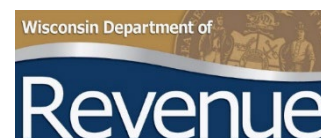


# Wisconsin Tax Bulletin

April 2022 - Number 217



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## New Income and Franchise Tax Laws

### Restaurant Revitalization Fund Income and Franchise Tax Exemption

([2021 Wis. Act 156](#), amend sec. 71.26(3)(L), create secs. 71.05(1)(hp), 71.26(3)(ag)4., 71.34(1k)(ai), and 71.45(1)(dn) and (2)(a)24., effective for taxable years beginning after December 31, 2020)

Income received in the form of a grant from the restaurant revitalization fund under section 5003 of the federal American Rescue Plan Act of 2021 (Public Law 117-2), is exempt from Wisconsin income and franchise tax.

Expenses paid directly or indirectly with the grant money that are otherwise deductible for Wisconsin income tax purposes remain deductible even though receipt of the grant money is not taxable for Wisconsin income tax purposes.

Instructions to [Wisconsin 2021 income/franchise tax forms](#) were updated and posted to the department's website on March 9, 2022.

### Increased Net Capital Loss Deduction

([2021 Wis. Act 157](#), renumber and amend sec. 71.05(10)(c), amend sec. 71.365(4m)(d)1.a., and create secs. 71.05(10)(c)2. and 3. and 71.365(4m)(d)1.am., effective for taxable years beginning after December 31, 2022)

Current Wisconsin law allows a capital loss deduction not to exceed \$500 each year. The amount of the capital loss not used in the year incurred is carried forward to the next taxable year and offset against Wisconsin income, subject to the above limitation. The amount of the loss may be carried forward until the loss has been used up.

This Act increases the capital loss deduction limitation to \$3,000 (\$1,500 for married persons filing separately) for individuals, partnerships making the election to pay tax at the entity level under sec. 71.21(6)(a), Wis. Stats., and tax-option (S) corporations making the election to pay tax at the entity level under sec. 71.365(4m)(a), Wis. Stats.

### Pass-Through Entity Audits

([2021 Wis. Act 262](#), repeal sec. 71.775(1)(b), renumber and amend sec. 71.76(2), consolidate, renumber, and amend sec. 71.775(1)(intro.) and (a), amend secs. 71.365(6), 71.78(1), 71.88, and 73.16(4), and create secs. 71.738(3d), (3e), and (3f), 71.745, 71.76(2)(b), 71.77(7)(c), 71.78(11), 71.80(26), and 71.83(1)(a)12., effective April 17, 2022)

The Act provides the following:

#### Definitions

"Pass-through entity" means a partnership, a limited liability company, a tax-option (S) corporation, an estate, or a trust that is treated as a pass-through entity for federal income tax purposes.

"Pass-through item" means an item of income, gain, loss, deduction, credit, or any other item that originates with a pass-through entity and is required to be reported by one or more pass-through members.

"Pass-through member" means a person who is a partner in a partnership, member of a limited liability company, shareholder in a tax-option (S) corporation, beneficiary of an estate or a trust, or any other person whose tax liability under ch. [71](#), Wis. Stats., is determined in whole or in part by taking into account the person's share of pass-through items, directly or indirectly, from a pass-through entity.

## Audit Provisions

The department may assess and collect additional tax from a pass-through entity on income otherwise reportable by its pass-through members. Tax rates for entity-level audit assessments are as follows:

- 7.65% for income otherwise reportable by direct owners that are individuals, estates, and trusts
- 7.9% for income otherwise reportable by all other direct owners (e.g., corporations and partnerships)

The department may issue a refund to a pass-through entity.

- Refunds may only be issued to a pass-through entity for overpayment of tax from payments made by the pass-through entity.
- If overpayment of tax is not a result of payments made by the pass-through entity, the pass-through members may file an amended return for each reviewed year to claim their proportionate share of overpayment within one year after the date the determination of the overpayment becomes final or within four years of the unextended due date of the pass-through members' return as provided in sec. [71.75](#), Wis. Stats., whichever is later.

The department may assess or adjust a credit under sec. [71.07](#), [71.28](#), or [71.47](#), Wis. Stats.

- An assessment to reduce or recover a credit may be issued to the pass-through entity if the pass-through entity previously computed the credit and reported the credit to its pass-through members. The assessment may be reduced by the tax effect from removing the credit from income as described under secs. [71.05\(6\)\(a\)15.](#) and [25.](#), [71.21\(4\)](#), [71.26\(2\)\(a\)4.](#) and [11.](#), [71.34\(1k\)\(g\)](#) and [\(m\)](#), and [71.45\(2\)\(a\)10.](#), Wis. Stats., if the income modification occurs in a taxable year under review in the audit. The income modification may not be claimed by the pass-through members.
- An adjustment to increase a credit may offset additional tax assessed to a pass-through entity. Any excess credit not used to offset additional tax may not be claimed by or refunded to the pass-through entity; however, pass-through members may file an amended return for each reviewed year to claim their proportionate share of excess credit. Such excess credits may be claimed by the pass-through members within one year from the date the determination becomes final or within four years of the unextended due date of the pass-through members' return as provided in sec. [71.75](#), Wis. Stats., whichever is later.

Statute of limitations, interest, and penalties under secs. [71.77](#), [71.82](#), and [71.83](#), Wis. Stats., apply to determinations made at the pass-through entity level without regard to the action or inaction of pass-through members.

## Appeal Provisions

A pass-through entity may, within 60 days after receipt of determination, petition the department for redetermination. The department shall make a redetermination on the petition within 6 months after the date on which the petition is filed. If no timely petition for redetermination is filed with the department, the department's determination is final and conclusive.

A pass-through entity may, within 60 days after receipt of redetermination, appeal the redetermination to the Wisconsin Tax Appeals Commission (TAC) as provided in sec. [71.88\(2\)](#), Wis. Stats. If no timely petition is filed with the TAC, the department's redetermination is final and conclusive.

## Election Provisions

A pass-through entity may elect to reduce or preclude an entity-level audit assessment.

