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Details:

(FORM UPDATED: 08/11/2010)

WISCONSIN STATE LEGISLATURE ...
PUBLIC HEARING - COMMITTEE RECORDS

2009-10

(session year)

Joint

(Assembly, Senate or Joint)

Committee for Review of Administrative Rules (JCR-AR)

COMMITTEE NOTICES ...

- Committee Reports ... **CR**
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INFORMATION COLLECTED BY COMMITTEE FOR AND AGAINST PROPOSAL

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- Miscellaneous ... **Misc**

* Contents organized for archiving by: Stefanie Rose (LRB) (June 2012)

1. The designated agent leaves the combined group, in which case the corporation which files, or will file, the first combined return after the date the designated agent leaves is deemed to be appointed as the new designated agent.

2. Except as provided in subd. 3., the combined group, or portion of the combined group that includes the designated agent, is acquired by another combined group, in which case the corporation which files, or will file, the first combined return after the date of the acquisition is deemed to be appointed as the new designated agent.

3. The designated agent ceases to exist, in which case the designated agent shall notify the department in writing that another member of the combined group (or successor corporation of any member of the combined group) will thereafter act as designated agent for that taxable year and any prior taxable years. The member appointed for that taxable year and any prior taxable years need not be the new designated agent for all future taxable years. The substitute designated agent will succeed to the rights and responsibilities of the former designated agent and may in turn appoint another designated agent for future taxable years. If the designated agent fails to notify the department in writing of the new designated agent, the department may select a surviving member of the combined group to act as the designated agent.

4. Where subd. 2. does not apply, the designated agent is still a member of the combined group but submits a written request to the department for another combined group member to act as designated agent, and the department grants the request.

Note: Send requests to change the combined group's designated agent and notifications of successor designated agents to: Corporation Processing Unit, Wisconsin Department of Revenue, P.O. Box 8908, Madison, WI 53708-8908.

(d) *Continuity of agency for prior years.* The designated agent of a combined group for a prior taxable year shall continue to act as the designated agent for that taxable year unless the designated agent ceases to exist, in which case par. (c) 3. applies, or the designated agent submits a written request to the department for another combined group member to act as designated agent, and the department grants the request.

Note: Send requests to change the combined group's designated agent and notifications of successor designated agents to: Corporation Processing Unit, Wisconsin Department of Revenue, P.O. Box 8908, Madison, WI 53708-8908. However, if the request relates to prior taxable years that are under audit, the designated agent may submit the written request to the department's representative that has notified the designated agent of the audit.

(e) *Designated agent for purposes of resolving disputes over combined group membership.* If the department determines that one or more corporations are members of a combined group and no combined return was filed, the group of corporations the department asserts is a combined group may appoint a member of that group as the designated agent solely for purposes of contesting the department's determination. The appointment of a designated agent under this paragraph may not be construed as a concession by either the corporations or the department regarding the existence of a combined group or the proper composition of a combined group.

(3) SCOPE AND LIMITATIONS OF AGENCY. (a) *Duties of designated agent.* The designated agent is generally required to act on behalf of the combined group in its own name in all matters relating to the combined return. This includes performing the following duties:

1. Filing the combined return, including the reporting of any separate entity items attributable to combined group members.

2. Filing any extension of time to file the combined return.

3. Filing any amended combined returns or claims for refunds or credits relating to the combined return, including any separate entity items attributable to combined group members.

4. Sending and receiving all correspondence with the department regarding the combined return, except that if correspondence relates to separate entity items or a payment made by another member of the combined group as provided in s. Tax 2.66(2), the department may send the correspondence to that other member or the designated agent, or both.

5. Remitting taxes applicable to the combined return, including estimated taxes, except as otherwise provided in s. Tax 2.66.

6. Participating on behalf of the group in any investigation or hearing by the department regarding the combined return, including producing all information requested and filing any appeal. Unless provided otherwise in writing, any appeal filed by the designated agent relating to the combined return shall be considered filed by all members of the combined group, including any corporations that were not included in the combined return but which the department asserts are members the combined group.

7. Executing waivers, closing agreements, powers of attorney, and other documents relating to the combined return. Unless the department and taxpayer agree otherwise in writing, any waiver, closing agreement, power of attorney, or other document executed by the designated agent relating to the combined return shall be considered executed by all members of the combined group, including any corporations that were not included in the combined return but which the department asserts are members of the combined group.

8. Receiving assessment notices regarding the combined return. Subject to par. (f), a notice received by the designated agent is considered received by all members of the combined group, including any corporations that were not included in the combined return but which the department asserts are members the combined group. If a notice relates to separate entity items that are attributable to a combined group member other than the designated agent, the designated agent may submit a written request to the department to reissue the notice or a portion of the amount of the notice to the combined group member responsible for the separate entity items. The designated agent shall submit the written request on or before the due date shown on the notice.

Note: Send written requests to reissue notices relating to separate entity items to: Wisconsin Department of Revenue, Mail Stop 5-257, P.O. Box 8906, Madison, WI 53708-8906.

9. Receiving any refunds relating to the combined return.

(b) *Exclusivity.* Except as provided in this paragraph, no person other than the designated agent shall have authority to act for or represent itself or the combined group regarding the duties listed in par. (a). A combined group member, or a corporation which the taxpayer asserts is a combined group member, may assume any of the duties listed in par. (a) under any of the following conditions:

1. By election of the designated agent or the applicable combined group member, a combined group member may perform any of the duties listed in par. (a) to the extent those duties relate to separate entity items. This may include the filing of a separate return to report the member's separate entity items, subject to the requirements of par. (c).

2. A combined group member may make estimated payments on its own behalf to the extent allowed in s. Tax 2.66(2).

3. If a combined return was filed, the department may allow any corporation which it asserts should be added to or eliminated from the combined group to represent itself after receipt of a written request from the corporation. However, that corporation shall still be bound by any action taken by the designated agent before the corporation's request to represent itself has been accepted by the department.

Note: A corporation that wishes to represent itself should submit the written request to the department's representative that has notified the corporation of the department's assertion.

(c) *Reporting of separate entity items.* If a combined group member chooses to file a separate Wisconsin return to report its separate entity items rather than having the designated agent include them in the combined return in the manner described in s. Tax 2.67(2)(d)3., the member shall consider the totality of its share of items from the combined return plus its separate entity items for purposes of applying any limitations, so that its total net tax plus recycling surcharge does not differ from the amount that would have been due if the separate entity items had been included in the combined return. The combined group member shall submit a copy of the combined return with its separate return.

(d) *Unauthorized acts.* The department is not bound by unauthorized acts made with respect to a combined return by a corporation that is not the designated agent. The department may choose to receive the benefits or assume the obligations of unauthorized acts, in which case the department is bound only if it takes affirmative steps to expressly manifest its intent to receive the benefits or assume the obligations of the acts.

(e) *Failure to act.* If the designated agent is unable or unwilling to fulfill its obligations with respect to the combined return, is unresponsive, or has not been identified to the department, the department may appoint a new designated agent, or it may deal directly with any member of the combined group in respect to its share of the combined return items in which case each member shall have full authority to act for itself.

(f) *Joint and several liability.* Under s. 71.255 (1) (n), Stats., the members of a combined group shall be jointly and severally liable for the combined tax, penalty, and interest attributable to the combined unitary income, net of any loss carryforwards and credits applied. This paragraph does not apply to any tax, interest, or penalty attributable to separate entity items. Although the department may send correspondence, notices, refunds, assessments, or other documents relating to any combined group member's separate entity items to the designated agent, and the designated agent may choose to pay any tax, interest, or penalty on behalf of a combined group member, the tax, interest, or penalty attributable to separate entity items is ultimately the responsibility of the combined group member or members to which the separate entity items are attributable.

(g) *Confidentiality provisions.* The designated agent is an agent under s. 71.78(4)(e), Stats. Therefore, the department may provide information relating to any member of the combined group to the designated agent, including information relating to the member's separate entity items.

Note: This section interprets s. 71.255(7), Stats.

Cross References: See s. Tax 2.60 for definitions that relate to this section. See s. Tax 2.66 for more information on combined estimated tax requirements. See s. Tax 2.67 for more information on combined returns.

Tax 2.66 Combined Estimated Tax Payments. (1) SCOPE. In general, s. 71.255(7)(b)5., Stats., provides that only the designated agent of a combined group may make estimated tax payments applicable to a combined return. This section provides exceptions to the general rule, explains the estimated tax requirements, and provides rules for applying estimated payments and overpayments.

