

FILED

DEC 15 2023

Wisconsin Tax Appeals Commission
Nicole Allee - Legal Assistant

STATE OF WISCONSIN
TAX APPEALS COMMISSION

LINCARE HOLDINGS, INC.,

DOCKET NO. 23-I-018

Petitioner,

v.

WISCONSIN DEPARTMENT OF REVENUE,

Respondent.

ORIGINAL
DO NOT ALTER

RULING AND ORDER

JESSICA ROULETTE, COMMISSIONER:

This case comes before the Commission on Summary Judgment motions filed by both parties. Petitioner, Lincare Holdings, Inc. ("Lincare"), is represented by Attorneys Stephen J. Jasper and Sara K. Morgan of Bass, Berry & Sims. Respondent, Wisconsin Department of Revenue ("the Department"), is represented by Attorney Mark S. Zimmer. The issue presented in this appeal is whether carried forward net business losses ("NBLs") can be used by any member of a corporate group which is joined by the business which incurred the losses both prior to joining the corporate group and prior to January 1, 2009. Both parties have filed briefs in this matter and filed a Stipulation of Facts on June 28, 2023, as follows:

STIPULATED FACTS¹

1. Petitioner, Lincare, was a healthcare supplier of oxygen, durable medical equipment, and other respiratory care products and services, all primarily to customers for in-home use. (Stipulation of Facts "SOF," ¶ 1.)

2. Lincare was a subchapter C corporation incorporated under the laws of the State of Delaware with its principal place of business in Clearwater, Florida and branch locations operating nationwide, including in Wisconsin. (SOF ¶ 2.)

3. Lincare was audited by Respondent Wisconsin Department of Revenue ("Department") for the period January 1, 2015, through December 31, 2017 ("Audit Period"). (SOF ¶ 3.)

4. Throughout the Audit Period, Lincare was required to, and did, calculate and report its Wisconsin taxable income along with other members of its combined group. (SOF ¶ 4.)

5. From January 1, 2011 until January 31, 2016, American Homepatient, Inc. (tax ID number ending in 35) and American Homepatient, Inc. (Tax ID number ending in 80), hereinafter referred to as the "AHI Entities," were a part of a Wisconsin combined group, the parent corporation of which was American Homepatient, Inc. (FEIN ending in 06). (Affidavit of Simranjit S. Sohal ("Sohal Aff.") ¶ 8.)

6. The combined group owned by American Homepatient, Inc. (FEIN ending in 06) ceased to exist on January 31, 2016. (Sohal Aff. ¶ 9.)

¹ All Stipulated Facts refer to the Audit Period unless specifically noted.

7. On January 31, 2016, Lincare acquired certain entities from American Homepatient (FEIN ending in 06). Two of the entities acquired were the AHI Entities. (SOF ¶ 5.)

8. After their acquisition, and beginning in the tax year ending December 31, 2016, the AHI Entities were combined group members of Lincare's combined group, and Lincare filed Wisconsin corporate franchise tax returns for the combined group. (SOF ¶ 6.)

9. In the combined group returns Lincare filed for tax years ending December 31, 2016, and December 31, 2017, each of the AHI Entities used 5% of its pre-2009 NBL carryforward, plus previously unused amounts from prior years, to offset the Wisconsin income of other members in the Lincare combined group. (SOF ¶ 7.)

10. As of January 31, 2016, American Home Patient, Inc. (tax ID number ending 80) had over \$11 million in remaining pre-2009 NBL carryforward that it had incurred and accumulated in past years through December 31, 2008.² (SOF ¶ 8.)

11. The Department field audited Lincare's Wisconsin corporate franchise tax filings for the Audit Period. (SOF ¶ 9.)

12. On August 23, 2021, Lincare submitted a notice of disagreement to the Department. (SOF ¶ 13, Ex. B.)

13. On September 16, 2021, the Department finalized the audit and imposed an assessment when it issued a Notice of Field Audit Amount Due with

² The parties initially refer to the entity as "American Homepatient, Inc." in stipulation of fact paragraph 5 but go on to refer to the entity as "American Home Patient, Inc." in stipulation of fact paragraph 8. The facts are reproduced here as they were stipulated to by the parties.

accompanying worksheets which imposed Wisconsin corporate franchise tax liability and interest in the amount of \$515,245.88 (“the Assessment”).³ (SOF ¶¶10, 13, Ex. A.)