- A pass-through entity may elect to reduce an audit assessment at the entity level if all the following apply:
  - The election is made within 60 days after the entity-level determination becomes final.
  - The pass-through entity reports to the department and its pass-through members the adjustments for each pass-through member's proportionate share of pass-through items for each taxable year.
  - The pass-through members report and pay within 60 days of the election any resulting tax due from the adjustments to the pass-through items.
- A pass-through entity may elect to have the department assess each of the pass-through members if all the following apply:
  - The election is made within 60 days after the entity-level determination becomes final.
  - The pass-through entity has 25 or fewer pass-through members for all years under review.
  - The pass-through entity does not have a pass-through member that is a pass-through entity for any year under review.

If this election is made, the department may assess the pass-through members within one year from the date of the election.

This election does not relieve a pass-through entity representative of its power and duty to enter into an extension agreement on behalf of the pass-through entity, file appeals of notices of pass-through entity audit adjustments, or to provide the department with sufficient information to identify each pass-through member and the capital, profit, and loss interest of each pass-through member.

## Pass-Through Entity Representative Provisions

Each pass-through entity shall designate a pass-through member or other person with substantial presence in the United States as the representative of the pass-through entity. The representative designated by a pass-through entity may be different than the pass-through entity's federal representative or authorized agent.

If a pass-through entity did not designate a representative, the entity must appoint a representative within 60 days following a written request by the department. If a pass-through entity fails to appoint a representative following a written request by the department, the department may designate a representative and notify, in writing, the pass-through entity or the beneficiaries in the case of a closed estate or trust.

A pass-through entity may at any time provide a written statement to the department designating a new representative and the department shall accept the designation if the statement is signed by an authorized agent of the pass-through entity.

The pass-through entity representative has the following powers and duties:

- Act as the sole authority on behalf of the pass-through entity and its pass-through members with respect to an entity-level audit determination, including making the election provisions described above.
- Provide the department sufficient information to identify each pass-through member and the capital, profit, and loss interest of each pass-through member.

- Enter into extension agreements with the department on behalf of the pass-through entity for purposes of extending the periods of limitation for issuing assessments and claiming refunds.
- Receive notices of pass-through entity adjustments.
- Notify all pass-through members of their share of corrections and adjustments made to pass-through items within 60 days after an entity-level audit determination becomes final or after receipt of notice of approval for a partnership to pay tax on behalf of the partners after being issued a final audit determination at the partnership level from the Internal Revenue Service.
- File appeals of notices of pass-through entity adjustments.
- Enter into settlement agreements and bind pass-through members to adjustments relating to pass-through items.

The representative may delegate their powers and duties to an authorized agent of the pass-through entity, such as a Power of Attorney.

## Confidentiality Provisions

If the department audits a pass-through entity for income or franchise taxes of its pass-through members, including when an election to pay tax at the entity level is made under sec. [71.21\(6\)\(a\)](#) or [71.365\(4m\)\(a\)](#), Wis. Stats., the department may disclose the following:

- To a pass-through member that the pass-through entity is under audit or was audited, if the disclosure is necessary to explain any amounts assessed or refunded to the pass-through member or to obtain information necessary to determine the proper amount of adjustment to make at the pass-through entity level.
- To a pass-through entity, the identities of one or more of its pass-through members who have failed to report pass-through items originating with the entity on their Wisconsin returns, if the disclosure is necessary to explain any amounts assessed or refunded to the pass-through member or to obtain information about a pass-through member's return in order to determine the proper amount of adjustment to make at the pass-through entity level.

## Other Provisions

Adjustments to pass-through items made in a pass-through entity audit determination are attributable to each pass-through member in a manner, and for the taxable year, that is consistent with the treatment of the pass-through items as if a determination was not made at the entity level. For example, a partner may increase basis in partnership interest by the partner's proportionate share of additional income determined in the partnership audit assessment.

If the department determines that a tax liability exists and that the liability may be owed by more than one pass-through member of a pass-through entity, the department may assess any pass-through member of the pass-through entity for their allocated portion of additional tax otherwise due.

If any pass-through entity required to file a return under ch. [71](#), Wis. Stats., files an incomplete or incorrect return, the department, upon a showing by the department under sec. [73.16\(4\)](#), Wis. Stats., may assess the pass-through entity an amount equal to 25 percent of the amount of the tax assessed under sec. 71.745, Wis. Stats. The amount shall be assessed, levied, and collected in the same manner as additional normal income or franchise taxes.

## Internal Revenue Service (IRS) Partnership Audit Adjustments

If a partnership receives an IRS audit adjustment at the partnership level, the partnership may request to amend the Wisconsin partnership returns and pay tax on behalf of the partners. The request must be made within 60 days after the final determination by the IRS.

- If the department approves the request, the partnership must amend the Wisconsin partnership returns for each reviewed year, as defined under section 6225 of the Internal Revenue Code, to report such changes within 180 days from the date the department approves the request. The partnership must pay tax at the highest tax rate computed under sec. 71.745(2)(a), Wis. Stats., as follows:
  - 7.65% for income otherwise reportable by direct owners that are individuals, estates, and trusts
  - 7.9% for income otherwise reportable by all other direct owners (e.g., corporations and partnerships)
- If the department denies the request, the partnership and its pass-through members must file amended Wisconsin returns for each reviewed year, as defined under section 6225 of the Internal Revenue Code, to report such changes within 180 days from the date the department denies the request.

## Resources for Additional Information

- [Pass-Through Entity Level Audits Under 2021 Wis. Act 262](#) common questions
- [Partnerships](#) common questions numbers 3 and 4
- [Form PT-R](#), *Pass-Through Entity Representative*
- [Form PT-R instructions](#)

## Changes to Uniform Partnership and Limited Liability Company Laws

([2021 Wis. Act 258](#), effective April 17, 2022)

Various changes for partnerships, corporations, and limited liability companies were made in chs. [178](#), [179](#), [180](#), [181](#), and [183](#), Wis. Stats. The following sections in ch. [71](#), Wis. Stats., *Income and Franchise Taxes for State and Local Revenues*, were revised to provide that the new provisions in the Act are treated for state tax purposes in the same manner as they are treated for federal tax purposes:

- Section [71.80\(21\)](#), Wis. Stats., *Business Entity Conversion*
- Section [71.80\(21m\)](#), Wis. Stats., *Business Entity Interest Exchange*
- Section [71.80\(22\)](#), Wis. Stats., *Business Entity Merger*
- Section [71.80\(22m\)](#), Wis. Stats., *Business Entity Domestication*

The Act also provides that income or franchise tax liabilities from an assessment under sec. [71.74](#), Wis. Stats., are excluded under secs. 178.0807, 179.0806, and 183.0704, Wis. Stats., and may be claimed against a dissolved limited liability partnership, limited partnership, or limited liability company.

