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Enacted Wisconsin budget bill benefits combined return filers, creates new credit

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Enacted Wisconsin tax legislation incorporated into the 2011-2013 biennial budget repeals statutory provisions that grant the Wisconsin Department of Revenue the authority to disregard a combined report "controlled group election"; allows certain net business loss carryforwards generated by one combined group member to be used by other group members; and authorizes a domestic production activities credit for qualifying manufacturers and agricultural businesses. In addition, the legislation modifies the taxation of capital gains for personal income tax purposes and provides a sales and use tax exemption for purchases of certain promotional goods. [[A.B. 40](#), enacted 6/26/11, pending publication as 2011 Wisc. Act 32]

Corporate income tax provisions

Controlled group election

Wisconsin requires taxpayers engaged in a unitary business operation to file combined reports for corporate net income tax liability purposes, beginning in the 2009 tax year. In computing a combined report liability, the statute allows taxpayers to make a "controlled group election." In general, the election allows a combined group's designated agent to include within the combined group every corporation in its commonly controlled group even if the corporations are not in the same unitary business. The election, which is required to be made on an original, timely filed combined return, is binding for ten years and renewable for a similar period. (AB 40, Sec. 1892, amending 71.255(2m), page 290)



The current statute allows the department, with respect to a controlled group election, to disregard the tax effect of or to disallow an election, where the department determines that an election has the effect of tax avoidance. Once disallowed, a taxpayer must compute its combined report liability using only the unitary business group members. The amendment repeals, effective January 1, 2009, provisions that grant the department authority to disregard the tax effect of or to disallow an election, regardless of the reason.

PwC observes

“The changes grant greater taxpayer autonomy in determining the makeup of the combined group by eliminating provisions that allow the department to second guess a taxpayer’s decision with respect to a controlled group election. It is unknown at this time if the retroactive effective date will provide taxpayers the opportunity to file amended returns to change the group election,” says Steven Koritzinsky, SALT Director with PwC in Milwaukee, Wisconsin.

Use of combined group member net business loss carryforwards

The legislation amends the statute to add a provision that allows the sharing – over a 20-year period - of individual member net business loss carryovers available as of the first taxable year beginning after December 31, 2008, but not used in a taxable year beginning before January 1, 2012. Such losses, referred to as “the pre-2009 net business loss carryforward” must be used by the member that generated the losses to first offset its own income in a carryforward year. Five percent of the remaining carryforward may then be used to offset, on a proportional basis, the adjusted incomes of other combined group members. If the full five percent of the remaining carryforward cannot be used to offset the taxable income of all other group members in any year, the carryforward may be carried forward to a subsequent year, but not to a year that begins after December 31, 2031. (AB 40, Sec. 1894, amending 71.255(6)(a), page 290)

PwC observes

“Taxpayers that established valuation allowances against deferred tax assets attributable to individual member net operating loss carryovers should consider the impact of this legislation on such valuation allowances,” says Koritzinsky.

Qualified Production Activities Credit

The legislation allows taxpayers to claim an income tax credit (“QPAI credit”) with respect to eligible qualified production activities income (“eligible QPAI”). (AB 40, Sec. 2011d, adding Sec. 71.28(5n), page 310; Sec. 2122d, adding Sec. 71.47(5n), page 327)

Eligible QPAI equals the lesser of:

- Qualified production activities income, as defined in I.R.C. Sec. 199(c), derived from the use of certain Wisconsin property assessed as manufacturing or agricultural property;

- Income allocated and apportioned to Wisconsin by a corporation not subject to combined filing;
- Income allocated and apportioned to Wisconsin by a unitary business group subject to combined filing.

The QPAI credit, which may first be claimed in a taxable year beginning after December 31, 2012, equals the following percentages of eligible QPAI in a tax year:

- Tax year beginning after 12/31/12 and before 1/1/14 1.875 percent
- Tax year beginning after 12/31/13 and before 1/1/15 3.75 percent
- Tax year beginning after 12/31/14 and before 1/1/16 5.526 percent
- Tax year beginning after 12/31/15 7.5 percent

The legislation requires an additional modification in an amount equal to the QPAI credit in computing net income. (See, e.g., AB 40, Sec. 1896f, amending Sec. 71.26(2)(a)(4), page 291)

The legislation provides that credits earned by flow through entities (i.e., partnerships, limited liability companies, tax option corporations) are claimed at the owner level, rather than the entity level. In addition, the legislation sets forth guidance regarding the ordering in which the QPAI credit may be claimed and provides that excess credits may be carried forward 15 years, that available credits must be claimed on a timely filed return, and that the Wisconsin Department of Revenue has full power to administer the credit. The legislation also provides that I.R.C. Sec. 383, which limits the use of pre-acquisition credits in the event of a change in ownership, applies for QPAI credit purposes. (AB 40, Sec. 2012d, adding Sec. 71.30(3)(dn), page 310)

PwC observes

“The governor has declared that ‘Wisconsin is open for business,’” says Mark Brzycki, SALT Director with PwC in Milwaukee. The governor and republican-controlled legislature are working quickly to create a business friendly environment and openly inviting businesses to relocate to Wisconsin from neighboring states. The QPAI credit is just one of a number of tax incentives enacted recently to encourage business development in Wisconsin. The Department will have to issue additional guidance to determine eligible Wisconsin QPAI, but that will likely not happen until the later part of 2011,” Brzycki reasons.

Other tax changes

The legislation defers or exempts, for personal income tax purposes, certain long term capital gain income, grants qualifying individuals a relocated business tax credit, and conforms to federal tax provisions dealing with the taxation of health care savings accounts. In addition, the legislation provides sales and use tax exemptions for purchases of promotional items given away as part of a “buy one/get one free”

promotion and exempts purchases of certain advertising and promotional direct mail materials.

PwC observes

“Governor Scott Walker (R) on June 26, 2011, signed the budget bill without substantive changes to the tax provisions,” says Koritzinsky. “The legislation is expected to be published by the Secretary of State by the end of the week.

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