25, 2017. 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 1.11 (2) is amended to read:

Tax 1.11 (2) GENERAL. The provisions of ss. 70.375 (2) (b), 71.78, 72.06, 77.61 (5), 77.76 (3), 77.79, 78.80 (3) and (4), 139.11 (4), 139.38 (6) and 139.82 (6), Stats., apply to the examination of mining net proceeds, income, franchise, ~~gift~~, fiduciary, partnership, ~~inheritance~~, estate, sales and use, county sales and use, withholding, motor fuel, general aviation fuel, special fuel, fermented malt beverage, distilled spirits and wine, cigarette and tobacco product tax returns and tax credit claims. No person may examine or receive information from a tax return or tax credit claim unless specifically authorized to do so by the appropriate statute.

SECTION 2. Tax 1.11 (4) (cm) and (gm) are created to read:

Tax 1.11 (4) (cm) *Legislative audit bureau.* The state auditor and the employees of the legislative audit bureau, to the extent necessary for the bureau to carry out its duties under s. 13.94, may examine tax returns under the provisions specified in sub. (2).

(gm) *Material interest in property subject to a tax warrant.* Any person, or authorized agent of any person, who provides satisfactory evidence to the department, as determined by the department, that the person has a material interest, or intends to obtain a material interest, in a property that is subject to a tax warrant filed by the department under s. 71.91 (5), may not examine tax returns of the persons subject to the tax warrant, but may obtain the outstanding liability secured by the tax warrant.

SECTION 3. Tax 1.11 (5) (a) 2. is amended to read:

Tax 1.11 (5) (a) 2. The type of tax return or tax credit claim, such as mining net proceeds, income, franchise, ~~gift~~, homestead credit, or sales and use tax.

SECTION 4. Tax 1.13 (1) (b) and (4) (b) are amended to read:

Tax 1.13 (1) (b) The power of attorney requirement applies to income, franchise, alternative minimum, withholding, ~~gift~~, sales and use, county sales and use, ~~inheritance~~, estate, motor fuel, general aviation fuel, special fuel, fermented malt beverage, intoxicating liquor, cigarette and tobacco products tax matters of individuals,

partnerships and corporations, including (S) corporations, and homestead and farmland preservation credit matters.

(4) (b) Use of the Wisconsin power of attorney form is not mandatory. However, the department prefers that this form or another similar form be used. The Wisconsin power of attorney form or substitute form shall clearly express the scope of the authority granted the taxpayer's representative, the Wisconsin tax matters, e.g., income, sales, or ~~gift tax, franchise,~~ covered and the tax year or period to which it relates.

SECTION 5. Tax 2.02 (4) (a) 4., (9) (a), and (10) (a) are amended to read:

Tax 2.02 (4) (a) 4. Minnesota, for the years beginning on and after January 1, 1968 and ending on January 1, 2010.

(9) (a) The reciprocity agreement with Minnesota, which ended on January 1, 2010, is limited to income from personal services, including wages, salaries, tips, fees, commissions, bonuses, or similar earnings, provided the taxpayer personally renders the services. The reciprocity exclusion for personal service income does not apply where the personal or professional service income is earned as a part of a business operated by the taxpayer which has employees that do more than incidental duties for the business, or where there is the sale or delivery of goods which is more than an incidental part of the business. A partner's salary from a partnership where the selling of goods or services of the employees is more than incidental is subject to the reciprocity exclusion, but the partnership profits are not excluded. Distributions from a tax-sheltered annuity are also considered subject to the reciprocity exclusion.

(10) (a) Nonresident persons, ~~other than residents of Minnesota,~~ employed in Wisconsin and residing in a state with which Wisconsin has reciprocity shall file form W-220, "Nonresident Employee's Withholding Reciprocity Declaration," with their Wisconsin employers to be exempt from withholding of Wisconsin income taxes. Upon receipt of this form, Wisconsin employers may not withhold Wisconsin income tax from Wisconsin personal service income of the employee.

SECTION 6. Tax 2.02 (10) (b) is repealed.

SECTION 7. Tax 2.12 (5) (b) is amended to read:

Tax 2.12 (5) (b) Prior to January 1, 2015, ~~Except~~ except as provided in par. (c), a claim for refund shall be filed on a form 1X, in the manner prescribed in sub. (6), if any of the following apply:

SECTION 8. Tax 2.31 (1) (**Note**) is amended to read:

Tax 2.31 (1) **Note:** Wisconsin has reciprocity agreements with Illinois, Indiana, Kentucky, and Michigan ~~and Minnesota.~~

SECTION 9. Tax 2.39 (3) (a) 1., (b) 1., (c) 1., (d), and (d) (**Note**) are amended to read:

Tax 2.39 (3) (a) 1. 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, and 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 (4) (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.

(b) 1. 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, public utilities, and 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 (4) (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.

(c) 1. 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, public utilities, and 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 (4) (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.

(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, public utilities, and 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 only the sales factor to compute the apportionment fraction, as provided in s. 71.04 (4) (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 factor. 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.

(d) **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.

SECTION 10. Tax 2.475 (title), (1), (1) (**Note**), (2), (2) (b) (**Note**), and (4) (**Note**) are amended to read:

Tax 2.475 (title) **Apportionment of apportionable income of interstate railroads, ~~sleeping car companies~~ and car line companies.**

(1) GENERAL. The apportionable income of a railroad, ~~sleeping car company~~, or car line company engaged in business in and outside this state shall be apportioned to

Wisconsin as described in this section, except if the company 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).