14. The Assessment imposed \$304,054.59 in additional Wisconsin corporate franchise tax liability based on the Department’s disallowance of Lincare’s utilization of pre-2009 NBLs that were incurred by the AHI entities. (SOF ¶11.)

15. The Assessment imposed \$22,375.41 in additional tax liability based on the Department’s disallowance of shared post-2008 NBLs and the Department’s determinations related to imputed interest income, interest expenses, state taxes, and royalty fees. The additional tax liability described in this paragraph is not challenged by Lincare in this appeal. (SOF ¶ 12.)

16. On November 15, 2021, Lincare filed a Petition for Redetermination to the Department and submitted a deposit of \$515,245.88 to prevent accumulation of additional interest during this appeal, and the Department has acknowledged receiving the deposit. (SOF ¶¶ 15, 16, Ex. C.)

17. On November 15, 2022, the Department issued a Notice of Action which sustained the full Assessment and denied Lincare's Petition for Redetermination. (SOF ¶ 17, Ex. D.)

18. On January 12, 2023, Lincare filed a timely Petition for Review to the Commission, and on February 13, 2023, the Department timely filed an Answer to the Commission. (Commission file.)

³ The September 16, 2021 Notice of Assessment reflected that \$326,400.00 of the Assessment amount was attributable to tax liability, and \$188,815.88 was attributable to interest, so long as the balance was paid by November 15, 2021.

INTRODUCTION

This case concerns whether pre-2009 carried forward net business losses (“NBLs”) can be used by any member of a corporate group that is joined by a business that incurred the losses both prior to joining the corporate group and prior to January 1, 2009. The parties have stipulated to the appropriate treatment of post 2008 NBLs carried forward by those business which left one combined reporting group and joined another.

Two statutory sections and one administrative code section are central to the dispute in this appeal, and a brief sketch of the enactment and amendment of each follows.

Prior to the effective date of the 2009-2010 Wisconsin statutes, Wisconsin law made no provision for combined reporting of income of corporations. Combined reporting in Wisconsin was initially implemented for the 2009 tax year, with the enactment of Wis. Stat. § 71.255. Subsection 71.255(6)(bm), relating to pre-2009 NBL carry-forwards, was created in the 2011-2012 Wisconsin statutes and was not amended in either the 2013-2014 or the 2015-2016 Wisconsin statutes.

Net business losses were defined and incorporated in the Wisconsin statutes at Wis. Stat. § 71.26 prior to the advent of combined reporting in Wisconsin. The 2011-2012 Wisconsin statutes include an expanded Wis. Stat. § 71.26, which adds a provision allowing the offset of pre-2009 NBL carryforward for the 20 taxable years that begin after December 11, 2011. Wis. Stat. § 71.26 was not amended in either the 2013-2014 or the 2015-2016 Wisconsin statutes.

Wisconsin Administrative Code Tax § 2, pertaining generally to income taxation, returns, records, and gross income, was updated on August 31, 2009, with an effective date of September 1, 2009, and on that date, the code did not contain subsection 2.61, relating to combined reporting. The initial version of Wis. Admin. Code Tax § 2.61, published in the Administrative Register on April 30, 2010, with an effective date of May 1, 2010, specifically prohibited the sharing of pre-2009 NBL carryforwards with other members of a combined group at Wis. Admin. Code Tax § 2.61(9)(b)1. Subsection (dm), relating to the sharing of pre-2009 NBL carryforwards, was added to Wis. Admin. Code Tax § 2.61, effective August 1, 2010, and subsection (9)(b)1. was removed from the code at the same time. This version of the code remains in effect to date and has not changed since it was published to the Register in July of 2010. The Department appears to have promulgated the administrative rule in advance of the first tax year where pre-2009 NBL carryforwards could be shared among combined group members.

WISCONSIN STATUTES

Wis. Stat. § 71.255 Combined reporting.⁴ⁱ

(6) CREDITS, NET BUSINESS LOSSES, AND POST-APPORTIONMENT DEDUCTIONS.

