

## Clearinghouse Rule 16-046

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

The Wisconsin Department of Revenue proposes an order to: **repeal** Tax 2.05, 2.66 (2) (b) (Note) and (4) (c) (Note), and 2.67 (2) (c) 2. and 3.; **amend** Tax 1.15 (title), (1), and (5) (intro.) and (Note), 2.61 (9) (c) 3. (Example), 2.67 (2) (c) 1. and 4. and (d) 1. and 3., 2.82 (1) (a), (4) (c) (Example), and (5) (a) (Example), 2.88 (3) (a), 4.10 (3) (b) 2., 4.65 (3) (c), 14.01 (4) (a), (b), and (c), and 14.03 (3) (a) and (a) (Example), (4) (b) 23. h., and (5) (a) 7.; **repeal and recreate** Tax 1.15 (2), (3), and (4); and **create** Tax 2.88 (3) (c) and 14.01 (4) (a) (Note); **relating to** income, franchise, and excise tax provisions.

The scope statement for this rule, SS 070-14, was approved by the Governor on July 24, 2014, published in Register No. 704 on August 14, 2014, and approved by the Secretary of Revenue on August 27, 2014.

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

**Statutes interpreted:** ss. 71.05 (8) (c), 71.52 (5) and (6), 78.005 (3), 78.01 (2t), 78.09 (6) and (7), and 227.04, Stats.

**Statutory authority:** s. 71.80 (1) (c), 78.79, and 227.04 (2m), Stats.

**Explanation of agency authority:** Under s. 71.80 (1) (c), Stats., the department may make such regulations as it shall deem necessary in order to carry out chapter 71 of the Wisconsin Statutes, relating to income and franchise taxes. This provision applies to the revision of ss. Tax 2.05, 2.61, 2.67, 2.82, 2.88, 14.01, and 14.03.

Section 78.79, Stats., provides "[t]he department may promulgate reasonable rules relating to the administration and enforcement of this chapter..." This provision applies to the revision of ss. Tax 4.10 and 4.65.

Section 227.04 (2m), Stats., requires each agency to promulgate a rule that requires the agency to disclose in advance the discretion that the agency will follow in the enforcement of rules against a small business that has committed a minor violation. This provision applies to the repeal and recreation of s. Tax 1.15.

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

**Plain language analysis:** The proposed rule makes the following changes:

- Revises s. Tax 1.15 to comply with the requirement under s. 227.04 (2m), Stats., as created by 2013 Wis. Act 296.
- Repeals s. Tax 2.05 to reflect the repeal by 2013 Wis. Act 54 of the capital stock transfer reporting requirement under s. 71.69, Stats.
- Clarifies an example of the carryforward of net business losses in s. Tax 2.61 (9) (c) 3.

- Revises ss. Tax 2.66, 2.67, and 2.82 to change references to certain corporate franchise and income tax forms that are being consolidated and renamed as a result of forms redesign.
- Revises s. Tax 2.88 (3) to reflect that refund interest may not be paid on an overpayment that results from the carryback of a net operating loss. This provision is under s. 71.05 (8) (c), Stats., as created by 2013 Wis. Act 145.
- Amends s. Tax 4.10 (3) (b) 2. to reflect the removal by 2013 Wis. Act 54 of limits on the capacity of a vehicle transporting fuel and the distance between the destination of the import or export of fuel from a bulk plant and the Wisconsin border.
- Revise s. Tax 4.65 (3) (c) to reflect that s. 78.01 (2t), Stats., as created by 2013 Wis. Act 204, provides that exemption certificates used to claim exemption from the motor vehicle fuel tax on gasoline or diesel fuel are valid for 3 years.
- Revises s. Tax 14.01 to include Schedule H-EZ as a form for claiming homestead credit.
- Revises s. Tax 14.03 to reflect the current amount of the dependent deduction under s. 71.52 (5), Stats.; include net operating loss carrybacks as an item includable in income under s. 71.52 (6), Stats., as amended by 2013 Wis. Act 184; and clarify that only nontaxable pension rollovers are excluded from income.

**Summary of, and comparison with, existing or proposed federal regulation:** There is no existing or proposed federal regulation that is intended to address the activities to be regulated by the rule.

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

**Summary of factual data and analytical methodologies:** The 2013-2014 Legislative session has made various changes to Wisconsin's income, franchise, and excise tax provisions. The department has created this proposed rule order to reflect these statutory changes, as well as provide needed clarification and reference changes as described above. No other data was used in the preparation of this proposed rule order or this analysis.

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

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

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

**Agency contact person:** Please contact Jennifer Chadwick at (608) 266-8253 or [jennifer.chadwick@wisconsin.gov](mailto:jennifer.chadwick@wisconsin.gov), if you have any questions regarding this rule order.