(2) SEPARATE ESTIMATED PAYMENTS. (a) *When separate estimated payments are allowed.* Although the designated agent is always authorized to make estimated payments on behalf of any and all of its combined group members, a combined group member other than the designated agent may make estimated payments on its own behalf if any of the following apply:

1. For the first taxable year for which a combined group files a combined return, any member of the group may make estimated payments on its own behalf.

2. For the first taxable year for which a corporation is a member of a combined group, that corporation may make estimated payments on its own behalf.

3. Any combined group member may make estimated payments on its own behalf to the extent those payments relate to separate entity items.

(b) *Reporting of separate estimated payments.* If a combined group member other than the designated agent makes separate estimated payments and applies those payments to the combined return, the designated agent shall notify the department of those payments on a department-prescribed form filed with the combined return. This notification authorizes the department to apply the separate estimated payments to the combined return.

Note: The form prescribed for notifying the department of separate estimated payments to be applied to the combined return is Part IV of Form 4M, Combined Group Member-Level Data.

(3) DETERMINATION OF REQUIRED ESTIMATED PAYMENTS. (a) *General.* If a combined return is filed, the amount of any addition to tax under s. 71.84(2), Stats., shall be computed as if the combined group were one corporation. "Tax shown on the return" and "tax for the taxable year" as defined in s. 71.29(1)(b), Stats., have the same meaning with respect to a combined return as to a separate return.

(b) *Computation of thresholds.* Since, as provided in par. (a), "tax shown on the return" has the same meaning with respect to a combined return as to a separate return, the amounts of the following thresholds are the same regardless of the number of combined group members included in the combined return:

1. Section 71.29(7), Stats., which provides that no interest on underpayment is required if the tax shown on the return for the taxable year is less than $500.

2. Section 71.29(9), Stats., which provides that for corporations that have Wisconsin net incomes of less than $250,000 and whose preceding taxable year was a 12-month taxable year, estimated payments may be based on the lesser of 90 percent of tax shown on the return for the current taxable year or the tax shown on the return for the preceding year.

(c) *Effect of separate entity items.* The amount of net income and tax shown on a combined return includes net income and tax attributable to separate entity items. If the combined return includes separate entity items of a corporation that would otherwise be a combined group member except that it has no items that are subject to combination under the water's edge rules of s. Tax 2.61(4), the corporation is considered a combined group member for purposes of determining required estimated payments.

Example: Combined Group AB consists of Member A and Member B. Group AB filed a combined return for calendar year 2010. The 2010 return includes $30,000 of net tax attributable to Member A's items and $20,000 attributable to Member B's items, including $5,000 attributable to B's separate entity items. The 2010 combined return also includes $10,000 of net tax from the separate entity items of Corporation C, which would be a combined group member except that none of its items are subject to combination under the water's edge rules. If Group AB is not eligible to base its estimated taxes on its 2009 net tax under the provisions of par. (b), Group AB's required estimated tax payments for purposes of its 2010 combined return are $60,000 (= $30,000 + $20,000 + $10,000).

(d) *Annualized income installment method.* For purposes of the annualized income installment method provided in s. 71.29(9)(c) and (10)(c), Stats., the previous year's apportionment percentage for a combined group equals the sum of the combined group members' modified sales factor numerators as determined under s. Tax 2.61(7)(a) for the combined group's preceding taxable year, divided by the combined group's modified sales factor denominator as determined under s. Tax 2.61(7)(b) for the combined group's preceding taxable year.

(e) *Change in membership.* For purposes of applying par. (a) and except as provided in par. (f), the combined group's "tax shown on the return" for the current taxable year or the preceding taxable year is the tax shown on the combined return for the applicable year, without regard to corporations that have joined or left the group.

Example: Group JK files a combined return for the calendar year 2009. During 2010, Member J acquires L and L becomes a member of the combined group. If the group qualifies to determine its estimated tax obligations for 2010 based on its preceding year's tax liability, its preceding year's tax liability only includes the tax shown on Group JK's 2009 combined return; it does not include any tax liability from L's 2009 separate return.

(f) *First combined return year.* The following rules apply to the computation of required estimated payments for the first year that a combined group files a combined return:

1. If the total of the combined group's Wisconsin net income reported on the combined return is less than $250,000, the required estimated payments may be based on the sum of the members' tax shown on their Wisconsin returns for the preceding year as provided by s. 71.29 (9) (a) 2., Stats., but only if all combined group members filed a Wisconsin return which covered a full 12 months in the preceding taxable year. If a member was included in the combined return

of another combined group in the preceding taxable year, its tax shown on the return for that year is the tax attributable to the sum of its share of combined unitary income and income from separate entity items reported on that return.

2. If one or more combined group members did not file a Wisconsin return which covered 12 months in the preceding taxable year, the combined group shall base its required estimated payments on 90 percent of the tax shown on the combined return as provided under s. 71.29(9) (a) 1. or (10) (b), Stats., as applicable.

3. The previous year's apportionment percentage for purposes of the annualized income installment method equals the sum of the current combined group members' apportionment factor numerators from their returns for the preceding taxable year, divided by the sum of the apportionment factor denominators from their returns for the preceding taxable year. If a member was included in the combined return of another combined group in the preceding taxable year, its apportionment percentage for this purpose is its modified sales factor numerator for that taxable year as determined under s. Tax 2.61(7)(a), divided by its separate company denominator for that taxable year as determined under s. Tax 2.61(7)(b).

4. For purposes of subds. 1. to 3., if a combined group member has a taxable year different than the combined group's taxable year, the member's preceding taxable year is its taxable year most recently ended before the first day of the combined group's taxable year.

(4) RULES FOR APPLYING ESTIMATED PAYMENTS AND OVERPAYMENTS. (a) *Separate returns filed in year following combined return year.* If a combined group terminates and the former members properly file separate returns in the subsequent year, any combined estimated payments made for that year shall be credited against the separate tax liabilities of the former members of the combined group in the manner allocated by the designated agent. The designated agent shall notify the department of the manner in which the payments are to be allocated. The designated agent may make this notification in correspondence to the department unless the department prescribes a specific form for this purpose, in which case the prescribed form shall be used. In either case, the notification shall be submitted to the department separately from any return.

(b) *Combined estimated payments but no combined return.* If combined estimated payments are made for a taxable year but no combined return is filed for that year or for the previous year, the estimated payment shall only be credited to the corporation that made the payment.

(c) *Overpayments.* 1. If a combined group member has a credit for an overpayment of taxes from a prior taxable year when it was not a combined group member, the member may, through its designated agent, authorize the department to apply some or all of the credit against the total tax liability reported on the combined return. To carry out this authorization, the designated agent shall file a department-prescribed form with the combined return to notify the department of the amount to be applied. Alternatively, the member may file a claim for refund of the overpayment, in which case the overpayment shall be refunded to that member.

Note: The form prescribed for notifying the department of a member's prior year overpayments to be applied to the combined return is Part IV of Form 4M, Combined Group Member-Level Data.

2. If a corporation leaves a combined group that has an overpayment of taxes carried over from a prior combined return year, the designated agent may allocate a portion of that overpayment to the former member. The designated agent shall notify the department of the amount to be allocated to the former member. The designated agent may make this notification in correspondence to the department unless the department prescribes a specific form for this purpose, in which case the prescribed form shall be used. In either case, the notification shall be submitted to the department separately from any return.

(d) *Erroneous combined estimated payments.* If a designated agent makes estimated payments on the erroneous premise that a corporation is an eligible member of the combined group, and discovers the error prior to the time the combined group and the corporation file their respective returns, the designated agent may allocate some or all of the combined estimated payments to the corporation. The designated agent shall notify the department of the amount to be allocated. The designated agent may make this notification in correspondence to the department unless the department prescribes a specific form for this purpose, in which case the prescribed form shall be used. In either case, the notification shall be submitted to the department separately from any return. The combined group and the corporation shall each compute their addition to tax under s. 71.84(2), Stats., as if the estimated payments allocated to the corporation had actually been paid by it rather than by the combined group.

(e) *Erroneous separate estimated payments.* If a corporation makes separate estimated payments on the erroneous premise that it is not a combined group member, the following rules apply:

1. If the corporation discovers the error prior to the time the designated agent files the combined return for the taxable year, and the corporation has not filed a separate return for the period that should have been included in that combined return or otherwise received a refund of the separate estimated payments, the corporation may apply the separate estimated payments to the combined return. The designated agent shall report the separate estimated payments in the manner described in sub. (2)(b).

2. If the corporation discovers the error prior to the time the designated agent files the combined return for the taxable year, but the corporation has already filed a separate return for the period that should have been included in the combined return, the corporation shall file an amended separate return showing no net income, overpayment, or underpayment, and stating that the corporation will join in the filing of a combined return and identifying the designated agent of the combined group. Unless the corporation specifies otherwise on the amended return, the department will not refund the erroneously paid amounts. When the designated agent files the combined return including that corporation, the corporation may apply the separate estimated payments to the combined return unless the corporation specified otherwise on its amended return or has otherwise received a refund of the separate estimated payments. The designated agent shall report the separate estimated payments so applied in the manner described in sub. (2)(b).