## Repeal Obsolete Tax Provisions

([2021 Wis. Act 127](#), repeal secs. 20.505(8)(hm)19., 20.835(2)(dn), (ka), and (q), 71.03(2)(a)3. and 4., 71.05(6)(b)47., 71.05(22)(f)1., 2. and 3., 71.07(2), (3m), and (8), 71.07(9e)(a), (ac), (ad), (af), (ah), (ap), (at), and (g), 71.10(4)(b), 71.15(2), 71.26(2)(a)10., 71.28(2m) and (9s), 71.30(3)(ex), 71.47(2m) and (9s), 71.49(1)(ex), 71.66(2)(c) and (d), 79.13, 238.3995 and 569.02(5), and amend secs. 71.03(2)(a)5., 71.07(2dm)(a)1. and 3., (f)1., (j), and (k), (2dx)(a)2., (b)(intro.), (c), and (d), and (9e)(aj)(intro.), 71.10(4)(i), 71.26(2)(a)4., 71.28(1dm)(a)1. and 3., (f)1., (j), and (k), 71.28(1dx)(a)2., (b)(intro.), (c), and (d), 71.30(3)(f), 71.45(2)(a)10., 71.47(1dm)(a)1. and 3., (f)1., (j), and (k), 71.47(1dx)(a)2., (b)(intro.), (c), and (d), 71.49(1)(f), 71.88(2)(b), 79.10(11)(b), 238.23(2)(b), 238.398(2)(b), 632.897(10)(a)3., 767.511(1)(b), 767.804(3)(c), 767.805(4)(c), and 767.89(3)(d), effective February 6, 2022)

The Act repeals the following credits and subtractions as they are obsolete provisions in the law and can no longer be claimed:

Repealed Credit/Subtraction	Repealed Statutes Related to Credit/Subtraction
Relocated business subtraction	Section 71.05(6)(b)47., Wis. Stats.
Community development finance authority credit	Section 71.07(2), Wis. Stats.
Farmland tax relief credit	Sections 71.07(3m), 71.28(2m), and 71.47(2m), Wis. Stats.
Personal exemptions credit for natural persons	Sections 71.07(8) and 71.15(2), Wis. Stats.
Relocated business credit	Sections 71.28(9s) and 71.47(9s), Wis. Stats.

The Act also revises the definition of a development zone for purposes of the development zone capital investment credit under secs. 71.07(2dm), 71.28(1dm), and 71.47(1dm), Wis. Stats., and development zones credit under secs. 71.07(2dx), 71.28(1dx), and 71.47(1dx), Wis. Stats. The definition is amended to exclude airport development zones under sec. [238.3995](#), 2019 Wis. Stats., or sec. [560.7995](#), 2009 Wis. Stats.

## New Sales and Use Tax Laws

### Increase in Standard for Occasional Sale Exemption for Nonprofit Organizations

([2021 Wis. Act 167](#), amend sec. 77.54(7m), Wis. Stats., effective June 1, 2022)

A nonprofit organization must meet certain standards in order for the nonprofit organization's sales to qualify as exempt occasional sales. The standard to determine whether entertainment is involved at an event for which the nonprofit charges an admission will increase from \$10,000 to \$50,000. The increase applies to entertainment admission events occurring on and after June 1, 2022.

The following publications have been updated and provide additional information about the standards that must be met for a nonprofit organization's sales to qualify as exempt occasional sales:

- [Publication 206](#), *Sales Tax Exemptions for Nonprofit Organizations*
- [Fact Sheet 2106](#), *Occasional Sale Exemption for Nonprofit Organizations*

## Changes to Uniform Partnership and Limited Liability Company Laws

([2021 Wis. Act 258](#), effective April 17, 2022)

Various changes for partnerships, corporations, and limited liability companies were made in chs. [178](#), [179](#), [180](#), [181](#), and [183](#), Wis. Stats. The Act makes changes to sec. [77.61\(15\)](#), Wis. Stats., to provide that the provisions under the Act are applicable to liquidations, reorganizations, and business entity formations under ch. [77](#), subch. III, Wis. Stats., *General Sales and Use Tax*.

The Act also provides that sales and use tax liabilities from an assessment under sec. [77.59](#), Wis. Stats., are excluded under secs. 178.0807, 179.0806, and 183.0704, Wis. Stats., and may be claimed against a dissolved limited liability partnership, limited partnership, or limited liability company.

## General Updates and Reminders

### Wisconsin Voluntary Disclosure Program

The Wisconsin Department of Revenue encourages businesses and individuals who are not in compliance with Wisconsin tax laws to voluntarily come forward. Taxpayers may remain **anonymous** throughout the voluntary disclosure process.

To be considered for voluntary disclosure treatment, a taxpayer must meet certain conditions and enter into a written agreement with the department. The following conditions must be met for a taxpayer to qualify for voluntary disclosure treatment.

- No tax returns filed for the period in question.
- No registration for the type of tax involved during the period in question.
- No contact by the department within the last 6 years regarding a registration/filing requirement, an assessment/audit assignment, or request for the completion of nexus questionnaires.
  - Any partners of partnerships, shareholders in S corporations, trusts, or trust beneficiaries are considered to have been contacted if the pass-through entity has been contacted.
  - Any owners of disregarded entities are considered to have been contacted if the disregarded entity has been contacted.

**Note:** The department will not enter into an agreement to resolve a successor's liability under sec. Tax [11.91](#), Wis. Adm. Code, unless collection of the amount due from the predecessor appears unlikely.

A taxpayer or the taxpayer's representative may request voluntary disclosure treatment by submitting [Form A-020](#), *Wisconsin Voluntary Disclosure Request*, to the department for consideration. If applying for voluntary disclosure for more than one tax type, **each tax type must be specified**. For example, a request for voluntary disclosure for income tax does not cover sales tax.

