



2021 ASSEMBLY BILL 816

January 6, 2022 - Introduced by Representatives WITKE, ARMSTRONG, BROOKS and KNODL, cosponsored by Senators MARKLEIN and KOYENGA. Referred to Committee on Ways and Means.

1 **AN ACT to repeal** 71.775 (1) (b); **to renumber and amend** 71.76 (2); **to**
2 **consolidate, renumber and amend** 71.775 (1) (intro.) and (a); **to amend**
3 71.365 (6), 71.78 (1), 71.88 and 73.16 (4); and **to create** 71.738 (3d), 71.738 (3e),
4 71.738 (3f), 71.745, 71.76 (2) (b), 71.77 (7) (c), 71.78 (11), 71.80 (26) and 71.83
5 (1) (a) 12. of the statutes; **relating to:** pass-through entity audits.

Analysis by the Legislative Reference Bureau

This bill makes various changes related to conducting tax audits of pass-through entities such as partnerships, limited liability companies, and tax-option corporations. Under the bill, the Department of Revenue may do all of the following with regard to an audit of a pass-through entity:

1. Assess and collect additional tax from a pass-through entity on income otherwise reportable by its pass-through members. Under the bill, a “pass-through member” is, generally, a partner in a partnership, member of a limited liability company, shareholder in a tax-option corporation, a beneficiary of an estate or a trust, or any other person who derives a tax benefit from a pass-through entity.

2. Direct the secretary of the Department of Administration to refund to a pass-through entity that part of an overpayment paid by the pass-through entity and not by the entity’s pass-through members.

3. Assess an adjustment to reduce a tax credit to a pass-through entity if the pass-through entity previously computed the credit and reported the credit to its pass-through members.

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4. Assess an adjustment to increase a tax credit to offset additional tax assessed to a pass-through entity.

5. Assess any pass-through member of a pass-through entity for additional tax otherwise owed by one or more of the pass-through members.

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.** 71.365 (6) of the statutes is amended to read:

2 71.365 **(6)** NOTICE TO SHAREHOLDERS OF APPEALS AND OTHER PROCEEDINGS. ~~Any~~
3 Except as provided in s. 71.745, any notice of determination by the department of any
4 tax-option item may be contested by a tax-option corporation under subch. XIV. A
5 tax-option corporation shall timely notify all shareholders of any administrative or
6 judicial proceeding about the determination of any tax-option item. Each
7 shareholder may participate in any such proceeding and shall be bound by the final
8 determination in that proceeding.

9 **SECTION 2.** 71.738 (3d) of the statutes is created to read:

10 71.738 **(3d)** "Pass-through entity" means a partnership, a limited liability
11 company, a tax-option corporation, an estate, or a trust that is treated as a
12 pass-through entity for federal income tax purposes.

13 **SECTION 3.** 71.738 (3e) of the statutes is created to read:

14 71.738 **(3e)** "Pass-through item" means a tax-option item under s. 71.34 (3)
15 or an item of income, gain, loss, deduction, credit, or any other item that originates
16 with a pass-through entity and is required to be reported by one or more
17 pass-through members under this chapter.

18 **SECTION 4.** 71.738 (3f) of the statutes is created to read:

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1 71.738 (3f) “Pass-through member” means a person who is a partner in a
2 partnership, member of a limited liability company, shareholder in a tax-option
3 corporation, beneficiary of an estate or a trust, or any other person whose tax liability
4 under this chapter is determined in whole or in part by taking into account the
5 person’s share of pass-through items, directly or indirectly, from a pass-through
6 entity.

7 **SECTION 5.** 71.745 of the statutes is created to read:

8 **71.745 Pass-through entity audits, additional assessments and**
9 **refunds at the entity level. (1) GENERAL APPLICABILITY.** Unless specifically
10 provided in subs. (2) to (9), additional assessments and refunds of pass-through
11 entities and pass-through members shall follow the provisions under this chapter.
12 This section shall not apply for taxable years for which a pass-through entity made
13 an election under s. 71.21 (6) (a) or 71.365 (4m) (a) that the pass-through entity did
14 not revoke under s. 71.21 (6) (c) or 71.365 (4m) (c). The department shall not make
15 additional assessments and refunds under this section to an entity treated as a
16 disregarded entity described under U.S. Treasury Regulation 301.7701-2 or to a
17 grantor trust, of the income of which is reportable under the Internal Revenue Code
18 by the grantor of the trust or by any person other than the trust.

