

STATEMENT OF SCOPE

Department of Revenue

Rule No.: Chapter Tax 2.82

Relating to: Nexus criteria for unlicensed foreign corporations

Rule Type: Permanent

1. Detailed description of the objective of the proposed rule:

The objective of the rule is to modify s. Tax 2.82 to clarify the level of activity and/or the types of activities that, when performed in Wisconsin by an out-of-state taxpayer, establishes nexus in Wisconsin and requires the filing of a Wisconsin income/franchise tax return.

2. Description of existing policies relevant to the rule, new policies proposed to be included in the rule, and an analysis of policy alternatives:

Currently s. Tax 2.82 provides a listing of activities that constitute nexus for an unlicensed foreign corporation, and require the filing of Wisconsin corporate income or franchise tax returns. The current list of activities uses the terms "usual or frequent" or "regularly" to describe certain activities that create nexus.

The department wishes to establish a standard by rule that can be administered clearly and consistently. In addition, the department may consider clarifying that these standards apply to a variety of activities described in s. Tax 2.82, as opposed to only those that use the terms "usual or frequent" or "regularly".

Finally, the department wishes to clarify that ownership of a tangible personal property in Wisconsin (e.g., inventory or equipment) establishes nexus in Wisconsin.

Without the proposed rule modification, taxpayers have some degree of uncertainty as to what constitutes nexus in Wisconsin.

Note: Section Tax 2.39 (6) (b) provides that sales of tangible personal property are included in the numerator of the sales factor of the apportionment percentage if the taxpayer ships the property from a location in Wisconsin to a destination state in which the taxpayer does not have nexus. Section Tax 2.39 (6) (b) 5. provides that the standards set forth in Tax 2.82 are used to determine whether a taxpayer has nexus in another state. Therefore, any changes to the standards in Tax 2.82 will affect the apportionment percentage and amount of income taxable to Wisconsin by certain taxpayers.

3. Detailed explanation of statutory authority for the rule (including the statutory citation and language):

Section 227.11 (2) (a), Wis. Stats., provides "[e]ach agency may promulgate rules interpreting the provisions of any statute enforced or administered by the agency, if the agency considers it necessary to effectuate the purpose of the statute..."

4. Estimate of amount of time that state employees will spend developing the rule and of other resources necessary to develop the rule:

The department estimates it will take approximately 100 hours to develop the rule.

5. List with description of all entities that may be affected by the proposed rule:

- Unlicensed foreign corporations and other entities engaging in activities in Wisconsin.
- Domestic and foreign entities that are engaged in business in Wisconsin and at least one other state that use an apportionment percentage to allocate income between the states.

6. Summary and preliminary comparison with any existing or proposed federal regulation that is intended to address the activities to be regulated by the proposed rule:

Federal constitutional provisions: Article I, Section 8 of the U.S. Constitution grants congress the power to regulate commerce with foreign nations and among the several states. States are prohibited from levying a tax which imposes a burden on interstate or foreign commerce.

Federal Public Law 86-272: Under Public Law 86-272, a state may not impose its franchise or income tax on a business selling tangible personal property, if the only activity of that business is the solicitation of orders by its salesperson or representative which orders are sent outside the state for approval or rejection, and are filled by delivery from a point outside the state. The activity must be limited to solicitation. If there is any activity which exceeds solicitation, the immunity from taxation under Public Law 86-272 is lost.

7. Anticipated economic impact of implementing the rule (note if the rule is likely to have a significant economic impact on small businesses):

The economic impact is minimal.

Contact Person: Jen Chadwick (608) 266-8253