3. If the corporation discovers the error after the designated agent has filed the combined return for the taxable year, but the corporation has not filed a separate return or otherwise received a refund of the separate estimated payments, the designated agent shall file an amended combined return and apply the corporation's separate estimated payments to the amount due on the amended combined return. The designated agent shall report the separate estimated payments so applied in the manner described in sub. (2)(b).

4. If the corporation discovers the error after the designated agent has filed the combined return for the taxable year and after the corporation has already filed a separate return for the period that should have been included in the combined return, the corporation shall file an amended separate return and the combined group shall file an amended combined return. The provisions of subd. 2. apply with respect to the amended separate return. The corporation may apply the separate estimated payments to the amended combined return unless the corporation specified otherwise on its amended return or has otherwise received a refund of the separate estimated payments. The designated agent shall report the separate estimated payments so applied in the manner described in sub. (2)(b).

Note: If an allocation described in sub. (4)(a), (c)2., or (d) is necessary and the department has not prescribed a form to use to notify the department of the allocation, send correspondence notifying the department of the allocation to: Corporation Processing Unit, Wisconsin Department of Revenue, P.O. Box 8908, Madison, WI 53708-8908.

Note: Section Tax 2.66 interprets ss. 71.255(7), 71.29, and 71.84(2), Stats.

Cross References: See s. Tax 2.60 for definitions that relate to this section. See s. Tax 2.65 for more information on the duties of the designated agent. See s. Tax 2.67 for more information on combined returns.

Tax 2.67 Combined Returns. (1) SCOPE. This section provides rules relating to the filing of combined returns by corporations required to use combined reporting under s. 71.255, Stats. This section explains the filing requirements for combined returns, provides rules relating to defining the taxable year included in a combined return, and describes how interest, penalties, and statutes of limitations apply to combined returns.

(2) FILING REQUIREMENTS FOR COMBINED RETURNS. (a) *General.* The designated agent of a combined group shall file a combined return on behalf of the group. For each combined group member included in the combined return, the combined return satisfies the member's requirement for filing returns under ss. 71.24(1) or (1m) or 71.44(1) or (1m), Stats., as applicable. The combined return shall be filed by the date provided in ss. 71.24(1), (1m), and (7) or 71.44(1), (1m), and (3), Stats., as applicable.

(b) *Electronic filing.* All combined returns shall be filed electronically. The secretary of revenue may waive the requirement to file a combined return electronically when the secretary determines that the requirement causes an undue hardship, if the person requests the waiver in writing and clearly indicates why the requirement causes an undue hardship. In determining whether the electronic filing requirement causes an undue hardship, the secretary of revenue may consider the following factors:

1. Unusual circumstances that may prevent the person from filing electronically.

Example: The person does not have access to a computer that is connected to the internet.

2. Any other factor that the secretary determines is pertinent.

Note: Written requests should be e-mailed to DORWaiverRequest@revenue.wi.gov, faxed to (608) 264-7776, or addressed to Mandate Waiver Request, Wisconsin Department of Revenue, Mail Stop 5-77, P.O. Box 8949, Madison, WI 53708-8949.

Note: Forms not filed electronically may be delivered in person to the Department of Revenue at 2135 Rimrock Road, Madison, Wisconsin or mailed to the address specified on the form or in the instructions.

(c) *Components of combined return.* A combined return shall include the following items, and shall be considered incomplete if any of these items are excluded:

1. One Wisconsin Form 4, Income or Franchise Tax Return, for the combined group as a whole.

2. One Wisconsin Form 4R, Federal Taxable Income Reconciliation for Combined Groups, for the combined group as a whole. The purpose of Form 4R is to reconcile federal taxable income per the federal consolidated return and separate returns, as applicable, with the amount on Form 4, line 1. Form 4R shall be considered complete only if the designated agent submits a supporting schedule which identifies each corporation to which each reconciling amount is attributable, and a schedule which identifies each corporation in the commonly controlled group which is not included in either the federal consolidated return or the combined return.

3. One Wisconsin Form 4M, Combined Group Member-Level Data, for each member of the combined group. The purpose of Form 4M is to identify the members of the combined group, provide information regarding the member's items included in the combined return, and account for payments to be applied to the combined return.

4. If the combined group is using apportionment, one Wisconsin Form 4A, Apportionment Data for Combined Groups, and the apportionment factor computation for each member of the combined group as performed on Form 4A-1, Apportionment Data for Single Factor Formulas, or Form 4A-2, Apportionment Data for Multiple Factor Formulas, as applicable.

5. Any other required supporting forms and schedules listed in s. Tax. 2.03, as applicable. Unless stated otherwise in the instructions, supporting forms and schedules shall be prepared separately for each combined group member.

6. A copy of the complete federal return for each combined group member, including all supporting schedules and any amended returns, for the member's taxable year included in the combined return. For combined group members that also file in a federal consolidated return, any of the following alternatives shall be considered to satisfy this requirement:

a. A copy of the federal consolidated return, including all supporting forms, schedules, and statements for each corporation included in the consolidated return, as submitted to the Internal Revenue Service.

b. Pro forma federal returns prepared separately for each combined group member, including all supporting forms and schedules prepared separately for each combined group member.

c. A spreadsheet showing the line-by-line computation of taxable income of each combined group member included in the federal consolidated return, including consolidating adjustments, plus the supporting forms, schedules, and statements filed with the Internal Revenue Service pertaining to each member. The supporting statements shall include balance sheets as of the beginning and end of the tax year, a reconciliation of income per books with income per return, and a reconciliation of retained earnings, to the extent the member was required to submit these items to the Internal Revenue Service.

7. For combined groups that also file in a federal consolidated return, a copy of federal Form 851, Affiliations Schedule.

(d) *Separate entity items.* 1. Subject to the provisions of s. Tax 2.65(3)(b), if any combined group member has separate entity items, the designated agent shall include those separate entity items in the combined return. If a corporation that would otherwise be a combined group member has no items that are subject to combination under the water's edge rules of s. Tax 2.61 (4), the designated agent may include that corporation's separate entity items in the combined return, in which case the combined return shall include the items specified in sub. (2) (b) 3., 5., and 6. and subd. 3. for that corporation as if it is a combined group member. Alternatively, the corporation may file a separate Wisconsin return to report those items.

2. The joint and several liability provisions of s. Tax 2.65(3)(f) do not apply to any tax, interest, or penalty attributable to separate entity items. Although the department may send correspondence, notices, refunds, assessments, or other documents relating to any combined group member's separate entity items to the designated agent, and the designated agent may choose to pay any tax, interest, or penalty on behalf of a combined group member, the tax, interest, or penalty attributable to separate entity items is ultimately the responsibility of the combined group member or members to which the separate entity items are attributable.

3. The separate entity net income or loss and apportionment factors included in the combined return shall be reported on Wisconsin Form 4N, Nonapportionable and Separately Apportioned Income. The designated agent shall complete and submit Form 4N with the combined return for each applicable corporation and carry forward the total Form 4N amounts to the appropriate line on Form 4. For purposes of the requirement of s. 71.255(2)(d), Stats., separate entity items reported on Form 4N shall be considered filed on a separate return. However, for purposes of determining a combined group member's net income, tax, interest, underpayment interest, recycling surcharge, and the statute of limitations, the separate entity amounts shall be added to its amounts, if any, computed in the unitary combination.

4. If a corporation is a member of more than one combined group at the same time, the corporation shall include its separate entity items, if any, in the combined return of only one group.

(e) *Amended returns.* If a corporation erroneously fails to join in the filing of a combined return, the designated agent shall file an amended combined return adding the corporation and, if a separate return was filed by the corporation, the corporation shall file an amended separate return showing no net income, overpayment, or underpayment, and stating that the corporation has joined in the filing of a combined return and identifying the designated agent of the combined group in which the corporation has been included.

(3) TAXABLE YEAR OF COMBINED RETURN. The taxable year included in a combined return is the combined group's taxable year as determined in s. 71.255(8), Stats. For purposes of determining the taxable year and the items includable in the combined group's taxable year, the following rules apply:

(a) *Combined group's taxable year.* If two or more members of the combined group file in a federal consolidated return, the combined group's taxable year is the taxable year of that federal consolidated return. If no federal consolidated return applies or there is more than one federal consolidated return, the combined group's taxable year is the taxable year of the designated

agent. In any case, s. Tax 2.65(2)(a) requires that the designated agent's taxable year shall be the same as the combined group's taxable year.