Taxpayer responsibilities include:

- File all returns for the periods agreed upon (usually 4 prior years).
  - Sales and withholding taxes are required to be filed on a quarterly basis.



- Combined corporation franchise or income tax returns must be filed electronically for the current and two prior years.
- Pay all tax, late filing fees, and interest according to the agreement.
- File the current and any subsequent returns in a timely manner according to the agreement.
- Make books and records available to the department.

## Income and Franchise Tax Updates and Reminders

### **New Publication 128, *Wisconsin Tax Information for Military Personnel and Veterans***

[Publication 128](#) was created to provide information on the treatment of income, deductions, and credits available for military personnel and veterans.

- Fact Sheet 1118, *Income Tax Information for Active Military Personnel*, has been discontinued as a result.
- The publication includes additional guidance on the new active-duty military pay subtraction under sec. [71.05\(6\)\(b\)56.](#), Wis. Stats.
- See next article titled "Active-Duty Military Pay Subtraction Emergency Rule" for information relating to the emergency rule for this subtraction.

### **Active-Duty Military Pay Subtraction Emergency Rule**

A new active-duty military pay subtraction was enacted for tax years beginning on or after 2021, under sec. [71.05\(6\)\(b\)56.](#), Wis. Stats. An [emergency rule](#) was published in Wisconsin Administrative Register number 794A2 on February 14, 2022, and is effective beginning on this date. The emergency rule does the following:

- Provides definitions of "active duty" and "U.S. armed forces"
- Describes the type of eligible pay for the subtraction

Additional information about the subtraction starts on page 9 of [Publication 128, \*Wisconsin Tax Information for Military Personnel and Veterans\*](#).

### **Reminder: Confirm Correct Address When Making A Payment**

Taxpayers making an individual income tax payment can visit our [Make a Payment](#) website for instructions and links for online payment options.

Taxpayers sending in checks should include a payment voucher or notice. Vouchers, notices, and checks should be mailed to our processing center in Milwaukee at the following address:

Wisconsin Department of Revenue  
PO Box 3028  
Milwaukee WI 53201-3028

## Interstate Motor Carrier Apportionment

A taxpayer engaged in business in and outside Wisconsin must determine the amount of apportionable income attributable to Wisconsin using an apportionment formula, unless an exception applies. For most taxpayers the apportionment formula is a fraction, the numerator being Wisconsin sales and the denominator is total company sales. This is known as the "single sales factor" apportionment method and is computed on Schedule A-01, *Wisconsin Single Sales Factor Apportionment Data for Nonspecialized Industries*.

Interstate motor carriers use a two-factor apportionment method under sec. [Tax 2.47](#), Wis. Adm. Code, and compute it on [Schedule A-03](#), *Wisconsin Apportionment Percentage for Interstate Motor Carriers*. The apportionment percentage is the average of the following ratios:

1. Gross receipts from carrying people or property, or both, first acquired in Wisconsin to total gross receipts from carrying people or property, or both, everywhere.
2. The movement of one ton of people or property, or both, the distance of one mile in Wisconsin to the movement of one ton of people or property, or both, the distance of one mile everywhere. For carriage of persons, each person shall be considered the equivalent of 200 pounds.

If gross receipts or ton mile data is not available, the department may authorize the substitution of similar factors such as gross tonnage and revenue miles.

Corporations in a combined group must adjust the numerator and denominator of their apportionment factors and convert the average of the factors to the modified sales factor. The modified sales factor then determines the company's Wisconsin share of the combined group's apportionable income. For additional information, see the [Schedule A-03 instructions](#).

## Manufacturing & Agriculture Credit – Business Income Limitation for Individual Shareholders, Partners, and Members

The manufacturing and agriculture credit may only be used by individuals and fiduciaries to offset the Wisconsin income tax resulting from the business operations that were used to compute the credit. The limitation is computed on Part II of Schedule [MA-M](#) and [MA-A](#).

Pass-through entities, shareholders of tax-option (S) corporations, and individual partners of partnerships are further limited as follows (sec. [71.07\(5n\)\(c\)](#), Wis. Stats.):

- Pass-through entities (partnerships, limited liability companies, and tax-option (S) corporations) cannot claim the credit; however, they calculate the credit based on the entity's eligible qualified production activities income and provide that information to the partners, shareholders, and members so they may claim the credit on their tax return
- Shareholders of a tax-option (S) corporation, including members of a limited liability company that elect to be classified as a tax-option (S) corporation, can only use the credit to offset the tax imposed on the shareholder's share of the tax-option (S) corporation's income.
- Individual partners of a partnership, including members of a limited liability company that elect to be classified or are required to file as a partnership, can only use the credit to offset the tax imposed on the partner's distributive share of the partnership's income.

When computing the business income limitation on Schedule MA-M or MA-A, Part II, column c, the partner, shareholder, or member must recompute their Wisconsin income tax liability by removing all items of

income, gain, loss, and deduction, from each Schedule 3K-1 or 5K-1 from which they have a manufacturing or agriculture credit. The Wisconsin income tax liability must be recomputed separately for each business from which they have a manufacturing or agriculture credit to report. Items from Schedules 3K-1 or 5K-1 that need to be removed to recompute the Wisconsin tax liability include, but are not limited to:

- Ordinary business income or loss
- Rental income or loss
- Capital gains and losses
- Interest and dividend income
- Section 179 expense
- Wisconsin modifications, such as depreciation

**Examples of Computing Business Income Limitation:**

**Example 1:** A tax-option (S) corporation shareholder files a 2021 married filing joint Wisconsin income tax return reporting the following income:

- \$60,000 of wages from the tax-option (S) corporation
- \$50,000 of ordinary business income from the tax-option (S) corporation
- \$20,000 deduction for section 179 expense from the tax-option (S) corporation
- \$5,000 of manufacturing credit passed through from the tax-option (S) corporation

(a)	(b)	(c)	(d)
Business	Tax	Recomputed 2021 Tax Liability	Portion of Tax Attributable to Manufacturing Activities [(b) – (c)]
A	\$3,911	\$2,003	\$1,908

- Column (b) is the Wisconsin tax from 2021 Form 1, line 10
- Column (c) is the shareholder's recomputed tax on all income except their distributable share of items reported to them on Schedule 5K-1 from the tax-option (S) corporation (i.e., tax is recomputed only on the \$60,000 wages)
- Column (d) is the tax attributable to the manufacturing operations (tax attributable to the business operations of the tax-option (S) corporation), and the maximum amount of credit that may be used to offset the shareholder's tax for the year

