



This Week in State Tax (TWIST)

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Wisconsin: Commission Addresses Use of Pre-Combined Reporting NOLs

The Wisconsin Tax Appeals Commission recently addressed whether certain losses incurred in years before Wisconsin moved to combined reporting beginning with the 2009 tax year could be shared with new combined group members. More specifically, the legal issue in the case was whether pre-2009 net business losses (NBLs) incurred by entities that were members of a combined reporting group beginning in 2009 could be shared with members of a new combined group when the entities incurring the NBLs left the former combined group and joined a new combined group. The Department of Revenue argued that entities that have NBLs on their books while they are members of a combined group are prohibited from sharing such losses with members of a new combined group, regardless of when the losses were incurred. The Department's position was supported by Wis. Admin. Code §Tax 2.61(9)(e). This administrative rule allows a departing member of a combined group to share its pre-2009 NBL carry-forward with another corporation if both entities departed the combined group at the same time and either 1) formed a new combined group, or 2) together joined an existing combined group. In those two scenarios, such businesses can share their remaining sharable NBL carry-forwards attributable to the former combined group only with one another, not with other businesses associated with the new combined group. The taxpayer's position was that this administrative rule was applicable to only post-combined reporting NBLs and did not apply to limit NBLs generated before combined reporting was implemented. The Commission disagreed, finding that the rule applied to both pre- and post-combined reporting NBLs. The taxpayer further supported its position based on a statute providing that if a corporation is no longer included in the "combined group ..., the corporation's pre-2009 net business loss carry-forward shall be available only to that corporation." The taxpayer argued that this language restricted the use of NBLs by other members of the combined group which the corporation has left. The Department argued that language restricted the use of NBLs by the corporation that left the group. Since NBLs are tracked and carried forward separately by each group member and essentially belong to each individual member, the Commission determined that the taxpayer's position made the statutory language a nullity, which was to be avoided: former group members could never use a departed member's NBL carryforward as they would have no tax documentation regarding the amount of NBL available. The Commission concluded that the NBLs at issue could not be shared with new combined group members. Please contact Brad Wilhelmson with questions on *Lincare Holdings, Inc. v. Wisconsin Department of Revenue*.

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