**Place where comments are to be submitted and deadline for submission:** Comments may be submitted to the contact person shown below no later than the date on which the public hearing on this proposed rule is conducted. Information as to the place, date, and time of the public hearing will be published in the Wisconsin Administrative Register.

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**SECTION 1.** Tax 1.15 (title) and (1) are amended to read:

Tax 1.15 (title) **Enforcement of rules and guidelines as they apply to against a small business that has committed a minor violation.**

(1) PURPOSE. This section discloses the discretion the department will follow in the enforcement of rules ~~and guidelines as they apply to~~ against a small business that has committed a minor violation after the initial applicability of this section .... [LRB inserts date].

**SECTION 2.** Tax 1.15 (2), (3), and (4) are repealed and recreated to read:

Tax 1.15 (2) **(2) DEFINITIONS.** In this section: (a) "Minor violation" has the meaning given in s. 227.04 (1) (a), Stats.

(b) "Small business" has the meaning given in s. 227.114 (1), Stats.

**(3) DISCRETION THE DEPARTMENT WILL FOLLOW.** The enforcement of rules against a small business that has committed a minor violation, including the assessment of a penalty, forfeiture, fine, or interest, shall be done on a case-by-case basis. Each case shall be determined on its merits as evaluated by the department, taking into consideration all relevant factors. Factors shall include:

(a) The difficulty and cost of compliance with the rule by the small business.

(b) The financial capacity of the small business, including the ability of the small business to pay the amount of any penalty that may be imposed.

(c) The compliance options available, including options for achieving voluntary compliance with the rule.

(d) The level of public interest and concern.

(e) The opportunities available to the small business to understand and comply with the rule.

(f) Fairness to the small business and to other persons, including competitors and the public.

**(4) SCOPE OF DISCRETION ALLOWED.** The department shall allow the discretion described in sub. (3) to be considered in all situations in which a small business has committed a minor violation, except in a situation where any of the following apply:

(a) The violation results in a substantial economic advantage for the small business.

(b) The small business has violated the same rule or guideline more than 3 times in the past 5 years.

(c) The violation may result in an imminent endangerment to the environment, or to public health or safety.

**SECTION 3.** Tax 1.15 (5) (intro.) and (Note) are amended to read:

Tax 1.15 (5) (intro.) VOLUNTARY DISCLOSURE. The department encourages a small business that ~~is not in compliance with Wisconsin tax law~~ has committed a minor violation to voluntarily come forward. On a case-by-case basis, considering all relevant factors, the department may exercise discretion to:

(Note) Section Tax 1.15 interprets s. ~~895.59~~ 227.04, Stats.

**SECTION 4.** Tax 2.05 is repealed.

**SECTION 5.** Tax 2.61 (9) (c) 3. (Example) is amended to read:

Tax 2.61 (9) (c) 3. (Example) Combined Group EFG consists of Member E, Member F, and Member G. E has the following loss carryforwards:

Year Incurred	Sharable Carryforward	Non-sharable Carry-forward
2008	--	(\$10,000)
2009	(\$6,000)	(\$2,000)

In 2010, E's share of combined unitary income plus its separate entity items equal \$14,000. After using its carryforwards to offset this income, E has \$4,000 of remaining net business loss carryforward (= (\$10,000) + (\$6,000) + (\$2,000) + \$14,000). Of this amount, a portion is a sharable carryforward that may be applied against F and G's shares of combined unitary income in the manner described in par. (d). Since loss carryforwards are applied in the order incurred, the \$10,000 carryforward from 2008 is used in its entirety, and \$4,000 of the 2009 carryforward is used. The portion of E's remaining carryforward from 2009 that is sharable is \$3,000 (= \$4,000 x [\$6,000 / \$8,000]) and the portion that is non-sharable is \$1,000 (= 4,000 x [\$2,000 / \$8,000]).

In 2012, E has the following loss carryforwards:

Year Incurred	Sharable Carryforward	Non-sharable Carry-forward
2009	(\$3,000)	(\$1,000)
2010	--	--

2011	(\$4,000)	(\$6,000)
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In addition, in 2012 E has received a pre-2009 net business loss carryforward of \$3,000 ( $\$60,000 \times 5\%$ ) from Member F. E's share of combined unitary income plus its separate entity items for 2012 equal \$16,000. After using its carryforwards to offset this income, E has \$1,000 of remaining net business loss carryforward ( $= (\cancel{\$3,000}) + (\cancel{\$3,000}) + (\$1,000) + (\$4,000) + (\$6,000) + (\cancel{\$3,000}) + \$16,000$ ). Since the loss carryforwards are first applied to the net business loss carryforwards incurred in 2009 and after, the \$4,000 carryforward from 2009 and the \$10,000 carryforward from 2011 are used in their entirety. The remaining \$2,000 of loss carryforwards are applied to the pre-2009 net business loss carryforward. The remaining pre-2009 net business loss carryforward is \$1,000.