**Example 2:** Limited Liability Company (LLC) is classified as a partnership for federal and Wisconsin income tax purposes. LLC member files a 2021 married filing joint Wisconsin income tax return reporting the following income:

- \$40,000 guaranteed payments from the LLC for services made without regard to partnership income
- \$45,000 of ordinary business income from the LLC

- \$2,000 Wisconsin subtraction modification from the LLC
- \$10,000 short-term capital loss from the LLC
- \$10,000 short-term capital gain from the sale of corporate stock
- \$6,000 of agricultural credit passed through from the LLC

(a)	(b)	(c)	(d)
Business	Tax	Recomputed 2021 Tax Liability	Portion of Tax Attributable to Agricultural Activities [(b) – (c)]
A	\$3,466	\$1,373	\$2,093

- Column (b) is the Wisconsin tax from 2021 Form 1, line 10
- Column (c) is the member's recomputed tax on all income except their distributable share of partnership items of income, gain, loss, and deductions reported to them on Schedule 3K-1 from the LLC. The guaranteed payments are not considered a distributive share of LLC income; it is income derived by the member for services performed for the LLC. Therefore, the member recomputes tax using \$40,000 guaranteed payments and \$10,000 short-term capital gain.
- Column (d) is the tax attributable to the agricultural operations (tax attributable to the business operations of the LLC), and the maximum amount of credit that may be used to offset the member's tax for the year

## Sales and Use Tax Updates and Reminders

### Reminder: Retailers May Not Accept 6-Digit CES Numbers After June 30, 2022

Beginning July 1, 2022, retailers may only accept a 15-digit Certificate of Exempt Status (CES) number beginning with 008 from qualifying nonprofit organizations that provide a CES number to make purchases exempt from Wisconsin sales and use tax.

See the article on page 14 of [Wisconsin Tax Bulletin 216](#) (February 2022) for more information.

### Use ZIP+4 For Purchases

It is important to provide the seller enough information to determine the correct sale tax rate if you purchase a product that will be delivered by the seller. If the seller charges an incorrect amount of tax, you could be held responsible for the tax not collected.

For example, providing a five-digit ZIP code could cause the seller to charge an incorrect sales tax rate if the ZIP code crosses county lines. Purchasers can avoid this situation by providing the nine-digit ZIP code (ZIP+4) as part of the product's delivery address. Nine-digit ZIP codes do not cross county lines.

If you are unsure of your nine-digit ZIP code, use the [United States Postal Service's lookup tool](#).

## Tools to Determine Correct Tax Rate

Avoid charging your customer the wrong amount of tax. Sellers can determine the correct sales tax rate for transactions using the [Sales Tax Rate Chart](#) (rate by county) or [Sales Tax Rate Lookup](#) (rate by ZIP code).

## Vehicle Trade-In Amount Cannot Reduce Sales Price of Service Contract or Extended Warranty

If a motor vehicle is traded in for a vehicle of lesser value, the credit cannot reduce the sales price or purchase price of a service contract or extended warranty that is sold at the same time.

When property is traded in toward the purchase of new property in the same transaction, the trade-in allowance reduces the taxable sales price of the new property. However, no reduction is allowed toward the purchase of a service (sec. [77.51\(15b\)\(b\)5.](#), Wis. Stats.).

**Example:** A customer trades their used vehicle for a new vehicle and extended warranty from a dealer. The sales price of the new vehicle is \$25,000 and the extended warranty is \$4,000. The dealer gives \$29,000 for trade value of the used vehicle. The taxable sales price of the new vehicle is zero (\$25,000 - \$29,000). However, the taxable sales price of the extended warranty is \$4,000. The \$4,000 excess trade value of the used vehicle cannot reduce the sales price of the extended warranty.

## Sales and Services to Seasonal Piers, Floating Docks, Swim Rafts, and Other Similar Property are Taxable

Sales and rentals of seasonal piers, floating docks, swim rafts, and similar items, including charges for installation or removal, are subject to Wisconsin sales and use tax. Charges for repairing, cleaning, maintaining, or providing other services to these items are also taxable. The sale of or service to an anchoring system for one of these items is a real property improvement and not taxable if the anchoring system is permanently affixed to the real estate (i.e., remains installed year-round).

The charge for moving a seasonal pier, floating dock, swim raft, or similar item from one location to another is not taxable if no repair or other service is performed to that item. For example, a seasonal pier is removed from one location, hauled to another location, and reinstalled at the new location and no repair or other service is performed to the pier. The only reason for the removal and reinstallation of the pier is to move it to a different location (i.e., the pier is not being removed in the fall and reinstalled in the spring).

A permanently installed pier or dock is a real property improvement if it is affixed to the real estate and intended to remain installed year-round, rather than be removed at the end of the season. Charges for installing the permanent pier or dock are not taxable; however, the seller must pay sales or use tax on its purchase of the pier and other materials and supplies used in making the real property improvement.

Charges to access or use a pier for boat docking are taxable.

## Enforcement Report

### **Milwaukee County Business Co-Owner Charged with Theft of Sales Tax**

In February 2022, Meiling Dong of Oak Creek, Wisconsin was charged by the Milwaukee County District Attorney's Office with one felony count of theft of sales tax (aggregated) between 2013 and 2016.

According to the criminal complaint, from 2013 to 2016, Dong was a co-owner of a restaurant on the east side of the city of Milwaukee. As a partner, Dong managed the point-of-sale (POS) system and did the accounting for the business. Only Dong had access to all areas within the POS system. During this time, Dong intentionally underreported \$858,184 in sales and failed to remit \$48,058 in sales tax collected.

The complaint further alleges that between 2013 and 2016, Dong intentionally deleted 3,108 separate transactions from the POS system. That resulted in a failure to report cash transactions, and the sales tax collected on those transactions.

The charge is the result of an investigation and referral for prosecution by special agents from the Wisconsin Department of Revenue's Office of Criminal Investigation. Dong faces up to 10 years in prison, a \$25,000 fine, or both if convicted.

