



2003 ASSEMBLY BILL 461

August 7, 2003 - Introduced by Representatives BLACK, BERCEAU, POCAN, MILLER, HEBL and PLOUFF, cosponsored by Senators CARPENTER, RISSER and CHVALA. Referred to Committee on Ways and Means.

1 **AN ACT** *to renumber and amend* 71.26 (2) (a); and *to create* 71.01 (5p), 71.01
2 (9b), 71.05 (6) (a) 21., 71.22 (3m), 71.22 (9b), 71.26 (2) (a) 6., 71.34 (1) (j), 71.42
3 (1p), 71.42 (4m), 71.45 (2) (a) 16., 71.738 (3m) and 71.80 (23) of the statutes;
4 **relating to:** adding payments to related entities to federal taxable income for
5 state income tax and franchise tax purposes.

Analysis by the Legislative Reference Bureau

For purposes of calculating a taxpayer's state income tax or franchise tax liability, this bill requires a taxpayer to add the following amounts to the taxpayer's federal taxable income: any amount that the taxpayer deducted or excluded under the Internal Revenue Code for management and service fees, interest expenses and costs, intangible expenses and costs, and any other expenses and costs directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more related entities.

This bill also authorizes the Department of Revenue (DOR) to allow the tax consequences of a transaction, as asserted by a taxpayer, even if DOR initially disallows the consequences by asserting the sham transaction doctrine or a related doctrine, if a taxpayer meets certain conditions. The conditions include the taxpayer's ability to demonstrate that the transaction had a valid, good faith business purpose other than tax avoidance, that the business purpose is commensurate with the transaction's tax benefit, and that the transaction had economic substance apart from the taxpayer's asserted tax benefit.

ASSEMBLY BILL 461

Also under the bill, a taxpayer is not required to add to the taxpayer's federal taxable income certain expenses or costs as specified in the bill if a number of conditions apply. The conditions include the following:

1. The transaction to which the expenses and costs apply did not have as its principal purpose tax avoidance.

2. The related entity to whom the taxpayer paid the expenses or costs paid, accrued, or incurred such amounts to a person who is not a related entity.

3. The related entity was subject to tax on its net income, and a measure of the tax included the expenses or costs received from the taxpayer.

For further information see the *state* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

1 **SECTION 1.** 71.01 (5p) of the statutes is created to read:

2 71.01 (5p) "Intangible expenses and costs" includes expenses, losses, and costs
3 for, related to, or directly or indirectly in connection with the direct or indirect
4 acquisition of, use of, maintenance or management of, ownership of, sale of, exchange
5 of, or any other direct or indirect disposition of intangible property to the extent that
6 such expenses, losses, and costs are allowed as deductions or costs to determine
7 federal taxable income under the Internal Revenue Code. For purposes of this
8 subsection, "expenses, losses, and costs" include losses related to or incurred directly
9 or indirectly in connection with factoring transactions and discounting transactions;
10 royalty, patent, technical, and copyright fees; licensing fees; and other similar
11 expenses and costs.

12 **SECTION 2.** 71.01 (9b) of the statutes is created to read:

13 71.01 (9b) "Related entity" means any person related to a taxpayer as provided
14 under section 267, 318, or 1563 of the Internal Revenue Code during all or a portion
15 of the taxpayer's taxable year.

16 **SECTION 3.** 71.05 (6) (a) 21. of the statutes is created to read:

ASSEMBLY BILL 461

1 71.05 (6) (a) 21. Any amount deducted or excluded under the Internal Revenue
2 Code for management and service fees, interest expenses and costs, intangible
3 expenses and costs, and any other expenses and costs directly or indirectly paid,
4 accrued, or incurred to, or in connection directly or indirectly with one or more direct
5 or indirect transactions with, one or more related entities.

6 **SECTION 4.** 71.22 (3m) of the statutes is created to read:

7 71.22 (3m) “Intangible expenses and costs” includes expenses, losses, and costs
8 for, related to, or directly or indirectly in connection with the direct or indirect
9 acquisition of, use of, maintenance or management of, ownership of, sale of, exchange
10 of, or any other direct or indirect disposition of intangible property to the extent that
11 such expenses, losses, and costs are allowed as deductions or costs to determine
12 federal taxable income under the Internal Revenue Code. For purposes of this
13 subsection, “expenses, losses, and costs” include losses related to or incurred directly
14 or indirectly in connection with factoring transactions and discounting transactions;
15 royalty, patent, technical, and copyright fees; licensing fees; and other similar
16 expenses and costs.