(b) *Methods for members with differing taxable years.* If the taxable year of a combined group member differs from the taxable year of the combined group, the designated agent shall include that member's net income or loss and apportionment factors in the combined return by using one of the following methods:

1. Preparing a separate income statement from the member's books and records for the months included in the combined group's taxable year and using that income statement to determine the amounts includable in the combined return.

2. Using the net income or loss for the member's taxable year that ends during the combined group's taxable year to determine the amounts includable in the combined return.

(c) *Election of method.* If the designated agent converts a combined group member's taxable year to the combined group's taxable year as described in par. (b)1. or 2., it shall use the same method for each combined group member subject to the election. Once the designated agent files the first combined return including a member whose taxable year is properly converted, the designated agent may not file an amended return to change the election, except that if the original return was not filed under extension, the designated agent may file an amended return to change the election on or before the end of the automatic seven-month extension period provided in ss. 71.24(7) or 71.44(3), Stats., as applicable. The designated agent shall use the same method in each subsequent taxable year unless it obtains written approval from the department to use the other method.

Note: Send written requests for approval to change the election to: Audit Bureau, Wisconsin Department of Revenue, P.O. Box 8906, Madison, WI 53708-8906.

(d) *Part-year members.* If, during a combined group's taxable year, a corporation ceases to be a member of the combined group or a new corporation becomes a member, the designated agent shall include that corporation's items attributable to the portion of the taxable year that the corporation was a member in the combined return covering the combined group's entire taxable year. For the portion of the taxable year when the corporation was not a member of the combined group, the corporation shall file a separate return or file in the combined return of another combined group, as applicable.

(4) INTEREST, PENALTIES, AND STATUTES OF LIMITATIONS. (a) *Interest.* For purposes of computing interest on late payments by or on behalf of combined group members, the following rules apply:

1. Interest shall be assessed to the designated agent of a combined group based upon the combined tax liability or deficiency shown on the combined return for the combined group's taxable year. However, the joint and several liability provisions of s. Tax 2.65(3)(f) do not apply to any interest attributable to separate entity items. If a notice of an interest amount due is attributable to separate entity items of a combined group member other than the designated agent, the designated agent may pay the amount due or may submit a written request to the department to reissue the notice or a portion of the amount assessed to the combined group member responsible for the separate entity items. The designated agent shall submit the written request on or before the due date shown on the notice.

Note: Send written requests to reissue notices relating to separate entity items to: Wisconsin Department of Revenue, Mail Stop 5-257, P.O. Box 8906, Madison, WI 53708-8906.

2. An extension filed by the designated agent shall be considered an extension filed by all members of the combined group. However, the extension filed by the designated agent does not apply to affiliated corporations that are not combined group members, even if those corporations will be included in the combined return under the provisions of par. (d) 1.

3. Interest due to underpayment of estimated taxes shall be computed based on the estimated tax requirements and other provisions described in s. Tax 2.66.

4. If a corporation erroneously fails to join in the filing of the combined return, all payments, credits, and other amounts collected from the corporation which are properly attributable to the combined group's taxable year and attributable to a period of time that the corporation was a member of the combined group shall be treated as having been paid by the combined group.

(b) *Late filing fees.* If a combined group fails to timely file a combined return and the late filing fee under s. 71.83(3), Stats., applies, the amount of the late filing fee shall be the amount provided in s. 71.83(3), Stats., regardless of the number of combined group members.

(c) *Failure to file.* For purposes of the penalty provided in s. 71.83(1)(a)1., Stats., the following rules apply:

1. A corporation which erroneously fails to join in the filing of a combined return, but which timely files a separate Wisconsin return or joins in the timely filing of a combined return for another combined group, may not be subject to a penalty for failure to file. In determining whether the return is timely filed, the taxable year of the erroneously filed return shall be used, rather than the taxable year of the combined group with which the corporation should have filed.

2. A corporation which erroneously fails to join in the filing of a combined return and which fails, without reasonable cause, to timely file a separate Wisconsin return or join in the timely filing of a combined return for another combined group, shall be subject to the penalty computed based on its share of tax required to be reported on the combined return for its proper combined group, including its tax attributable to separate entity items. Except as provided in sub. (2)(d)2., the members of the combined group shall be jointly and severally liable for the penalty because under s. 71.255 (1) (n), Stats., joint and several liability may apply to penalties and it is the duty of the designated agent to include the corporation in the combined return. The department may send a notice of assessment of the penalty to the designated agent instead of the corporation which was erroneously omitted from the combined return.

(d) *Statutes of limitations.* 1. The designated agent's filing of a combined return shall be considered to be a return filed by each combined group member whose items are included in the combined unitary income reported on that return.

2. If a combined return includes separate entity items of a corporation that would otherwise be a combined group member but for the water's edge rules of s. Tax 2.61 (4), the designated agent's filing of the combined return shall be considered to be a return filed by that corporation.

3. For purposes of the statute of limitations in s. 71.77 (7) (a), Stats., allowing the department to make an assessment within six years after the filing of a return, the statute of limitations shall be determined for each combined group member separately based on its total net income reported on its return, which is its net income or loss from the unitary combination as

included in the combined return, plus its net income or loss from separate entity items. The six-year statute of limitations applies if a combined group member's total net income reported on its return is less than 75 percent of the net income properly assessable and the tax attributable to the additional income is in excess of $100. The designated agent shall be responsible for any combined group member's return that is open under the 6-year statute of limitations, subject to the provisions of s. Tax 2.65(3)(f), even if the designated agent's return, as included in the combined return, is not open under the six-year statute of limitations.

Note: Section Tax 2.67 interprets ss. 71.24(1), (1m), and (7), 71.255(1)(b), (7)(b), (8), and (9), 71.44(1), (1m), and (3), 71.77, 71.82, and 71.83, Stats.

Cross References: See s. Tax 2.60 for definitions that relate to this section. See s. Tax 2.65 for more information on the duties of the designated agent. See s. Tax 2.66 for more information on combined estimated tax requirements.

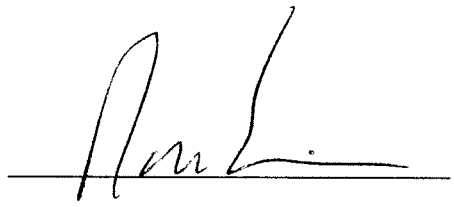
The rules contained in this order shall take effect on the first day of the month following publication in the Wisconsin administrative register as provided in s. 227.22(2)(intro.), Stats.

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: 1/5/10

By: 

Roger M. Ervin
Secretary of Revenue

E:Rules/Combined Reporting Proposed Order (v2)

FISCAL ESTIMATE FORM

2009 Session

☐ ORIGINAL ☒ UPDATED
☐ CORRECTED ☐ SUPPLEMENTAL

LRB #
INTRODUCTION #
Admin. Rule # Chapter Tax 2.60 through 2.67

Subject: Combined Reporting

Fiscal Effect

State: ☐ No State Fiscal Effect
Check columns below only if bill makes a direct appropriation or affects a sum sufficient appropriation

☐ Increase Existing Appropriation ☐ Increase Existing Revenues
☐ Decrease Existing Appropriation ☐ Decrease Existing Revenues
☐ Create New Appropriation

☐ Increase Costs - May be Possible to Absorb Within Agency's Budget ☐ Yes ☐ No
☐ Decrease Costs

Local: ☐ No Local Government Costs

1. ☐ Increase Costs
   ☐ Permissive ☐ Mandatory
2. ☐ Decrease Costs
   ☐ Permissive ☐ Mandatory
3. ☐ Increase Revenues
   ☐ Permissive ☐ Mandatory
4. ☐ Decrease Revenues
   ☐ Permissive ☐ Mandatory
5. Types of Local Governmental Units Affected:
   ☐ Towns ☐ Villages ☐ Cities
   ☐ Counties ☐ Others _____
   ☐ School Districts ☐ WTCS Districts

Fund Sources Affected
☐ GPR ☐ FED ☐ PRO ☐ PRS ☐ SEG ☐ SEG-S

Affected Ch. 20 Appropriations

Assumptions Used in Arriving at Fiscal Estimate:

The proposed rules create Tax 2.60 through 2.67 to incorporate tax law changes included in 2009 Act 2 and 2009 Act 28 related to combined reporting for commonly controlled groups of corporations.

The fiscal effect from implementation of combined reporting was included in the fiscal effect for Act 2, and the fiscal effect of certain changes to combined reporting that were a part of Act 28 were included in the fiscal effect for the Act. The administrative rules for these provisions have no fiscal effect independent of Acts 2 and 28.