19 **(2) AUDIT ASSESSMENTS AND REFUNDS.** Except as provided in sub. (9), for the
20 purpose performing audit assessments and issuing refunds, the department may do
21 all of the following:

22 (a) Assess and collect additional tax from a pass-through entity on income
23 otherwise reportable by its pass-through members. In computing the tax to assess
24 to a pass-through entity under this paragraph, the department shall apply the
25 highest tax rate under s. 71.06 on income otherwise reportable by pass-through

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1 members that are individuals, estates, or trusts with a direct interest in the
2 pass-through entity and apply the highest tax rate under s. 71.27 on income
3 otherwise reportable by pass-through members, other than individuals, estates, or
4 trusts, with a direct interest in the pass-through entity.

5 (b) Direct the secretary of administration to refund to a pass-through entity
6 that part of an overpayment paid by the pass-through entity and not by the entity's
7 pass-through members. Pass-through members may claim overpayments not paid
8 by the pass-through entity within one year after the date the determination of the
9 overpayment becomes final or before the end of the period specified under s. 71.75,
10 whichever is later.

11 **(3) ADJUSTMENT OF CREDITS.** Except as provided in sub. (9), for the purpose
12 adjusting credits, the department may do all of the following:

13 (a) Assess an adjustment to reduce a credit under s. 71.07, 71.28, or 71.47 to
14 a pass-through entity if the pass-through entity previously computed the credit and
15 reported the credit to its pass-through members. An assessment made under this
16 paragraph may be reduced by the tax effect from the modifications described under
17 ss. 71.05 (6) (a) 15. and 25., 71.21 (4), 71.26 (2) (a) 4. and 11., 71.34 (1k) (g) and (m),
18 and 71.45 (2) (a) 10., if the modification occurs in a taxable year under review, except
19 that the modification shall not pass through to nor be claimed by the pass-through
20 members.

21 (b) Assess an adjustment to increase a credit under s. 71.07, 71.28, or 71.47 to
22 offset additional tax assessed to a pass-through entity under sub. (2). Any excess
23 credit not used to offset additional tax may be claimed by the pass-through members
24 within one year from the date the determination of the adjustment becomes final or
25 before the end of the period specified under s. 71.75, whichever is later.

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1 **(4) ADJUSTMENTS ATTRIBUTABLE TO MEMBERS.** Adjustments to pass-through
2 items under this section are attributable to each pass-through member in a manner,
3 and for the taxable year, that is consistent with the treatment of the pass-through
4 items if a determination was not made under this section.

5 **(5) STATUTE OF LIMITATIONS, INTEREST, AND PENALTIES.** Statute of limitations,
6 interest, and penalties under ss. 71.77, 71.82, and 71.83 apply to determinations
7 made under this section without regard to the action or inaction of pass-through
8 members.

9 **(6) CONTESTED ADJUSTMENTS.** (a) Except as provided in par. (b), a determination
10 made by the department under this section is final and conclusive upon receipt by
11 the pass-through entity. Pass-through members shall concede to the accuracy of
12 and shall be bound by a determination made under this section. A pass-through
13 entity shall timely notify all pass-through members of any administrative or judicial
14 proceeding regarding the determination of any pass-through item.

15 (b) A pass-through entity aggrieved by a determination made by the
16 department under this section may, within 60 days after receipt of the
17 determination, petition the department for redetermination. The department shall
18 make a redetermination on the petition within 6 months after the date on which the
19 petition is filed. If no timely petition for redetermination is filed with the
20 department, the department's determination shall be final and conclusive.

21 **(7) LIABILITY MAY BE ASSESSED TO MORE THAN ONE PERSON.** If the department
22 determines that a liability exists under this chapter and that the liability may be
23 owed by more than one pass-through member of a pass-through entity, the
24 department may assess any pass-through member of the pass-through entity for
25 additional tax otherwise due under this chapter.

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1 **(8) ELECTION TO REDUCE ASSESSMENT.** Within 60 days after the department's
2 determination under this section becomes final, a pass-through entity may elect, in
3 a manner prescribed by the department, to have the pass-through entity's
4 assessment under this section reduced for pass-through items reported and paid by
5 pass-through members within 60 days of the election. A pass-through entity shall
6 furnish to the department and its pass-through members the adjustments to the
7 each pass-through member's proportionate share of pass-through items for each
8 taxable year.

