

**Report From Agency**  
**DEPARTMENT OF REVENUE**  
**CLEARINGHOUSE RULE NUMBER 18-080**  
**SECTION 227.19(2) AND (3), STATS., REPORT**

**1. Basis and Purpose of the Proposed Rule**

The proposed rule creates section Tax 11.905 to establish criteria applicable to field audits for which an auditor uses a statistical sampling method. The rule also provides that any person with less than \$10,000,000 in annual sales during any year may choose to have the audit conducted using statistical sampling. Finally, the rule specifies the number of transactions necessary to qualify for statistical sampling and the maximum sample size.

**2. Comments and Response**

**A. Public Hearing**

A public hearing was held on December 3, 2018. No one appeared at the hearing.

**B. Pre-Public Hearing Written Comments with DOR's Response**

Written comments were received from Citgo Petroleum Corp and Kristin Harrell, Association Wholesale Grocers.

*Comment 1* – Citgo Petroleum Corp (August 1, 2018):

- The taxpayer and DOR should be in agreement with the sample before starting the audit
- Need to clarify how tax paid to vendors in error will be treated in the sample

*DOR's Response to Comment 1* – These comments are addressed in the department's current practice, which is provided in Publication 516, *Statistical Sampling*.

The department currently works with each taxpayer to be in agreement prior to sampling. A taxpayer may be willing to accept a less precise sample in order to reduce the sample size and expedite the audit. A taxpayer may enter a binding agreement with the department in order to reduce the sample size.

If the taxpayer believes that tax was paid in error on certain transactions included in the sample population, the taxpayer can choose to either:

- Compile a claim for refund on a specific basis, or
- Include the transactions in the sample so the refund can be projected along with the other adjustments.

*Comment 2* – Kristin Harrell, Associated Wholesale Grocers (August 2, 2018):

Opposing the rule as 99% of their sales are for resale and non-taxable. If an error is found on a taxable item where the proper sales or use tax was not charged, it would be extrapolated across all sales including the non-taxable sales.

*DOR's Response to Comment 2* – The department's current policy is to determine the projection population by the sampling population. In the example provided where 99% of a company's sales are for resale and, therefore, not taxable, the department would sample from nontaxable sales, so that any errors found sampling nontaxable sales would be extrapolated against the nontaxable sales population. However, if the department is sampling both taxable and nontaxable sales, the error results would be extrapolated against taxable and nontaxable sales.

In cases where problems exist with completeness or accuracy of population amounts, alternative methods (alternative ratio, simple average, etc.) are utilized by the department. Alternative methods in all cases are discussed with the taxpayer to determine what makes the most sense, given the facts and circumstances.

The department's projection methods are illustrated on pages 5-8 of Publication 515, *Non-Statistical Sampling*, and page 9 of Publication 516, *Statistical Sampling*.

## **C. Changes Made to the Proposed Rule**

### **3. Legislative Council Staff Recommendations**

Legislative Council suggested that DOR consider the following:

- *Form, Style, and Placement in Administrative Code*

In the rule summary, the heading and entry for the estimate of the amount of time that state employees will spend developing the rule should be removed. This is not a required provision for the rule summary of a proposed rule.

*DOR's response* – This heading and entry were removed.

In s. Tax 11.905 (3) (a) (intro.), a phrase such as "any of the following is true should be inserted before the colon.

*DOR's response* – This phrase was added.

In s. Tax 11.905 (3) (a) 1., the sentence should end in a period rather than a comma. Likewise, in subd. 2., the sentence should end in a period rather than a comma and the word "or".

*DOR's response* – These were both changed.

In s. Tax 11.905 (3) (d) (intro.), it appears that the listed items following the introduction are intended to be substantive identifications of when separate sampling may be used, and is not intended to be a Note that lists examples. If so, in the second sentence, consider removing the phrase "following are examples of when the" and inserting the

phrase "in any of the following circumstances" at the end of the sentence. Alternatively, if appropriate, consider removing the second sentence entirely and inserting the phrase "in any of the following circumstances:" at the end of the first sentence. Also, if the list in subds. 1. to 4. is not intended to be exhaustive, consider adding a final subdivision, along the lines of "Other relevant circumstances in which the use of more than one sample population or a separate sampling method to select sample units would be reasonably necessary to maintain statistical quality."

*DOR's response* – All the above changes were made.

In s. Tax 11.905 (4) (intro.), the sentence should conclude with a colon as it precedes a list.

*DOR's response* – A colon was inserted instead of a period.

In s. Tax 11.905 (4) (d) (intro.), the phrase "all of" should be inserted after the word "include".

*DOR's response* – Phrase was inserted.

In s. Tax 11.905 (4) (d) 1. to 5., each sentence should end in a period.

*DOR's response* – Periods were added.

- *Adequacy of References to Related Statutes, Rules, and Forms*

In the rule summary's listing of statutes interpreted, should sub. (2) be added to the listed of s. 77.59 (2g), Stats.? Subsection (2) is specifically cited in the Note at the end of s. Tax 11.905.

*DOR's response* – Sub. (2) was added.

- *Clarity, Grammar, Punctuation, and Use of Plain Language*

In s. Tax 11.905 (4) (g), the word "are" should be revised to the phrase "must be" in order to maintain verb uniformity with the other paragraphs in the subsection.

*DOR's response* – Wording was changed.

#### **4. Regulatory Flexibility Analysis**

The proposed rule order does not affect small businesses.