**SECTION 6.** Tax 2.66 (2) (b) (Note) and (4) (c) (Note) are repealed.

**SECTION 7.** Tax 2.67 (2) (c) 1. is amended to read:

Tax 2.67 (2) (c) 1. One Wisconsin Form 4 6, Income or Franchise Tax Return, for the combined group as a whole.

**SECTION 8.** Tax 2.67 (2) (c) 2. and 3. are repealed.

**SECTION 9.** Tax 2.67 (2) (c) 4. and (d) 1. and 3. are amended to read:

Tax 2.67 (2) (c) 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 A-1, Apportionment Data for Single Factor Formulas, or Form 4A-2 A-2, Apportionment Data for Multiple Factor Formulas, as applicable.

(d) 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) (c) ~~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.

3. The separate entity net income or loss and apportionment factors included in the combined return shall be reported on Wisconsin Form 4 ~~N~~ N, Nonapportionable and Separately Apportioned Income. The designated agent shall complete and submit Form 4 ~~N~~ N with the combined return for each applicable corporation and carry forward the total Form 4 ~~N~~ N amounts to the appropriate line on Form 4 6. For purposes of the requirement of s. 71.255 (2) (d), Stats., separate entity items reported on Form 4 ~~N~~ N shall be considered filed on a separate return. However, for purposes of determining a combined group member's net income, tax, interest, underpayment interest, economic development surcharge, and the statute of limitations, the separate entity amounts shall be added to its amounts, if any, computed in the unitary combination.

**SECTION 10.** Tax 2.82 (1) (a), (4) (c) (Example), and (5) (a) (Example) are amended to read:

Tax 2.82 (1) (a) Every domestic corporation, one incorporated under Wisconsin's laws, except those exempt under ss. 71.26 (1) and 71.45 (1), Stats., and every licensed foreign corporation, one not incorporated in Wisconsin, is required to file a complete corporation franchise or income tax return, ~~from~~ Form 4, 5S, or 5 6, regardless of whether or not business was transacted.

(4) (c) (Example) Corporation W is a calendar year corporation that operates five retail stores, one of which is in Wisconsin. The stores constitute a unitary business. Corporation W is not in a combined group. In the year ~~2010~~ 2014, Corporation W operated one store in Wisconsin. On August 31, ~~2010~~ 2014, Corporation W sold the Wisconsin store to Corporation Y but continued to operate the other stores outside Wisconsin. Between September 1, ~~2010~~ 2014 and December 31, ~~2010~~ 2014, Corporation W had no activities that would create nexus in Wisconsin. Corporation W is considered to have nexus in Wisconsin for its entire taxable year. Therefore, on its ~~2010~~ 2014 Wisconsin Form 4, Corporation W must compute its apportioned share of Wisconsin income based on its apportionable income from all of its stores for the entire year ~~2010~~ 2014. In addition, the numerator of the sales factor in its apportionment computation must include sales shipped to Wisconsin customers for the entire year ~~2010~~ 2014.

(5) (a) (Example) Assume the same facts as the example in sub. (4) (c). In addition, assume Corporation Y is a member of Combined Group XYZ, which reports on a calendar year. Although Group XYZ operated numerous stores outside Wisconsin for the entire year, none of the members of Group XYZ had any nexus-creating activities in Wisconsin until July 1, ~~2010~~ 2014, when Corporation Y set up a temporary office in Wisconsin in anticipation of the purchase of the store from Corporation W. However, Corporation Z had sales shipped to Wisconsin customers during ~~2010~~ 2014. Since Corporation Y established nexus in Wisconsin during the year, Group XYZ is considered to have nexus in Wisconsin for its entire taxable year. Therefore, Group XYZ must file a ~~combined~~ Wisconsin Form ~~4 6~~ for the year ~~2010~~ 2014. On the combined return, Group XYZ must include its apportionable income for the entire taxable year (from all stores) in the combined unitary income to be apportioned. The Wisconsin share of the combined unitary income for Corporation Y and Corporation Z is then determined as described in s. 71.255 (5), Stats., and s. Tax 2.61 (7). Assuming all of Group XYZ's Wisconsin sales are attributable to Corporations Y and Z, Corporations Y and Z would be the only corporations in the group with Wisconsin income.