In addition to the rule changes made necessary by the statutory changes under Acts 2 and 28, the rule also specifies that basis for depreciable assets for corporations that are subject to tax for the first time shall be the federal basis of the assets, except that the basis shall be computed without regard to any bonus depreciation claimed for federal purposes as required by statute. The fiscal effect of this provision is unknown.

Long-Range Fiscal Implications:

Agency/Prepared by: (Name & Phone No.)	Authorized Signature/Telephone No.	Date
Wisconsin Department of Revenue Michael Oakleaf (608) 261-5173	Rebecca Boldt (608) 266-6785	

DEPARTMENT OF REVENUE

CLEARINGHOUSE RULE NUMBER 09-064

SECTION 227.19(2) AND (3), STATS., REPORT

Basis and Purpose of the Proposed Rule

The rule is necessary to reflect the changes in Wisconsin's franchise and income tax laws affected by 2009 Act 2 and provide guidance to taxpayers and Department employees so they can properly apply the Wisconsin franchise and income tax laws.

Public Hearings

Public hearings were held on September 25, 2009, and October 16, 2009.

Public Comment and Legislative Council Staff Recommendations

See attached Summary of Comments.

Regulatory Flexibility Analysis

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

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
1	Written Comments from Taxpayers	2.61(6)(a)3.	**Asset Basis.** Section 71.265, Stats., provides that when previously exempt corporations become taxable in Wisconsin, they must use their federal basis of assets for Wisconsin purposes. Section Tax 2.61(6)(a)3. applies this statute to combined group members that file Wisconsin returns for the first time because of combined reporting. Commenters have pointed out that s. Tax 2.61(6)(a)3. will cause some companies to permanently lose the tax benefit of some of their depreciation because the assets will have a deflated federal basis due to bonus depreciation. Additionally, commenters state that the statute interpreted in this manner may violate the Commerce Clause. This is not a combined reporting issue *per se*, but the issue is more prevalent because combined reporting will cause a sizable number of non-Wisconsin corporations to become Wisconsin taxpayers for the first time. Commenters are bringing up the Commerce Clause concern because under combined reporting, substantially all companies affected by s. 71.265 will be non-Wisconsin taxpayers. Commenters recommended allowing a basis adjustment or similar relief. They noted that Massachusetts allows a basis adjustment in its combined reporting regulations.	• Under s. Tax 2.30(3), an individual, estate, or trust computes asset basis under the "Internal Revenue Code" as defined for Wisconsin purposes, regardless of whether the property was acquired before the taxpayer became taxable in this state. This rule interprets s. 71.05(12), Stats., which is the individual income tax equivalent to s. 71.265, Stats. Thus, the same treatment should be granted to corporations. • **Amended 2.61(6)(a)3. to clarify that the federal basis computed under s. 71.265, Stats., must be determined using the "Internal Revenue Code" as defined for Wisconsin purposes. In effect, this allows the basis adjustment sought by the commenters.**
2	Written Comments from Taxpayers	None	**Recycling Surcharge.** Commenter notes that the recycling surcharge should be addressed in the rules. The rules don't address whether corporations that would have no nexus with Wisconsin on a separate entity basis (but have nexus because they are part of a combined group) have nexus for purposes of the recycling surcharge.	• Yes, these companies do have nexus for purposes of the recycling surcharge. • This topic is addressed in the emergency rule order for amendments to s. Tax 2.82, *Nexus*. The emergency rule order is expected to be published December 31, 2009.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
3a	Written Comments from Taxpayers	2.61(9)(h)	**Net Business Losses.** Section Tax 2.61(9)(h) provides that a combined group member may elect not to use or not to share all or a portion of its net business loss. Commenters requested that more specific language be put into the rules to clarify the following: • A combined group member that elects to share (or not to share) any or a part of its net business loss is not bound by that election for any subsequent taxable year • How to make the election	• **Added sentence to 2.61(9)(h)2. to clarify that the election is not binding on subsequent years.** • There is no separate application for making the election. Details of how to make the election will be covered in publication and form instructions.
3b	Written Comments from Taxpayers	2.61(9) & (10)	**Net Business Losses and Research Credits.** Subsections Tax 2.61(9) and (10) each deal with the ordering of net losses and credits, separately. Commenter notes that these sections do not address priority of use if a member has both net business losses and research credits available. Commenter recommends clarifying language to say that the net losses should be considered used first, then the research credits.	• Even before combined reporting, our published position has been that a taxpayer may choose not to use its research credits so it can use net business losses first. • Published Tax Releases in *Wisconsin Tax Bulletin* 138-24 and 139-21.
4a	Written Comments from Taxpayers	2.61(10)(d)	**Research Credits.** Commenter requested an example be inserted following s. Tax 2.61(10)(d) to show that when Corporations A and B are in the same combined group, and Corporation B performs otherwise qualified research for Corporation A which is funded by Corporation A, the following are true for purposes of computing the research credit: • Corporation B may claim that research as qualified research • The research is includable in the credit at 100%, not at the 65% contract research rate • Corporation A may not include the research in its research credit	• **Added example following 2.61(10)(d).** • **Example also clarifies that the amount Corporation B includes in the credit does not include its markup on the sale of the service.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
4b	Written Comments from Taxpayers	2.61(10)(c)	**Research Credits.** Commenters requested that the rules clarify the following: • A combined group member with research credits but no tax liability can share its unused credit with the rest of the combined group even though the corporation with the research credits has no tax liability of its own (one commenter recommended providing an example of this) • A combined group member that elects to share (or not to share) any or a part of its research credit with the rest of the combined group is not bound by that election for any subsequent taxable year • How to elect to share research credits	• **Inserted "if any" In 2.61(10)(c)1. to address the first bullet point.** • **Added sentence to 2.61(9)(h)2. to clarify that the election is not binding on subsequent years. Section 2.61(10)(c)5. Incorporates (9)(h)2. by reference.** • There is no separate application for making the election. Details of how to make the election will be covered in publication and form instructions.
4c	Written Comments from Taxpayers	2.61(10)(c)2.	**Research Credits.** Section Tax 2.61(10)(c)2. provides that the amount of available research credit for the current taxable year is to be used before any research credit carryforward. Commenter indicates that there is nothing in the statutes mandating that current credits be used prior to carryforwards.	• The rule was actually inconsistent with our position published in *Wisconsin Tax Bulletin* 138-24. • **Deleted the text in 2.61(10)(c)2. that was inconsistent with WTB 138-24 and added sentence to end of section 10(c)1.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
5a, 5b	Written Comments from Taxpayers	2.63(4)	**Controlled Group Election.** Commenters stated that s. Tax 2.63(4) creates too much uncertainty. This provision allows the Department to disregard or revoke the controlled group election in cases where the facts demonstrate that the election has the primary effect of tax avoidance rather than of simplification. Commenters expressed concerns that if they choose the controlled group election, the Department could pick and choose who should be in the combined group based solely on what produces the highest tax result. Commenters offered three recommendations to ease the uncertainty: 1. Revise sub. (4)(b) to provide that if the Department is going to make an adjustment to pull a company out of the controlled group election, it must revoke the election for the entire group. 2. As an add-on to recommendation 1., revise sub. (4)(b) so that the Department can *partially* revoke the election only if there is an agreement between the Department and taxpayer to do so. 3. Add language to sub. (4)(a) or (b) stating that the Department cannot exclude a corporation from a combined group that has made the controlled group election if that corporation is otherwise part of the unitary business.	• **Amended 2.63(4)(b) to provide that if the Department is going to make an adjustment under the anti-abuse provision, it must revoke the election for the entire group (Commenter Recommendation 1.)**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
5c	Written Comments from Taxpayers	2.61(7)(c)	**Controlled Group Election.** When a combined group makes the controlled group election, all members of the commonly controlled group become combined group members and thus have nexus in Wisconsin under s. 71.255(5)(a), Stats. Accordingly, when a combined group member computes throwback sales, it is not required to throw back sales destined for a state where any member of the combined group has nexus. Commenter requested that the rules contain more specific language clarifying that this rule applies equally to combined group members that are unitary and those that are included in the combined group solely because of the controlled group election.	• **Amended 2.61(4)(h)2. to 4. to more clearly state that if the controlled group election applies, nexus is automatic for all members of the commonly controlled group.** • **Amended 2.61(7)(c) to more clearly state that if the controlled group election applies, a member should not throw back sales destined for a state where any member of the group has nexus, even if that member is not in the unitary business.**
5d	Written Comments from Taxpayers	2.63(3)(a)	**Controlled Group Election.** Commenter noted that while section Tax 2.63(3)(a) provides that the controlled group election "...is also binding on any corporations that join the commonly controlled group during the period the election is in effect," it does not address the situation where a combined group that has not made a controlled group election purchases the parent company of a group that has made the election. Commenter suggests the following language be added to s. Tax 2.63(3)(a): "When a merger or acquisition occurs between two combined groups of corporations, and the book value of total assets or fair market value of the acquiring group is greater than that of a target controlled group on the date of the transaction, the controlled group election of the target group terminates."	• **Renumbered 2.63(3) to 2.63(3)(a) and added par. (b) to explain how reorganizations affect the controlled group election.** • **Also addressed what happens when a commonly controlled group divests a subgroup of companies.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
5e	Review Comments from Legislative Council	2.63 & 2.64	**Controlled Group Election and Specialized Apportionment Formulas.** Legislative Council inquires whether the provisions relating to the controlled group election (s. Tax 2.63) and specialized apportionment formulas (s. Tax 2.64) should address what happens if the business terminates before the end of the election period.	• Whether the election or method continues to apply after termination of the business makes no difference since the business cannot be subject to tax if it no longer exists.
6	Written Comments from Taxpayers	2.61(6)(h)	**Allocation of Expenses and Deductions.** Section Tax 2.61(6)(h) provides that if an expense or amount otherwise deductible is indirectly related to both combined unitary income and to income not subject to combination, a reasonable allocation should be made. Commenter requests further detail and examples of how these allocations are to be made.	• **Renumbered section 2.61(6)(h) to (6)(h)1. and added subds. 2. and 3. to specify that Wisconsin would follow the same requirements and methods specified in the Internal Revenue Code and its regulations.** • The federal regulations in this area are quite detailed and contain numerous examples.
7a	Written Comments from Taxpayers	2.61(8) & (9)	**100% Wisconsin Groups.** Commenter requests that examples be added to clarify that when a combined group consists only of 100% Wisconsin corporations (and therefore does not use apportionment), a member with current year income can offset that income with the current year loss of another member or members.	• **Amended 2.61(8)(intro.) to explicitly state that the group's tax liability is based on the aggregate total net business income or loss of the unitary business.** • This computation becomes apparent from looking at how the combined return comes together (i.e. the amounts on each member's Form 4M must add up to the combined group's total on Form 4).