9 **(9) ELECTION TO PRECLUDE ASSESSMENT.** Within 60 days after the department's
10 determination under this section becomes final, a pass-through entity with 25 or
11 fewer pass-through members for all years under review may elect, in a manner
12 prescribed by the department, to require the department to make an assessment to
13 each of its pass-through members. This subsection does not apply to a pass-through
14 entity if one or more of its pass-through members is a pass-through entity for any
15 year under review. The election under this subsection does not relieve a
16 representative designated by the pass-through entity under s. 71.80 (26) (a) of the
17 representative's duties under s. 71.80 (26) (b) 2., 3., and 6.

18 **SECTION 6.** 71.76 (2) of the statutes, as created by 2021 Wisconsin Act 1, is
19 renumbered 71.76 (2) (a) and amended to read:

20 71.76 (2) (a) In Except as approved in par. (b), in the case of any partnership
21 adjustments, as defined under section 6241 of the Internal Revenue Code and
22 including adjustments under section 6225 of the Internal Revenue Code, the
23 partnership and its partners shall report such changes or corrections to the
24 department within 180 days after the final determination by the internal revenue
25 service and shall concede the accuracy of such determination or state how the

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1 determination is erroneous. The partnership and its partners are not required to
2 report such changes or corrections unless the changes or corrections affect the
3 amount of net tax payable under this chapter, of a credit calculated under this
4 chapter, of a Wisconsin net operating loss carried forward under this chapter, of a
5 Wisconsin net business loss carried forward under this chapter, or a capital loss
6 carried forward under this chapter. The partnership and its partners shall submit
7 amended returns, as applicable, for each reviewed year, as defined under section
8 6225 of the Internal Revenue Code, to which such partnership adjustments relate.

9 **SECTION 7.** 71.76 (2) (b) of the statutes is created to read:

10 71.76 (2) (b) In the case of any partnership adjustments, as defined under
11 section 6241 of the Internal Revenue Code and including adjustments under section
12 6225 of the Internal Revenue Code, the partnership may submit a request to the
13 department, in a manner prescribed by the department, within 60 days after the
14 final determination by the internal revenue service to amend the partnership
15 returns and pay tax on behalf of the partners at the highest tax rate computed under
16 s. 71.745 (1) (a) for each reviewed year, as defined under section 6225 of the Internal
17 Revenue Code, to which such partnership adjustments relate. The partnership and
18 its partners shall report such changes or corrections to the department within 180
19 days after the receipt of the notice of approval from the department and shall concede
20 the accuracy of such determination or state how the determination is erroneous. The
21 partnership and its partners shall report changes and corrections as provided under
22 par. (a) within 180 days after the receipt of the notice of denial from the department.
23 The partnership and its partners are not required to report such changes or
24 corrections unless the changes or corrections affect the amount of net tax payable
25 under this chapter, of a credit calculated under this chapter, of a Wisconsin net

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1 operating loss carried forward under this chapter, of a Wisconsin net business loss
2 carried forward under this chapter, or a capital loss carried forward under this
3 chapter.

4 **SECTION 8.** 71.77 (7) (c) of the statutes is created to read:

5 71.77 (7) (c) When an election is made under s. 71.745 (9), with respect to
6 assessments of a tax or an assessment to recover all or part of any tax credit under
7 this chapter in any calendar year or corresponding fiscal year, if notice of assessment
8 is given to pass-through members within one year from the date of the election.

9 **SECTION 9.** 71.775 (1) (intro.) and (a) of the statutes are consolidated,
10 renumbered 71.775 (1) and amended to read:

11 71.775 (1) DEFINITIONS. In this section: ~~(a) “Nonresident”~~ “nonresident”
12 includes an individual who is not domiciled in this state; a partnership, limited
13 liability company, or corporation whose commercial domicile is outside the state; and
14 an estate or a trust that is a nonresident under s. 71.14 (1) to (3m).

15 **SECTION 10.** 71.775 (1) (b) of the statutes is repealed.