(a) Except as provided in pars. (b), (bm), and (c) no tax credit, Wisconsin net business loss carry-forward, or other post-apportionment deduction earned by one member of the combined group, but not fully used by or allowed to that member, may be used in whole or in part by another member of the combined group or applied in whole or in part against the total income of the combined group. A member of a combined group

⁴ This is the 2013-2014 version of the statute which was in effect for tax year 2016. The 2015-2016 statutes made no change to this subsection. The 2009 version of this statute, which was the inaugural version of the provision and applicable to tax years 2009 and 2010, is reproduced in pertinent part at endnote i.

may use a carry-forward of a credit, Wisconsin net business loss carry-forward, or other post-apportionment deduction otherwise allowable under s. 71.26 or 71.45, that was incurred by that same member in a taxable year beginning before January 1, 2009.

(b)

1. Subject to the limitations provided under s. 71.26 (3) (n), for each taxable year that a corporation has a net business loss carry-forward, as provided under s. 71.26 (4) or 71.45 (4), that was computed on a combined report for a combined group's unitary business for a taxable year beginning on or after January 1, 2009, the corporation may, after using such net business loss carry-forward to offset its own income for the taxable year, use any remaining net business loss carry-forward to offset the income of all other members of the combined group on a proportionate basis, to the extent such income is attributable to that same unitary business.

2. Unless otherwise provided by the department by rule, if the corporation may no longer be included in the combined group, as determined under this section, the corporation's net business loss carry-forward shall be available only to that corporation.

(bm)

1. In this paragraph, "pre-2009 net business loss carry-forward" means a corporation's total net Wisconsin business loss carry-forward computed under s. 71.26 (4) or 71.45 (4) as of the beginning of its first taxable year that begins after December 31, 2008, but not used by the corporation in any taxable year beginning before January 1, 2012.

2. Starting with the first taxable year beginning after December 31, 2011, and for each of the 19 subsequent taxable years, and subject to the limitations provided under s. 71.26 (3) (n), for each taxable year that a corporation that is a member of a combined group has pre-2009 net business loss carry-forward, the corporation may, after using the pre-2009 net business loss carry-forward to offset its own income for the taxable year, and after using shareable losses to offset its

own income for the taxable year, as provided under par. (b) 1., use up to 5 percent of the pre-2009 net business loss carry-forward, until used or expired, to offset the Wisconsin income of all other members of the combined group on a proportionate basis, to the extent such income is attributable to the unitary business. If the full 5 percent of such pre-2009 net business loss carry-forward cannot be fully used to offset the Wisconsin income of all other members of the combined group, the remainder may be added to the portion that may offset the Wisconsin income of all other members of the combined group in a subsequent year, until it is completely used or expired, except that unused pre-2009 net business loss carry-forwards may not be used in any taxable year that begins after December 31, 2031.

3. Unless otherwise provided by the department by rule, if the corporation may no longer be included in the combined group, as determined under this section, the corporation's pre-2009 net business loss carry-forward shall be available only to that corporation.

4. The department shall promulgate rules to administer this paragraph.

Wis. Stat. § 71.26 Income Computation⁵ⁱⁱ

(4) NET BUSINESS LOSS CARRY-FORWARD.

(a) Except as provided in par. (b), a corporation . . . may offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next 20 preceding taxable years, if the corporation was subject to taxation under this chapter in the taxable year in which the loss was sustained, to the extent not offset by other items of Wisconsin income in the loss year and by Wisconsin net business income of any year between the loss year and the taxable year for which an offset is claimed. For purposes of this subsection Wisconsin net business income or loss shall consist of all the income attributable to the operation of a trade or business in this

⁵ This is the version of the statute in effect for tax years 2016 and 2017. It is identical to the statute as it was amended in the 2011-2012 statutes. The 2009 version of this statute, applicable to tax years prior to 2009 (the advent of Wisconsin combined reporting), is reproduced at endnote ii.

state, less the business expenses allowed as deductions in computing net income. The Wisconsin net business income or loss of corporations engaged in business within and without the state shall be determined under s. 71.25 (6) and (10) to (12). Nonapportionable losses having a Wisconsin situs under s. 71.25 (5) (b) shall be included in Wisconsin net business loss; and nonapportionable income having a Wisconsin situs under s. 71.25 (5) (b), whether taxable or exempt, shall be included in other items of Wisconsin income and Wisconsin net business income for purposes of this subsection.