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
7b	Written Comments from Taxpayers	2.61(8)	**100% Wisconsin Groups.** Commenter wants to confirm that within a group of 100% Wisconsin companies (where there is no apportionment), there is no requirement or mechanism to allocate any portion of a member's Wisconsin net income to other members.	• Commenter is correct. • If there were a requirement to allocate a member's net income to other members, the requirement would be just as likely to increase a taxpayer's tax liability as it would decrease a taxpayer's tax liability. • Such a requirement or mechanism does not appear to be authorized by statute.
8a	Written Comments from Taxpayers	2.61(2)(c)	**Nonincludable Corporations.** Commenter requests that the rules more clearly state the answers to the questions below regarding real estate investment trusts (REITs), regulated investment companies (RICs), real estate mortgage investment conduits (REMICs), and financial asset securitization investment trusts (FASITs). The questions arise from s. Tax 2.61(2)(c), which provides that these corporations are treated as pass-through entities for purposes of determining whether combined reporting applies. • Does a shareholder in one of these corporations include income from the corporation in the year it is actually distributed or when it is earned by the corporation? • How is tax basis of the ownership interest of these corporations determined? • Do such corporations have earnings and profits for Wisconsin purposes? • Are such corporations required to file a separate Wisconsin tax return if they have nexus?	• All of these questions have the same answers as before combined reporting. • **Added sentence to end of 2.61(2)(c) simply stating that the tax status of these entities was not affected by combined reporting.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
8b	Written Comments from Taxpayers	2.60(2)(i)	**Nonincludable Corporations.** Commenter wants to confirm that: • A "nonincludable corporation" as defined in s. Tax 2.60(2)(l) is different than a corporation that is excluded from a combined group because it does not meet the three-part test in s. Tax 2.61(2)(a) • A "nonincludable corporation" would only include two types of entities (a) pass-through entities as defined in s. 71.255(1)(m), Stats., and (b) tax exempt organizations	• Commenter is probably correct, although there is always a chance that new forms of organization will emerge as business laws are modernized.
9a	Written Comments from Taxpayers	2.61(4)(h)	**Water's Edge.** Commenter notes that clarification is needed in Example 1 following s. Tax 2.61(4)(h). The example describes a foreign 80/20 company that is not a combined group member, but it happens to have nexus in Wisconsin because of the activities of agents acting on its behalf in Wisconsin. Commenter points out that IRC §864(c)(5)(A) states that, with some exceptions, "in determining whether a nonresident alien individual or corporation has an office or other fixed place of business, an office or fixed place of business of an agent shall be disregarded." Commenter recommends inserting language in the example to clarify that the agency relationship that creates nexus does not run afoul of IRC §864 or P.L. 86-272.	• IRC §864(c)(5)(A) relates to foreign source income that is "effectively connected." In the example, the income at issue is true U.S. source income, not foreign source income that is "effectively connected." • **Added language to 2.61(c)2. to clarify that "effectively connected" has no effect on the "active foreign business income" test – this may be why the commenter erroneously referenced IRC §864(c)(5)(A).** • **Added language to example stating that the agent's activities exceeded the protection of P.L. 86-272.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
9b	Written Comments from Taxpayers	2.61(4)(h)	**Water's Edge.** Commenter requested clarification of how items that are excluded from combination under the water's edge rules are to be reported for Wisconsin purposes in the following scenarios: • Foreign corporation that isn't an 80/20 (therefore is included in combination to extent of U.S. source income) but has foreign source income excluded from combination • Foreign corporation that is an 80/20 (therefore is entirely excluded from combination) but also has nexus in Wisconsin • Domestic corporation that is an 80/20 and has foreign or certain U.S. source income excluded from combination	• The rules address this reasonably well, although the pieces of the answers to these questions are in several different places (e.g. ss. 2.61(4)(h), (5)(b), 2.65(3)(c) and (f), 2.67(2)(d)). • The instructions for Form 4N, *Nonapportionable and Separately Apportioned Income*, will put the pieces together. • **Amended section 2.67(2)(d) to further clarify that a nonmember's Form 4N may be filed along with the combined return.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
9c	Oral Comments by Taxpayers, Discussion with Massachusetts DOR	2.61(4)(g)	**Water's Edge.** Section Tax 2.61(4)(g) provides that if a corporation's income is not taxable for federal purposes under the provisions of a federal treaty, the income is not taxable for Wisconsin purposes and is not required to be included in combined unitary income. In informal discussions, taxpayers have inquired how this paragraph would apply to a tax treaty that provides for a reduced federal tax rate rather than an exclusion from federal taxable income.	• Confirmed position that any income that is exempt from taxation for federal purposes under a federal treaty is also exempt from taxation for Wisconsin purposes because Treas. Reg. §1.894-1(a) excludes income that is exempt by treaty from "gross income." • Confirmed position that if a treaty provides for the reduction in the federal tax rate or federal withholding rate, that treaty would have no impact on Wisconsin taxation. • **Amended 2.61(4)(g) to say "included in gross income" instead of "taxable" to be more precise.**
9d	Oral Comments by Taxpayers	2.61(4)(c)	**Water's Edge.** Section Tax 2.61(4)(c) draws a distinction between U.S. source and foreign source income, and paragraphs (d) and (e) then specify that apportionment factors relating to foreign source income must be excluded. At training presentations, audience members have asked how to apply paragraphs (d) and (e) to apportionment factors that relate to income that is dual-sourced (both U.S. source and foreign source) under specific provisions of sections 861 through 865 of the Internal Revenue Code.	• **Added 2.61(7)(i) (after renumbering prior (7)(i) to (7)(h)2.) to specify how a taxpayer must adjust apportionment factors to account for dual-sourced income.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
9e	Discussion with Massachusetts DOR	2.61(4)(c)3.	**Water's Edge.** Section Tax 2.61(4)(c)3. expands the scope of U.S. source income by providing that all income that is "effectively connected" with the conduct of a trade or business located in the U.S. (as determined under sections 861 through 865 of the Internal Revenue Code) is considered U.S. source even if otherwise derived from sources outside the U.S. Our counterparts in Massachusetts have asked if this means (or should mean) we use the expanded definition of U.S. source income for both foreign and domestic corporations.	• Under the Internal Revenue Code, the classification of income as "effectively connected" only applies to a foreign corporation. • **Amended 2.61(4)(c) to clarify that "effectively connected" income is only considered U.S. source income if the corporation is a foreign corporation.**
10a	Written Comments from Taxpayers	2.61(6)(c)6.	**Apportionment and Capital Losses.** In the example for s. Tax 2.61(6)(c)6., which demonstrates how to apply unused capital loss carryovers, commenter asks why Corporation Q's deduction is the post-apportioned amount of $250 instead of the pre-apportioned amount of $1000, since the net capital loss carryover was reduced by the pre-apportioned amount of $1000.	• The rule applies the capital loss limitation before apportionment, which is consistent with how capital loss limitations have been applied in prior years.
10b	Oral Comments by Taxpayers	2.61(6)(a) & (7)	**Apportionment and Bonus Depreciation.** Audience members at the Department's presentations have asked whether any relief could be given to taxpayers who had relatively high Wisconsin apportionment percentages in 2008 and added back bonus depreciation in 2008, but whose combined groups will have lower apportionment percentages in 2009 and subsequent years when the bonus depreciation is subtracted back out.	• If applied equally, this type of relief provision would be as just as likely to increase a taxpayer's tax liability as it would decrease a taxpayer's tax liability. • Such a provision does not appear to be authorized by statute.
11a	Written Comments from Taxpayers	2.61(3)(b) & (c)	**Commonly Controlled Group.** Commenter indicates that it would be helpful to see some examples of when the Department would assert s. Tax 2.61(3)(b) & (c), which provide that: • The common owner or owners of a commonly controlled group need not be combined group members • A commonly controlled group may be engaged in one or more unitary businesses	• To the extent resources permit, these types of examples will be provided in other published guidance.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
11b	Written Comments from Taxpayers	2.61(3)(a)2.	**Commonly Controlled Group.** Commenter requests clarification on how the Department would apply the provision in s. Tax 2.61(3)(a)2. which provides that the Department may consider a person to own stock if the person has options to acquire stock. Commenter inquires whether it makes any difference if the options are "in the money."	• The general rule in 2.61(3)(a)2. is that stock options are disregarded in the attribution of ownership; the exception is if options are being used to avoid a corporation's inclusion in a combined group. • Determining whether the exception applies is very fact-specific and would be difficult to embody in a rule without risking abuse of the rule.
12	Written Comments from Taxpayers	2.67(2)(c)	**Electronic Filing.** Commenter indicates that specific guidance may be needed for how to file attachments (for example, the federal consolidated return) electronically.	• This guidance will be published in media other than the administrative rules, such as tax form instructions and the *Guide to Combined Reporting* publication.
13a	Written Comments from Taxpayers	2.61(6)(e)	**Dividends.** Commenter indicates that in s. Tax 2.61(6)(e), which provides that dividends paid between combined group members may be eliminated under certain conditions, the term "dividends" should be changed to "distributions" since a distribution with respect to stock may or may not be a "dividend" depending on whether it is treated as made from applicable earnings and profits.	• The subtraction adjustment in sub. (6)(e) applies only to amounts paid from certain earnings and profits, Since it always must come from *earnings and profits*, the term "dividend" is entirely appropriate. • Massachusetts also uses the term "dividend."