**SECTION 11.** Tax 2.88 (3) (a) is amended to read:

Tax 2.88 (3) (a) Any refund of individual income or corporate franchise or income taxes shall include interest at the rate of 3% per year from the due date of the return to the date paid by the department, except as provided in ~~par.~~ pars. (b) and (c).

**SECTION 12.** Tax 2.88 (3) (c) is created to read:

Tax 2.88 (3) (c) No interest may be allowed on a refund of income taxes that results from the carryback of a net operating loss.

**SECTION 13.** Tax 4.10 (3) (b) 2. is amended to read:

Tax 4.10 (3) (b) 2. The product is transported across the state line by a supplier from an out-of-state bulk plant in a transporting vehicle ~~not capable of carrying more than 4,200 gallons and the delivery location is no more than 25 miles inside the Wisconsin border~~. The sales

invoice shall clearly indicate Wisconsin as the destination state and that the tax shall be paid by the supplier.

**SECTION 14.** Tax 4.65 (3) (c) is amended to read:

Tax 4.65 (3) (c) The customer shall provide the vendor with an ~~annual~~ exemption certificate when purchasing undyed diesel fuel and gasoline which will be consumed by that customer for an exempt purpose as defined in s. 78.01 (2) and (2m), Stats. A purchaser of undyed diesel fuel and gasoline for an exempt use shall provide the seller with a properly completed exemption certificate, form MF-209, prior to the tax-exempt purchase. ~~The certificate may not cover a period of more than 12 months.~~

**SECTION 15.** Tax 14.01 (4) (a) is amended to read:

Tax 14.01 (4) (a) A homestead credit claim shall be filed on schedule H or H-EZ, titled "~~Wisconsin Homestead Credit Claim,~~" ~~and filed with the department at the location described in the instructions to schedule H~~ homestead credit."

**SECTION 16.** Tax 14.01 (4) (a) (Note) is created to read:

Tax 14.01 (4) (a) (Note) **Note:** Schedules H and H-EZ are available from the department's website at [www.revenue.wi.gov](http://www.revenue.wi.gov).

**SECTION 17.** Tax 14.01 (4) (b) and (c) are amended to read:

Tax 14.01 (4) (b) If a person or the person's spouse files a Wisconsin income tax return and claims a homestead credit on the return, the claimant shall attach schedule H or H-EZ to the income tax return. If the claimant has previously filed the income tax return or is filing an income tax return separately from the schedule H or H-EZ, the preferred procedure for filing a homestead credit claim is to file a duplicate copy of the income tax return with schedule H or H-EZ and to write the words "Duplicate" on the top of the first page of the tax return copy and "Income Tax Return Separately Filed" on the top of schedule H or H-EZ.

(c) If neither the claimant nor the claimant's spouse is required to file a Wisconsin income tax return for the year to which the claim relates, the claimant may file schedule H or H-EZ without attaching it to a return.

**SECTION 18.** Tax 14.03 (3) (a) and (a) (Example), (4) (b) 23. h., and (5) (a) 7. are amended to read:

Tax 14.03 (3) (a) Under s. 71.52 (5), Stats., a deduction of ~~\$250~~ \$500 is allowed for each of the claimant's dependents, as defined in s. 152 of the ~~internal revenue code~~ Internal Revenue Code, who have the same principal abode as the claimant for more than 6 months during the calendar year to which a claim for homestead credit relates. A claimant may multiply the number of dependents with the same principal abode for more than 6 months by ~~\$250~~ \$500 and subtract the result from the total of the income items to arrive at household income.

(a) (Example) A claimant and the claimant's spouse claim 3 dependents on their ~~1997~~ 2014 federal income tax return, and all 3 dependents have the same principal abode as the claimant for the entire year. Household income items include Wisconsin adjusted gross income of \$10,500, depreciation of \$1,500 and unemployment insurance of \$500.

Total household income is ~~\$11,750~~ \$11,000, consisting of the total of the income items listed, \$12,500, minus the dependent deduction of ~~\$750~~ \$1,500, which is ~~\$250 times~~ \$500 multiplied by 3 dependents.

(4) (b) 23. h. Net operating loss carryforwards and carrybacks.

(5) (a) 7. ~~Pension~~ The nontaxable portions of pension, annuity, or other retirement plan payments rolled over from one retirement plan to another.

**SECTION 19.** INITIAL APPLICABILITY. The treatment of s. Tax 1.15 first applies to minor violations committed after the effective date of this rule.

**SECTION 20.** EFFECTIVE DATE. This rule shall take effect on the first day of the month following publication in the Wisconsin Administrative Register as provided in s. 227.22 (2) (intro.), Stats.

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DEPARTMENT OF REVENUE

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

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