17 **SECTION 5.** 71.22 (9b) of the statutes is created to read:

18 71.22 (9b) “Related entity” means any person related to a taxpayer as provided
19 under section 267, 318, or 1563 of the Internal Revenue Code during all or a portion
20 of the taxpayer’s taxable year.

21 **SECTION 6.** 71.26 (2) (a) of the statutes is renumbered 71.26 (2) (a) (intro.) and
22 amended to read:

23 71.26 (2) (a) *Corporations in general.* (intro.) The “net income” of a corporation
24 means the gross income as computed under the Internal Revenue Code as modified
25 under sub. (3) ~~minus~~ and modified as follows:

ASSEMBLY BILL 461**SECTION 6**

1 1. Minus the amount of recapture under s. 71.28 (1di) ~~plus.~~

2 2. Plus the amount of credit computed under s. 71.28 (1), (3), (4), and (5) ~~plus.~~

3 3. Plus the amount of the credit computed under s. 71.28 (1dd), (1de), (1di),
4 (1dj), (1dL), (1dm), (1ds), (1dx), and (3g) and not passed through by a partnership,
5 limited liability company, or tax-option corporation that has added that amount to
6 the partnership's, limited liability company's, or tax-option corporation's income
7 under s. 71.21 (4) or 71.34 (1) (g) ~~plus.~~

8 4. Plus the amount of losses from the sale or other disposition of assets the gain
9 from which would be wholly exempt income, as defined in sub. (3) (L), if the assets
10 were sold or otherwise disposed of at a gain and minus deductions, as computed
11 under the Internal Revenue Code as modified under sub. (3), ~~plus.~~

12 5. Plus or minus, as appropriate, an amount equal to the difference between
13 the federal basis and Wisconsin basis of any asset sold, exchanged, abandoned, or
14 otherwise disposed of in a taxable transaction during the taxable year, except as
15 provided in par. (b) and s. 71.45 (2) and (5).

16 **SECTION 7.** 71.26 (2) (a) 6. of the statutes is created to read:

17 71.26 (2) (a) 6. Plus any amount deducted or excluded under the Internal
18 Revenue Code for management and service fees, interest expenses and costs,
19 intangible expenses and costs, and any other expenses and costs directly or indirectly
20 paid, accrued, or incurred to, or in connection directly or indirectly with one or more
21 direct or indirect transactions with, one or more related entities.

22 **SECTION 8.** 71.34 (1) (j) of the statutes is created to read:

23 71.34 (1) (j) An addition shall be made for any amount deducted or excluded
24 under the Internal Revenue Code for management and service fees, interest
25 expenses and costs, intangible expenses and costs, and any other expenses and costs

ASSEMBLY BILL 461

1 directly or indirectly paid, accrued, or incurred to, or in connection directly or
2 indirectly with one or more direct or indirect transactions with, one or more related
3 entities.

4 **SECTION 9.** 71.42 (1p) of the statutes is created to read:

5 71.42 (1p) "Intangible expenses and costs" includes expenses, losses, and costs
6 for, related to, or directly or indirectly in connection with the direct or indirect
7 acquisition of, use of, maintenance or management of, ownership of, sale of, exchange
8 of, or any other direct or indirect disposition of intangible property to the extent that
9 such expenses, losses, and costs are allowed as deductions or costs to determine
10 federal taxable income under the Internal Revenue Code. For purposes of this
11 subsection, "expenses, losses, and costs" include losses related to or incurred directly
12 or indirectly in connection with factoring transactions and discounting transactions;
13 royalty, patent, technical, and copyright fees; licensing fees; and other similar
14 expenses and costs.

15 **SECTION 10.** 71.42 (4m) of the statutes is created to read:

16 71.42 (4m) "Related entity" means any person related to a taxpayer as provided
17 under section 267, 318, or 1563 of the Internal Revenue Code during all or a portion
18 of the taxpayer's taxable year.