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
13b	Written Comments from Taxpayers	2.61(6)(e)	**Dividends.** Commenter states that for the regular dividends received deduction under s. 71.26(3)(j), Stats., the determination of at least 70% ownership and ownership during the entire tax year should be based on a combined group approach and addressed in the rules.	• The ability to exclude dividends from taxation has already been substantially expanded under combined reporting to account for the fact that the unitary business is being taxed as a whole. • The commenter's recommendation does not appear to be consistent with the federal rules for consolidated groups, and at any rate it is not authorized by statute.
14a	Written Comments from Taxpayers	2.62(3)(a)	**Unitary Business.** Commenter indicates that in s. Tax 2.62(3)(a), for the phrases "contribute in a nontrivial way," "nontrivial business objectives," and "some economies of scale or economies of scope" (emphases added), it would be helpful to have a definition of "nontrivial" with some additional explanation and examples.	• To the extent resources permit, further guidance will be provided in media other than administrative rules.
14b	Written Comments from Taxpayers	2.62(6)(a)	**Unitary Business.** For the presumption in s. Tax 2.62(6)(a), which states that commonly owned entities are presumed to be unitary if they are in the same general line of business, commenter requests that "same general line of business" be defined and examples provided. Commenter suggests using NAICS codes at some level.	• Determining whether a unitary business exists very fact-specific • Tying the definition of "unitary business" to NAICS codes may provide a more restrictive definition than the statutes allow. • To the extent resources permit, further guidance will be provided in media other than administrative rules.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
14c	Review Comments from Legislative Council	2.62(6)(g)	**Unitary Business.** Section Tax 2.62(6)(g) provides a presumption that the Department's determination of a whether an entity is engaged in a unitary business is presumed correct if the taxpayer unreasonably refuses to provide pertinent information. The Legislative Council inquires whether the Department has the statutory authority to create this presumption.	• The Department has specific authority in s. 71.80(9m), Stats., to disallow deductions, credits, exemptions, or include income related to records that the taxpayer fails to provide (this particular provision is effective July 1, 2009). • The Department also has general authority in ss. 73.03(1) and 71.74(2)(b), Stats. to obtain whatever records are necessary to determine the proper amount of tax owed.
14d	Review Comments from Legislative Council	2.62(6)(c)	**Unitary Business.** Section Tax 2.62(6)(c) generally provides that an enterprise is presumed to be a unitary business if there is centralized management. Legislative Council inquires whether the provisions in sub. (4)(b) and (c) may be confused by the presumption that the business is unitary if there is centralized management alone. Subsection (4)(b) and (c) list factors that evidence unity of operation of use, both of which must exist in order for the business to be considered unitary.	• The presumption in 2.62(6)(c) is phrased more broadly than subs. (4)(b) and (c), so it is not automatic that if you met (6)(c), you also meet (4)(b) or (4)(c). • If the presumption in sub. (6)(c) is met, the taxpayer could rebut that presumption if it could show that neither sub. (3) or sub. (4)(a) & (b) apply.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
15a	Written Comments from Taxpayers	2.64(2)(b)	**Alternative Apportionment Method.** Section Tax 2.64(2)(b) states that a taxpayer eligible and electing to petition for an alternative method of apportionment must file an application at least 60 days before the return is due. Commenter asks the following questions: • What happens if the taxpayer files the petition in time, but the Department does not get the approval certificate back to the taxpayer in time to file the return? • Are there any parallel time limits as to when the Department can raise or require an alternative method? • Does the fact that the taxpayer did not apply for alternative apportionment preclude the Department from allowing alternative apportionment in settlement of an audit?	• **Amended 2.64(d) to specify that the Department generally has 45 days to respond to the petition, but if there is a delay, the alternative method can't be used until approved. When approved, the taxpayer may amend the return.** • Under s. Tax 2.45, the Department may require alternative apportionment in special cases, under the normal statute of limitations rather than a 60-day period. • The administrative rules cannot address what may or may not be allowed in audit settlements.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
15b	Written Comments from Taxpayers	2.64(3)(b)	**Alternative Apportionment Method.** Section Tax 2.64(3)(b) provides that the alternative method, if approved, must be used by the combined group for a 7-year period, unless it becomes an ineligible group during that period (a combined group is ineligible if less than 30% of its total business income is otherwise required to be apportioned using a multiple-factor formula). Commenter requests that this rule be revised to allow a taxpayer to petition for a change any time it can demonstrate that there has been a significant operational change.	• As long as the combined group is still a qualifying combined group, the Department and taxpayer are both "locked in" to the alternative method for a 7-year period, so the tax effect could go either way. • If the taxpayer's operational change is significant enough so that 70% or more of the group's income is required to be apportioned using a single factor method, the alternative apportionment method does not apply anyway.
15c	Written Comments from Taxpayers	2.64(3)(b)	**Alternative Apportionment Method.** Section Tax 2.64(3)(b) provides that the alternative apportionment method cannot result in a lower tax liability than the corporations in the combined group would have had if each of their tax liabilities were computed without applying the combined reporting provisions. Commenter requests eliminating this limitation.	• This limitation is consistent with the limitation in s. Tax 2.395(6)(b), which provides for alternative apportionment methods for certain companies that had corporate restructuring. • The limitation in s. Tax 2.395(6)(b) has existed since 1999.
16	Written Comments from Taxpayers	2.61(2)(f)	**Department's General Authority.** Commenter requests specifics or examples as to when the Department would apply s. Tax 2.61(2)(f), which restates the provisions of s. 71.255(2)(f), Stats. This statute gives the Department authority to include corporations in a combined group that are not otherwise includable, or exclude corporations that would otherwise be included, in order to reflect proper apportionment of income or to prevent avoidance or evasion of tax.	• Determining whether these exceptions apply is very fact-specific and would be difficult to embody in a rule without risking abuse of the rule.