16 **SECTION 11.** 71.78 (1) of the statutes is amended to read:

17 71.78 (1) DIVULGING INFORMATION. Except as provided in subs. (4), (4m) ~~and,~~
18 (10), and (11), no person may divulge or circulate or offer to obtain, divulge, or
19 circulate any information derived from an income, franchise, withholding, fiduciary,
20 partnership, or limited liability company tax return or tax credit claim, including
21 information which may be furnished by the department as provided in this section.
22 This subsection does not prohibit publication by any newspaper of information
23 lawfully derived from such returns or claims for purposes of argument or prohibit
24 any public speaker from referring to such information in any address. This
25 subsection does not prohibit the department from publishing statistics classified so

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1 as not to disclose the identity of particular returns, or claims or reports and the items
2 thereof. This subsection does not prohibit employees or agents of the department of
3 revenue from offering or submitting any return, including joint returns of a spouse
4 or former spouse, separate returns of a spouse, individual returns of a spouse or
5 former spouse, and combined individual income tax returns, or from offering or
6 submitting any claim, schedule, exhibit, writing, or audit report or a copy of, and any
7 information derived from, any of those documents as evidence into the record of any
8 contested matter involving the department in proceedings or litigation on state tax
9 matters if, in the department's judgment, that evidence has reasonable probative
10 value.

11 **SECTION 12.** 71.78 (11) of the statutes is created to read:

12 71.78 (11) PASS-THROUGH ENTITY AUDITS. If the department audits a
13 pass-through entity for income or franchise taxes of its pass-through members,
14 including when an election is made under s. 71.21 (6) (a) or 71.365 (4m) (a) to pay tax
15 at the entity level, the department may disclose the following:

16 (a) To a pass-through member that the pass-through entity is under audit or
17 was audited, if the disclosure is necessary to explain any amounts assessed or
18 refunded to the pass-through member or to obtain information necessary to
19 determine the proper amount of adjustment to make at the pass-through entity
20 level.

21 (b) To a pass-through entity, the identities of one or more pass-through
22 members who have failed to report pass-through items originating with the entity
23 on their Wisconsin returns, if the disclosure is necessary to explain any amounts
24 assessed or refunded to the pass-through member or to obtain information about a

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1 pass-through member's return in order to determine the proper amount of
2 adjustment to make at the pass-through entity level.

3 **SECTION 13.** 71.80 (26) of the statutes is created to read:

4 71.80 **(26)** PASS-THROUGH ENTITY REPRESENTATIVE. (a) Each pass-through entity
5 shall designate, in the manner prescribed by the department, a pass-through
6 member or other person with substantial presence in the United States as the
7 representative of the pass-through entity. In the case in which such designation is
8 not in effect, the pass-through entity shall appoint a representative within 60 days
9 following a written request by the department. If the pass-through entity fails to
10 appoint a representative following a written request by the department, the
11 department may designate a representative and notify the pass-through entity, or
12 the beneficiaries in the case of a closed estate or trust, in writing of the designation.
13 The pass-through entity may at any time provide a written statement to the
14 department designating a new representative and the department shall accept the
15 designation if the statement is signed by an authorized agent of the pass-through
16 entity. The representative designated by a pass-through entity under this
17 paragraph may be different than the pass-through entity's federal representative or
18 authorized agent.

19 (b) The representative designated under par. (a) shall have the power and duty
20 to do all of the following:

21 1. Act as the sole authority on behalf of the pass-through entity and its
22 pass-through members with respect to a determination under s. 71.745.

23 2. Provide the department sufficient information to identify each pass-through
24 member and the capital, profits, and loss interest of each pass-through member.

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1 3. Enter into extension agreements on behalf of the pass-through entity under
2 s. 71.77 (5).

3 4. Receive notices of pass-through entity adjustments under this chapter.

4 5. Notify all pass-through members of their share of corrections and
5 adjustments made to pass-through items within 60 days after a determination
6 under s. 71.745 becomes final or after receipt of notice of approval under s. 71.76 (2)
7 (b).

8 6. File appeals of notices of pass-through entity adjustments under this
9 chapter.

10 7. Enter into settlement agreements and bind pass-through members to
11 adjustments relating to pass-through items.

12 (c) The representative designated under par. (a) may delegate the powers and
13 duties under par. (b) to an authorized agent of the pass-through entity.