19 **SECTION 11.** 71.45 (2) (a) 16. of the statutes is created to read:

20 71.45 (2) (a) 16. By adding to federal taxable income any amount deducted or
21 excluded under the Internal Revenue Code for management and service fees,
22 interest expenses and costs, intangible expenses and costs, and any other expenses
23 and costs directly or indirectly paid, accrued, or incurred to, or in connection directly
24 or indirectly with one or more direct or indirect transactions with, one or more
25 related entities.

ASSEMBLY BILL 461**SECTION 12**

1 **SECTION 12.** 71.738 (3m) of the statutes is created to read:

2 71.738 **(3m)** “Related entity” means any person related to a taxpayer as
3 provided under section 267, 318, or 1563 of the Internal Revenue Code during all or
4 a portion of the taxpayer’s taxable year.

5 **SECTION 13.** 71.80 (23) of the statutes is created to read:

6 71.80 **(23)** TRANSACTIONS. (a) Subject to par. (b), if the department asserts the
7 sham transaction doctrine, or any other related tax doctrine, to disallow the tax
8 consequences, as asserted by the taxpayer, of a transaction, the department may
9 allow the tax consequences, as asserted by the taxpayer, of the transaction, if the
10 taxpayer demonstrates by clear and convincing evidence that the transaction had a
11 valid, good faith, business purpose other than tax avoidance and had economic
12 substance apart from any tax benefit asserted by the taxpayer.

13 (b) For all instances in which the department disallows the tax consequences,
14 as asserted by the taxpayer, of a transaction, the department may allow the tax
15 consequences, as asserted by the taxpayer, of the transaction, if the taxpayer
16 demonstrates by clear and convincing evidence that the transaction’s nontaxable
17 business purpose, as asserted by the taxpayer, is commensurate with the
18 transaction’s tax benefit, as asserted by the taxpayer.

19 (c) The adjustments under ss. 71.05 (6) (a) 21., 71.26 (2) (a) 6., 71.34 (1) (j), and
20 71.45 (2) (a) 16. shall not apply to any expenses or costs if all of the following apply
21 to the expenses or costs:

22 1. The transaction to which the expenses or costs are related did not have tax
23 avoidance as its principal purpose.

24 2. The related entity to whom the taxpayer paid interest expenses or costs,
25 intangible expenses, or management or service fees during the taxable year directly

ASSEMBLY BILL 461

1 or indirectly paid, accrued, or incurred such amounts to a person who is not a related
2 entity. For purposes of this subdivision, “interest” means interest on a debt for which
3 the taxpayer is the guarantor, if the interest rate is the market rate in effect at the
4 time of the debt’s origination, but excludes interest that is paid in connection with
5 any debt that is incurred to acquire the taxpayer’s assets or stock under section 368
6 of the Internal Revenue Code.

7 3. The related entity was subject to tax on its net income in this state, or any
8 state, U.S. possession, or foreign country; a measure of the tax paid included the
9 interest income, intangible income, or management or service fees received from the
10 taxpayer; and the tax rate applied to the interest income, intangible income, or
11 management or service fees was not less than 3 percentage points below the tax rate
12 that would have applied under s. 71.27. For purposes of this subdivision, “any state,
13 U.S. possession, or foreign country” does not include any state, U.S. possession, or
14 foreign country under the laws of which the taxpayer files or could have elected to
15 file with the related entity, or the related entity files or could have elected to file with
16 another entity, a combined income tax report or return, a consolidated income tax
17 report or return, or any other report or return that is due because of the imposition
18 of a tax that is measured on or by income, if the report of return results in eliminating
19 the tax effects of transactions directly or indirectly between either the taxpayer and
20 the related entity or between the related entity and another entity.

SECTION 14. Initial applicability.

21
22 (1) This act first applies to taxable years beginning on January 1 of the year
23 in which this subsection takes effect, except that if this subsection takes effect after

ASSEMBLY BILL 461

SECTION 14

1 July 31 this act first applies to taxable years beginning on January 1 of the year
2 following the year in which this subsection takes effect.

3 (END)