### **Milwaukee Area Tax Preparer Charged with Tax Crimes**

On February 3, 2022, felony charges were filed in Milwaukee County Circuit Court against Sandy M. Yang for theft (false representation), two counts of fraud (rendering a fraudulent income tax return), and two counts of filing a fraudulent claim for a tax credit.

According to the criminal complaint, Yang attempted to appear as a tax professional. Yang created a business named Sy Advanced Accounting, Inc., and attempted to create a false image as a doctoral degree holder. Yang represented to others as holding a doctorate degree from UW-Milwaukee in management science. Yang's family held a graduation party, in which Yang had a sign that said, "Dr. Sandy Yang, Sy Advanced Accounting," and a banner with an emblem for UW-Milwaukee Ph.D. in Management Science. The investigation showed that Yang had no doctoral degree, and the false representation enhanced Yang's ability to defraud victims.

In 2017 and 2018, Yang took money from individuals in the Hmong community by purporting to file and pay their Wisconsin income taxes. Yang told victims there were other fees and assessments they were required to pay. One couple lost over \$40,000 because of Yang's actions.

Further, the complaint alleges that during the tax years of 2017 and 2018 Yang filed false Wisconsin income tax returns that failed to report significant amounts of income Yang received, including income from misappropriated funds, gambling income, and canceled debt. In addition, Yang falsely claimed the Wisconsin earned income tax credit for both tax years. If Yang reported the income it would have exceeded the amount eligible to qualify for the earned income tax credit. Yang defrauded the State of Wisconsin of over \$16,000.

The charges were the result of a joint investigation conducted by the West Allis Police Department and special agents from the Wisconsin Department of Revenue's Office of Criminal Investigation, with assistance from the Milwaukee County District Attorney's Office.

## Report on Litigation

Summarized below are recent significant Wisconsin Tax Appeals Commission (WTAC) and Wisconsin Court decisions.

### Individual Income Tax

#### Gambling Income and Losses

*Julie Chier v. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, March 22, 2022).

The issues in this case are unreported gambling income, the taxpayer's status as a professional gambler, and using the session method to report gambling income.

The taxpayer engaged in slot machine gaming at various Wisconsin casinos during 2012, 2013, and 2014. The taxpayer had gambling winnings in each year and received several federal Forms W-2G, *Certain Gambling Winnings*. The taxpayer claimed to be a professional gambler and reported gambling winnings as income and the losses as business expenses on federal Schedule C.

In conducting the gambling activities, separate bank accounts were not kept, the activities were not tracked on a computer spreadsheet or similar document, contemporaneous notes were not kept, there was no business plan, and the gambling was not carried on in a professional manner. However, the taxpayer did utilize player's cards and casino gaming records to substantiate a portion of the gambling winnings.

The department issued an assessment on November 8, 2016, that disallowed the professional gambling status, and thereby disallowed the gambling losses/expenses for tax years 2012 and 2013 and added unreported gambling income to the taxpayer's 2014 Wisconsin income. The taxpayer filed a timely petition for redetermination with the department objecting to the assessment, which was denied by the department by notice dated July 17, 2017. The taxpayer timely filed a petition for review with the Commission appealing the department's denial.

Upon appeal to the Commission, the taxpayer produced casino records and notes which showed losing gambling sessions and claimed they had no gambling winnings in 2012, 2013, and 2014. The taxpayer testified that player's cards were used at most of the casinos during which they played, but the taxpayer always gambled the winnings until they had no money left. The taxpayer claimed that the casino reported winnings in error, because on the winning occasions the taxpayer had either forgotten to use the player's card or chose not to use the player's card while losing the last of the money in each of the sessions.

The Commission stated that the taxpayer's notes appeared to have been written in one or a small handful of sittings and there was a consistency of margins and style throughout. The notes appeared to have, for the most part, been copied from records from one casino, and in one section a date was missed so the records match the casino amounts while the dates are off by one day. The notes also contained no time details to the beginnings and endings of sessions played, and the amounts for "coin in" on nearly every single entry are exactly as those from the casino records. If the player's card was not always used, there would have been instances where the "coin in" amount would have differed from the amounts recorded by the casinos.

During the trial, an Internal Revenue Service notice dated April 27, 2015, was presented stating that the taxpayer did not qualify as a professional gambler. The taxpayer finally conceded they were not a professional gambler and should have reported the winnings based on the session method. The department considered the taxpayer's substantiation along with casino generated records. The department

did not find the taxpayer's notes to be credible but did reduce its assessment in accordance with session information contained in the casino records.

Under the session method adopted by the department, a taxpayer's contemporaneous notes or player's card records are used to substantiate the net winnings of each gambling session. The taxpayer includes net winnings from all winning sessions in income, however, the net loss from losing sessions is not deductible. A gambling session is defined as a period of continuous play with only short breaks for bathroom, beverage, change of tables, or machines. For example, if a person plays for an hour, then takes a two-hour break, then plays for another hour, the person has played two sessions.

**Example 1** – Session 1: If the person begins with \$100, wins a \$250 jackpot, loses most of the jackpot winnings, and finishes the session with \$50, there are no winnings for the session (session started with \$100 and ended with \$50), and the \$50 loss is not deductible.

**Example 2** – Session 2: If the person begins with the \$50 remaining from session one, wins another \$250 jackpot, loses most of the jackpot winnings, and finishes with \$100, the person has \$50 of winnings (session started with \$50 and ended with \$100) that must be reported as gambling income.

The Commission concluded that the taxpayer failed to prove they were a professional gambler. They also concluded that the taxpayer's unreported gambling winnings must be included in Wisconsin income for the years at issue, but the taxpayer was able to report the winnings using the session method.

It is unknown at the time of publication whether the taxpayer will appeal this decision to the Circuit Court.

### Pass-Through Withholding Tax

#### Tax-Option (S) Corporation Without Physical Presence In Wisconsin – Subject To Wisconsin Pass-Through Withholding Tax

*MacKinney Systems Inc. v. Wisconsin Department of Revenue*, (Wisconsin Tax Appeals Commission, March 16, 2022)

The issue is whether a Missouri tax-option (S) corporation without physical presence in Wisconsin is subject to the Wisconsin pass-through withholding tax under sec. [71.775](#), Wis. Stats.