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Ruie Section	Description of Comment	Resolution
17	Written Comments from Taxpayers	2.65(2)(c)	**Designated Agent.** Commenter noted that s. Tax 2.65(2)(c) does not address who the designated agent should be in cases where a combined group is acquired by another combined group (thus creating a new combined group). Commenter recommends the rules provide that in this situation, whichever corporation files the first combined return after the acquisition date is appointed as the new designated agent.	• **Renumbered 2.65(c)2. to 3. and added subd. 2. to state that if two combined groups merge together, the designated agent is the corporation that files the first combined return for the new group.**
18a	Written Comments from Taxpayers	2.61(6)(f)3.	**Miscellaneous Correction.** Commenter points out that in s. Tax 2.61(6)(f)3., regarding the stock basis adjustment for dividends, the reference to the elimination of dividends should be to pars. (e)(intro.) and (e)3., not just (e)3.	• **Made correction so the reference is more precise.**
18b	Written Comments from Taxpayers	2.61(9)(a)2.	**Miscellaneous Correction.** Commenter points out that in s. Tax 2.61(9)(a)2., where sharable loss carryforwards are described, in the phrase "...regardless of whether new corporations have joined or left the combined group in the intervening years," the word "new" may cause confusion and should be stricken.	• **Correction made as noted.**
19a	Review Comments from Legislative Council	Throughout	**Form and Style.** Legislative Council advises that throughout the rule, subsection titles should be written in solid capital letters as specified in s. 1.05(2)(c) of the *Administrative Rules Procedures Manual.*	• No style changes needed.
19b	Review Comments from Legislative Council	Throughout	**Form and Style.** Legislative Council advises that use of terms like "such" and "thereof" should be avoided. For example, in the first sentence of s. Tax 2.61(3)(d)3., "the" should replace "such" in two places.	• **Style changes made throughout.**
19c	Review Comments from Legislative Council	2.61(2)(f) (intro.)	**Form and Style.** Legislative Council advises that in s. Tax 2.61(2)(f)(intro.) the word ", inclusive" should be removed from the first sentence.	• **Style change made as noted.**

Summary of Comments on Emergency Rules for Combined Reporting (Sections Tax 2.60-2.67)

Comment No.	Source	Rule Section	Description of Comment	Resolution
19d	Review Comments from Legislative Council	Throughout	**Form and Style.** Legislative Council advises that definitions that apply to specific portions of the rule should be placed more prominently at the beginning of the subunit to which the definition applies. Sections Tax 2.61(4)(c)1. and (f)1. and 2. are cited as examples.	• Verified that all definitions are in the most logical place for easiest readability.
19e	Review Comments from Legislative Council	Throughout	**Form and Style.** Legislative Council advises that references to the U.S. Treasury Regulations should be consistent throughout as specified in s. 1.07(3)(b) of the *Administrative Rules Procedures Manual.*	• **Style changes made throughout.**
19f	Review Comments from Legislative Council	2.62(3)(a)4.	**Form and Style.** Legislative Council inquires whether the case citation in s. Tax 2.62(3)(a)4. should be placed in notes rather than in the text of the rule itself.	• Followed the format of s. Tax 2.82(a), where the case citation followed, in parentheses, the specific paragraph to which it applies.
19g	Review Comments from Legislative Council	2.62(3)(b) (intro.)	**Form and Style.** Legislative Council inquires whether s. Tax 2.62(3)(b)(intro.) would be better stated as "Activities between participants that constitute a flow of value between them include all of the following:"	• **Style change made as noted.**
19h	Review Comments from Legislative Council	2.61(7)(b)2.	**Form and Style.** Legislative Council advises that in s. Tax 2.61(7)(b)2., "ch. 71," should be inserted before "subchapter."	• **Style change made as noted.**

LCRC
FORM 2

WISCONSIN LEGISLATIVE COUNCIL
RULES CLEARINGHOUSE

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CLEARINGHOUSE REPORT TO AGENCY

[THIS REPORT HAS BEEN PREPARED PURSUANT TO S. 227.15, STATS. THIS IS A REPORT ON A RULE AS ORIGINALLY PROPOSED BY THE AGENCY; THE REPORT MAY NOT REFLECT THE FINAL CONTENT OF THE RULE IN FINAL DRAFT FORM AS IT WILL BE SUBMITTED TO THE LEGISLATURE. THIS REPORT CONSTITUTES A REVIEW OF, BUT NOT APPROVAL OR DISAPPROVAL OF, THE SUBSTANTIVE CONTENT AND TECHNICAL ACCURACY OF THE RULE.]

CLEARINGHOUSE RULE **09-064**

AN ORDER to to create Tax 2.60 to 2.67, relating to combined reporting for corporation franchise and income tax purposes.

Submitted by **DEPARTMENT OF REVENUE**

08-14-2009 RECEIVED BY LEGISLATIVE COUNCIL.

09-14-2009 REPORT SENT TO AGENCY.

RNS:SG

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LEGISLATIVE COUNCIL RULES CLEARINGHOUSE REPORT

This rule has been reviewed by the Rules Clearinghouse. Based on that review, comments are reported as noted below:

1. STATUTORY AUTHORITY [s. 227.15 (2) (a)]

   Comment Attached YES ☑ NO ☐

2. FORM, STYLE AND PLACEMENT IN ADMINISTRATIVE CODE [s. 227.15 (2) (c)]

   Comment Attached YES ☑ NO ☐

3. CONFLICT WITH OR DUPLICATION OF EXISTING RULES [s. 227.15 (2) (d)]

   Comment Attached YES ☐ NO ☑

4. ADEQUACY OF REFERENCES TO RELATED STATUTES, RULES AND FORMS [s. 227.15 (2) (e)]

   Comment Attached YES ☑ NO ☐

5. CLARITY, GRAMMAR, PUNCTUATION AND USE OF PLAIN LANGUAGE [s. 227.15 (2) (f)]

   Comment Attached YES ☐ NO ☑

6. POTENTIAL CONFLICTS WITH, AND COMPARABILITY TO, RELATED FEDERAL REGULATIONS [s. 227.15 (2) (g)]

   Comment Attached YES ☐ NO ☑

7. COMPLIANCE WITH PERMIT ACTION DEADLINE REQUIREMENTS [s. 227.15 (2) (h)]

   Comment Attached YES ☐ NO ☑

WISCONSIN LEGISLATIVE COUNCIL
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CLEARINGHOUSE RULE 09-064

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Legislative Reference Bureau and the Legislative Council Staff, dated September 2008.]

1. Statutory Authority

Does the department have the statutory authority to create a presumption of a unitary business based on absence of cooperation as described in s. Tax 2.62 (6) (g)?

2. Form, Style and Placement in Administrative Code

a. Throughout the rule, subsection titles should be written in solid capital letters as specified in s. 1.05 (2) (c), Manual.

b. Throughout the rule, the use of terms like "such" and "thereof" should be avoided. [s. 1.09 (9) (c), Manual.] For example, in s. Tax 2.61 (2) (d) 3., "the" should replace "such" in two places in the first sentence.

c. In s. Tax 2.61 (2) (f) (intro.), the department should delete ", inclusive,". [s. 1.01 (9) (d), Manual.]

d. Throughout the rule, definitions that apply to specific portions of the rule should be placed more prominently at the beginning of the subunit to which the definition applies. For example, the department should reconsider the placement of the definitions of "United States" in s. Tax 2.61 (4) (c) 1., "intangible property" in s. Tax 2.61 (4) (f) 1., and "intangible expenses" in s. Tax 2.61 (4) (f) 2.

e. Throughout the rule, the department should use consistent references to U.S. Treasury regulations. Compare references in s. Tax 2.61 (6) (b) (intro.) to those in sub. (6) (b) note. References to treasury regulations in the administrative code should refer to the Code of Federal Regulations. [s. 1.07 (3) (b), Manual.]

f. Throughout the rule, should case citations be placed in notes? For example, in s. Tax 2.62 (3) (a) 4., should the case citation be placed in a note?

g. In s. Tax 2.62 (3) (b) (intro.), could the department rephrase the sentence to state "Activities between participants that constitute a flow of value between them include all of the following:"?

h. Is s. Tax 2.62 (6) (c) inconsistent with material in sub. (4) (b) and (c) based on different burdens of proof? Will the relationship between evidence of unity of operation and unity of use be confused by the presumption created by the presence of centralized management?

i. Generally, should ss. Tax 2.63 and 2.64 address the issue of cessation of business with regard to its effect on a controlled group election and apportionment in specialized industries, respectively?

4. Adequacy of References to Related Statutes, Rules and Forms

In s. Tax 2.61 (7) (b) 2., "ch. 71," should be inserted before "subchapter."