14 **SECTION 14.** 71.83 (1) (a) 12. of the statutes is created to read:

15 71.83 (1) (a) 12. 'Incomplete or incorrect pass-through entity return' If any
16 pass-through entity, as defined in s. 71.738 (3d), required to file a return under this
17 chapter files an incomplete or incorrect return, the department, upon a showing by
18 the department under s. 73.16 (4), may assess the pass-through entity an amount
19 equal to 25 percent of the amount of the tax assessed under s. 71.745. The amount
20 shall be assessed, levied, and collected in the same manner as additional normal
21 income or franchise taxes.

22 **SECTION 15.** 71.88 of the statutes is amended to read:

23 **71.88 Time for filing an appeal. (1) APPEAL TO THE DEPARTMENT OF REVENUE.**

24 (a) *Contested assessments and claims for refund.* Except for refunds set off under
25 s. 71.93 in respect to which appeal is to the agency to which the debt is owed, except

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1 for refunds set off under s. 71.935 in respect to which an appeal is held under
2 procedures that the department of revenue establishes and except for refunds set off
3 under s. 49.855 in respect to which a hearing is held before the circuit court, and
4 except as provided in s. 71.745 (6), any person feeling aggrieved by a notice of
5 additional assessment, refund, or notice of denial of refund may, within 60 days after
6 receipt of the notice, petition the department of revenue for redetermination. A
7 petition or an appeal by one spouse is a petition or an appeal by both spouses. The
8 department shall make a redetermination on the petition within 6 months after it
9 is filed.

10 (b) *Contested adjustments to credits.* ~~Any~~ Except as provided in s. 71.745 (6),
11 any person feeling aggrieved by the determination made by the department to adjust
12 a credit claimed under s. 71.07, 71.28 or 71.47 or subch. VIII or IX may, within 60 days
13 after receipt, petition the department for redetermination. The department shall
14 make a redetermination on the petition within 6 months after it is filed and notify
15 the claimant under s. 71.74 (11). If no timely petition for redetermination is filed
16 with the department, its determination shall be final and conclusive.

17 (2) APPEAL TO THE WISCONSIN TAX APPEALS COMMISSION. (a) *Appeal of the*
18 *department's redetermination of assessments and claims for refund.* A person feeling
19 aggrieved by the department's redetermination, including a pass-through entity
20 that has been issued a redetermination under s. 71.745 (6) (b), may appeal to the tax
21 appeals commission by filing a petition with the clerk of the commission as provided
22 by law and the rules of practice promulgated by the commission. If a petition is not
23 filed with the commission within the time provided in s. 73.01 or, except as provided
24 in s. 71.75 (5), if no petition for redetermination is made within the time provided the
25 assessment, refund, or denial of refund shall be final and conclusive.

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1 (b) *Appeal of department's redetermination of credits.* Any person aggrieved by
2 the department of revenue's redetermination, including a pass-through entity that
3 has been issued a redetermination under s. 71.745 (6) (b), of a credit under s. 71.07
4 (3m), (6), or (9e), 71.28 (1) or (2m) or 71.47 (1) or (2m) or subch. VIII or IX, except when
5 the denial is based upon late filing of claim for credit or is based upon a
6 redetermination under s. 71.55 (8) of rent constituting property taxes accrued as at
7 arm's length, may appeal the redetermination to the tax appeals commission by
8 filing a petition with the commission within 60 days after the redetermination, as
9 provided under s. 73.01 (5) with respect to income or franchise tax cases, and review
10 of the commission's decision may be had under s. 73.015. For appeals brought under
11 this paragraph, the filing fee required under s. 73.01 (5) (a) does not apply.

12 **SECTION 16.** 73.16 (4) of the statutes is amended to read:

13 73.16 (4) NEGLIGENCE DETERMINATIONS. The department shall not impose a
14 penalty on a taxpayer under ss. 71.09 (11) (d), 71.83 (1) (a) 1. to 4. and 12. and (3) (a),
15 76.05 (2), 76.14, 76.28 (6) (b), 76.39 (3), 76.645 (2), 77.60 (2) (intro.), (3), and (4), 78.68
16 (3) and (4), and 139.25 (3) and (4), unless the department shows that the taxpayer's
17 action or inaction was due to the taxpayer's willful neglect and not to reasonable
18 cause.

19

(END)