MacKinney Systems, Inc. ("MacKinney") is a Missouri tax-option (S) corporation, and all the shareholders and employees are nonresidents of Wisconsin. MacKinney delivers prewritten ("canned") software to customers via electronic download over the internet and provides technical support and maintenance for that software. All support and maintenance are conducted from Missouri.

For taxable years 2015 through 2018:

- MacKinney received payments in excess of \$100,000 per year from customers who used the software in Wisconsin, but MacKinney did not:
  - File Wisconsin income/franchise tax returns,
  - File Wisconsin pass-through withholding tax returns, or
  - Pay Wisconsin pass-through withholding taxes.
- The department issued a pass-through withholding tax assessment which MacKinney appealed, and the department denied the appeal.
- MacKinney appealed to the Wisconsin Tax Appeals Commission (WTAC).



MacKinney claims it is not subject to Wisconsin pass-through withholding taxes because MacKinney lacks physical presence in Wisconsin. To support its position, MacKinney references income/franchise tax law and guidance such as:

- "[Informational Paper 5](#)" published by the Wisconsin Legislative Fiscal Bureau in 2015
- [15 U.S.C. § 381](#) (P.L. 86-272)

The WTAC denied the appeal and affirmed the department's assessment, concluding:

- Pass-through entity withholding tax is different from income/franchise tax.
- For purposes of pass-through withholding tax, MacKinney meets the definition of "doing business in this state" under sec. [71.22\(1r\)](#), Wis. Stats., because some of the customers received the product and related services in Wisconsin. Therefore, as a pass-through entity doing business in Wisconsin, MacKinney is subject to Wisconsin pass-through withholding tax under sec. [71.775\(2\)\(a\)](#), Wis. Stats.

It is unknown at the time of publication whether the taxpayer will appeal this decision to the Circuit Court.

## Sales and Use Tax

### County Sales and Use Tax Ordinance

*Brown County vs. Brown County Taxpayers Association* (Wisconsin Supreme Court, March 4, 2022). See [Wisconsin Tax Bulletin 209](#) (April 2020), page 22, for a summary of the Brown County Circuit Court decision.

The issue in this case is whether the sales and use tax enacted by Brown County directly reduces the property tax levy, as required by sec. [77.70](#), Wis. Stats., if the proceeds are designated to fund new capital projects that together would otherwise exceed the levy limits established by sec. [66.0602](#), Wis. Stats., but that the County could otherwise fund by borrowing.

The Wisconsin Supreme Court affirmed the Brown County Circuit Court decision that the Brown County sales and use tax ordinance complies with sec. 77.70, Wis. Stats., adding, "Section 77.70 does not require a dollar-for-dollar offset to the property tax levy. Instead, it authorizes counties to impose a sales and use tax for the specific purpose of directly reducing the property tax levy, while leaving the means to accomplish that purpose up to the county. Because the County's ordinance does in fact directly reduce the property tax levy by funding projects that would otherwise have been paid for through additional debt obligations, we determine that the ordinance is permissible."

### Renting Go-Carts or Selling Taxable Admissions

*SPA Indoor Speedway, LLC vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission, January 24, 2022).

The issue in this case is whether the taxpayer is renting go-carts or selling a taxable admission to an amusement, entertainment or recreational place, device, or facility, for which the required rental of a go-cart is incidental to the service.

The taxpayer's business, SPA Indoor Speedway LLC, offers customers access to a go-cart racing speedway, on which customers can race go-carts rented to them by the business. The taxpayer does not charge an admission fee to enter its building or racetrack. Customers can enter without charge. Only customers who rent or lease a go-cart are charged. The speedway is available to race only rented go-carts.

The taxpayer requested a declaratory ruling from the department that no sale tax is due on the taxpayer's purchase of go-carts in future years under sec. [77.52\(1\)\(a\)](#), Wis. Stats., because the taxpayer rents the go-carts to consumers and is not the end user of the go-carts for sales tax purposes. The taxpayer argued that it does not charge admission to the building or racetrack. Only customers who rent or lease a go-cart are charged.

The department issued a Declaratory Ruling which stated that the taxpayer's purchases of go-carts, go-cart parts, and its expenses for go-cart repairs and maintenance are taxable. The department ruled the taxpayer is selling a taxable admission to an amusement, entertainment or recreational place, device, or facility, that the go-carts are transferred incidentally with its admission service, and thus, under the taxpayer's business model, the taxpayer is the end user of the go-carts and therefore cannot be exempt from sales tax when it purchases go-carts for its business.

Section [77.52\(2\)\(a\)](#), Wis. Stats., imposes tax on certain services including admissions to amusement, athletic, entertainment or recreational events or places, with limited exceptions.

Section [77.51\(15a\)\(b\)3.](#), Wis. Stats., provides tax exempt sales do not include transfers of tangible property to a service provider that the service provider transfers in conjunction with the selling, performing, or furnishing of any service, if the property is incidental to the service.

Section [77.51\(5\)](#), Wis. Stats., defines "incidental" as depending upon something else as necessary. That statute further clarifies that property transferred by a service provider is incidental to the service if the purchaser's main purpose is to obtain the service even though the property may be necessary or essential to providing the service.

The Commission stated that what the taxpayer chooses to call the fee is not determinative of the nature of the fee and that the rental fee allows customers access to the go-carts on the speedway. Based on facts supplied by the parties, customers cannot remove the go-carts from the premises and must use the taxpayer's go-carts to access the speedway. The Commission ruled that the go-cart rental fee serves the purpose of an admission fee for the use of the speedway to race the go-carts provided by the taxpayer.

The Commission concluded:

- SPA offers a speedway racing experience to its customers, which is a taxable service.
- SPA's provision of go-carts is incidental to SPA's business, and therefore, no part of the charge for the service may be deemed a rental of tangible personal goods under sec. [77.52\(2m\)\(a\)](#), Wis. Stats.
- SPA is the end user of the go-carts it purchases, and so when SPA purchases go-carts, go-cart parts, and go-cart maintenance supplies, the purchase is at retail and therefore subject to sales tax.

The taxpayer did not appeal this decision.

### Lease of Taxicabs

*Green Cab of Wisconsin, Inc. vs. Wisconsin Department of Revenue* (Wisconsin Tax Appeals Commission March 10, 2022).