(1) **Note:** A railroad, ~~sleeping car company~~, or car line company 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) ~~INTERSTATE RAILROADS AND SLEEPING CAR COMPANIES.~~ With respect to the imposition of Wisconsin franchise or income tax measured by or on net income for taxable years beginning on or after January 1, 1991, the apportionable income of a railroad or ~~sleeping car company~~ engaged in business in and outside this state shall be apportioned to Wisconsin on the basis of the arithmetical average of the following 2 factors:

(b) **Note:** Railroads and ~~sleeping car companies~~ that are in combined groups must adjust the numerator and denominator of each of these factors and then convert the arithmetical average of these factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. See s. 71.255 (5), Stats., and s. Tax 2.61 (7) for details.

(4) **Note:** Section 71.26 (1) (a), Stats., was amended by 1991 Wis. Act 39, effective for taxable years beginning on or after January 1, 1991. For taxable years beginning before January 1, 1991, railroads, ~~sleeping car companies~~ and car line companies were exempt from Wisconsin franchise and income taxation.

SECTION 11. Tax 2.955 (3) (a) is amended to read:

Tax 2.955 (3) (a) Income tax paid to Illinois, Indiana, Kentucky, or Michigan ~~or Minnesota~~ on personal service income earned in these states included under a reciprocity agreement.

SECTION 12. Tax 2.955 (4) (e) and (f) are created to read:

Tax 2.955 (4) (e) For a Wisconsin resident partner in a partnership or member of a limited liability company treated as a partnership:

1. If a Wisconsin resident partner or member files an individual income tax return with that state, attach a copy of the other state's income tax return to the Wisconsin income tax return.

2. If the partnership or limited liability company treated as a partnership files a combined or composite return with that state on behalf of its partners or members who are nonresidents of that state and pays the tax on their proportionate share of the income earned there, attach to the Wisconsin income tax return either a copy of the Wisconsin schedule 3K-1 on which is shown the partner's or member's share of tax paid to that state, or a letter as provided in par. (f).

3. If the partnership or limited liability company treated as a partnership files a partnership income or franchise tax return with that state and pays tax on or measured by income earned there that is attributable to its partners or members who are nonresidents of that state, attach to the Wisconsin income tax return either a copy of the Wisconsin schedule 3K-1 on which is shown the partner's or member's share of tax paid to that state, or a letter as provided in par. (f).

(f) If the partnership or limited liability company treated as a partnership is not required to file a form 3, "Wisconsin Partnership Return," a Wisconsin resident partner shall attach to the Wisconsin income tax return a letter provided by the partnership or limited liability company treated as a partnership in lieu of Wisconsin schedule 3K-1 as required in pars. (e) 2. and 3. The letter shall include a schedule showing the partner's or member's proportionate share of the items of income taxable by that state, the adjusted gross income, and the net tax paid.

SECTION 13. Tax 3.01 (7) (b) 1. is amended to read:

Tax 3.01 (7) (b) 1. A taxpayer with related entity expenses shall disclose such expenses on or before the extended due date of the return for the year in which the expenses are reported. The department is authorized to disallow related entity expenses, even if the expenses meet the conditions in s. 71.80 (23) (a), Stats., and sub. (4) for failure to timely disclose such expenses. The form prescribed by the department to disclose related entity expenses shall not be accepted by the department if filed with an amended return after the extended due date. Failure to disclose or untimely disclosure by a taxpayer subjects the taxpayer and related entities to the provisions of sub. (5) ~~(e)~~ (f).

SECTION 14. Tax 3.05 (3) is amended to read:

Tax 3.05 (3) AMOUNT OF DEDUCTION. Sections 71.05 (6) (b) 47m., 71.26 (1) (h), and 71.45 (1) (c), Stats., provide for an income and franchise tax deduction, prior to January 1, 2015, in an amount equal to the increase in the number of full-time equivalent employees employed by the taxpayer in this state during the taxable year, multiplied by \$4,000 for a business with gross receipts of no greater than \$5,000,000 in the taxable year or \$2,000 for a business with gross receipts greater than \$5,000,000 in the taxable year.

SECTION 15. Tax 3.095 (4) (a) 2. is repealed.

SECTION 16. Tax 3.095 (4) (a) 22. is created to read:

Tax 3.095 (4) 22. Bonds or notes issued by a sponsoring municipality to assist a local exposition district created under subch. II of ch. 229, Stats.

SECTION 17. Tax 9.69 (5) (intro.) is amended to read:

Tax 9.69 (5) (intro.) RECORDKEEPING REQUIREMENTS. Every tobacco product manufacturer required to file a schedule under sub. (3) shall maintain complete and accurate records to support the information reported on the required schedule. These records shall be maintained for a period of 4 5 years from the date of sale into Wisconsin and shall include all of the following:

SECTION 18. EFFECTIVE DATE; GENERAL. 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.

DEPARTMENT OF REVENUE

Dated: _____

By: _____

Richard G. Chandler
Secretary of Revenue

E:Rules/Rule 156/Chapters 1, 2, 3, and 9 Proposed Order