The issue in this case is whether the taxpayer's lease of taxicabs to drivers is subject to the 5% state rental vehicle fee provided in sec. [77.995\(2\)](#), Wis. Stats.

The taxpayer, Green Cab of Wisconsin, Inc., operated a taxicab company in Wisconsin. During the period of January 1, 2013, through May 31, 2019, the taxpayer paid the 5% rental vehicle fee and the 5.5% sales

tax on the taxpayer's lease of its taxicabs to drivers. The taxpayer received its gross receipts from fees paid by drivers. The taxpayer did not receive any portion of the fares paid by customers for taxicab rides. Each driver kept all money collected from customers for taxicab rides provided.

The department issued an assessment to the taxpayer for underpaid state rental vehicle fees. The department based the assessment on its determination that the taxpayer was an establishment which leased Type 1 vehicles without drivers and the taxpayer's primary business was the rental of vehicles, as most of the taxpayer's income was from the fees it charges to drivers who offered their services as

independent contractors. The lease agreements specified each "shift" was a separate rental period for which the driver must pay a separate lease payment before taking possession of a vehicle. No driver was guaranteed a specific car. Based on this information, the department concluded the taxpayer leased the vehicles for periods less than 30 days.

The taxpayer appealed the assessment and requested a refund of the rental vehicle fee paid, arguing that it was a taxicab company, not a business primarily engaged in the short-term rental of vehicles without drivers. The taxpayer also pointed to the specific exemption of "taxicab" from the definition of "limousine" in secs. [77.995\(1\)\(a\)](#) and [\(b\)](#), Wis. Stats.

Section [77.995\(2\)](#), Wis. Stats., imposes "a fee at the rate of 5% of the sales price on the rental, but not for rental and not for rental as a service or repair replacement vehicle of Type 1 automobiles, as defined in s. [340.01\(4\)\(a\)](#)...by establishments primarily engaged in the short-term rental of vehicles without drivers, for a period of 30 days or less...There is also imposed a fee at the rate of 5 percent of the sales price on the rental of limousines."

The taxpayer argued that because it rented a specific type of driverless vehicle (taxicabs) to a specific subset of renters (licensed taxicab drivers) for a limited purpose (providing taxicab services to the public), the leases were exempt from the rental fee.

The Commission noted the fact that Green Cab rented a particular subset of vehicles to a particular subset of drivers did not remove the lease/rental transaction from the state vehicle rental fee imposed in sec. [77.995\(2\)](#), Wis. Stats.

The Commission rejected the taxpayer's argument that the Legislature never intended the fee to apply to the taxpayer stating that if the plain language of the statute is clear then the Commission does not resort to interpreting legislative intent. The Commission further noted that if the Legislature had wanted to exempt the rental of taxicabs to taxicab drivers, it could have done so as it has done for other vehicle rentals. Absent such an exemption, the Commission applied the law as written and affirmed the assessment of the department.

The Commission concluded:

1. Taxicabs are Type 1 motor vehicles as defined in Wis. Stats. [§340.01\(4\)\(a\)](#).
2. The taxpayer's primary business is the rental of driverless vehicles to independent contractor licensed taxi drivers.
3. Rental of a driverless vehicle licensed as a taxicab to a driver holding a valid taxicab driver's permit is subject to the State Rental Vehicle Fee pursuant to Wis. Stat. [§ 77.995\(2\)](#).

The taxpayer has appealed this decision.

## Gambling Enforcement

### Video Gaming Machines with a Preview Feature

*JD Prime Games Kiosk, LLC et al vs. Wisconsin Department of Revenue et al*, 2022 WI App. 6, 400 Wis. 2d 499, 969 N.W.2d 778 (Wis. Ct. App. Dec. 21, 2021), *pet. for rev. denied* (Wis. Mar. 16, 2022).

The issue in this case is whether video gaming machines with a preview feature are illegal gambling machines under sec. [945.01\(3\)](#), Wis. Stats.

In June 2017, agents from the Department of Revenue Alcohol and Tobacco Enforcement Unit found video gaming machines at several retail establishments. Players inserted money into the video gaming machines and received credits. Players then wagered the credits to play games; if they won, the credits accumulated, and the players could redeem them for cash.

The enforcement agents issued removal orders to the establishments where these machines were being operated, stating they were gambling machines subject to seizure. In response to the orders, the operator of the video gaming machines, JD Prime, and several of the retail establishment owners filed a lawsuit in Racine County Circuit Court, seeking declaratory judgment that the JD Prime machines were not gambling machines under the statutory definition.

Section 945.01(3), Wis. Stats., defines a gambling machine as "a contrivance which for a consideration affords the player an opportunity to obtain something of value, the award of which is determined by chance, even though accompanied by some skill and whether or not the prize is automatically paid by the machine." JD Prime asserted that the video gaming machines had a preview feature which allowed the player to determine the outcome of any game play prior to depositing money or credits, thereby removing the element of chance.

In October 2020, the Racine County Circuit Court issued an order declaring these video gaming machines were not gambling machines. The Court found with the availability of the preview feature on the JD Prime machines, a player "has to intentionally make a choice to ignore or not utilize a feature on a game with a known outcome," and that this "intentional choice by a player does not change the basic, known outcome of the game."

The department appealed this decision, arguing that the circuit court erred in concluding that the JD Prime video gaming machines were not gambling machines. Specifically, the department argued that the player does not need to use the preview feature to play the machines. Furthermore, the results of the game were determined completely by chance, regardless of whether the preview feature was used. In December 2021, the Wisconsin Court of Appeals agreed with the defendants and reversed the circuit court decision.

JD Prime petitioned the Wisconsin Supreme Court for review. The Supreme Court denied the petition in March 2022.

## Applicable Laws and Rules

This document provides statements or interpretations of the following laws and regulations enacted as of April 28, 2022: chs. 66, 71, 73, 77, 78, 178, 179, 180, 181, 183, and 945 [Wis. Stats.](#), and chs. Tax 1, 2, 3, 4, and 11, [Wis. Adm. Code](#). Laws enacted and in effect after this date, new administrative rules, and court decisions may change the interpretations in this document. Guidance issued prior to this date that is contrary to the information in this document is superseded by this document, according to sec. 73.16(2)(a), Wis. Stats.

## Public Comments

The public may [submit comments on guidance documents](#) at any time.