- (b) A corporation that is part of a combined group under s. 71.255 may offset against its Wisconsin net business income any unused pre-2009 net business loss carryforward under s. 71.255 (6) (bm) for the 20 taxable years that begin after December 31, 2011.

Wis. Admin. Code Tax § 2.61 Combined reporting.⁶ⁱⁱⁱ

...

(9) NET BUSINESS LOSSES.

A combined group member may carry forward its net business loss as provided in ss. 71.26 (4) and 71.45 (4), Stats. A net business loss carryforward is an attribute of the separate corporation rather than of the combined group. However, s. 71.255 (6) (b), Stats., provides that a combined group member may share all or a portion of its net business loss carryforward with the other members of its combined group if certain conditions are met. This subsection explains which net business loss carryforwards are sharable, how to compute the sharable amount, and how to apply the shared losses. The following rules apply:

- (a) *Sharable loss carryforwards.* A combined group member may share its net business loss carryforward incurred in a taxable year beginning on or after January 1, 2009 with other

⁶ Wis. Admin. Code Tax § 2.61 was published in the Administrative Register on July 31, 2010 and had an effective date of August 1, 2010. This version of the subsection remains in effect to date and has not changed since it was published to the Register in July of 2010. The version of Wis. Admin. Code Tax § 2.61 initially published in the Administrative Register on April 30, 2010, with an effective date of May 1, 2010 is reproduced at endnote iii, without examples.

combined group members to the extent that all of the following conditions are met:

1. The net business loss is attributable to combined unitary income included in a combined report.
2. The member originally computed the net business loss in the combined report for the same combined group as the combined group that will use the shared loss carryforward, regardless of whether corporations have joined or left the combined group in the intervening years.
3. The member is still a member of the combined group described in subd. 2. for the year the loss carryforward will be shared.

(b) *Non-sharable loss carryforwards.* A combined group member's net business loss carryforward incurred in a taxable year beginning on or after January 1, 2009 that cannot be shared with other combined group members includes amounts attributable to the following:

2. Net business losses attributable to separate entity items.
3. Net business losses attributable to a different unitary business.

(c) *Order of carryforwards.* A combined group member shall apply net business loss carryforwards in the following order:

1. Net business loss carryforwards incurred by that same member in taxable years beginning before January 1, 2009, in the order that the underlying net business losses were incurred.

2. Sharable and non-sharable net business loss carryforwards under par. (d) incurred in taxable years beginning on or after January 1, 2009, in the order that the underlying net business losses were incurred. If the net business loss carryforward to be used consists of both a sharable amount and a non-sharable amount incurred in the same taxable year, the amount of sharable and non-sharable carryforward used shall be determined on a pro rata basis according to the amount of each type of carryforward available from that year.
3. For loss carryforwards shared in a taxable year that begins after December 31, 2011, pre-2009 net business loss carryforwards under par. (dm). (Example omitted.)

(d) *Method of sharing.* The amount of net business loss carryforward under par. (c)2. eligible for sharing shall be computed and assigned as follows:

1. Each combined group member shall first apply its total available net business loss carryforward against its total Wisconsin income as computed under sub. (5) (a) to (g),

including net income or loss attributable to separate entity items. A combined group member's net business loss carryforward shall be considered used against its net income from separate entity items before its share of combined unitary income.

2. Each member shall then separate any remaining net business loss carryforward into the sharable amount and the non-sharable amount, as applicable, using the ordering rules in par. (c). The sharable net business loss carryforward amounts for each combined group member shall then be aggregated, except that any combined group member that elects not to share its sharable amount as provided in par. (h) may exclude some or all of its sharable amount from the aggregate sharable amount.

3. Except as provided in par. (g) . . . , the aggregate sharable amount shall be assigned to each combined group member in proportion to its share of combined unitary income as computed in subs. (6) to (8), net of any losses from separate entity items or loss carryforwards already applied. The sharable amount may only be assigned to a member to the extent the member's share of combined unitary income has not already been offset by losses taken into account under subd. 1. An amount may not be assigned to a combined group member whose share of combined unitary income, net of any losses already applied by the member under subd. 1., is zero or less.

4. Any remaining sharable amount remains an attribute of the corporation that originally incurred the loss. The aggregate sharable amount used under subd. 3. shall be considered used proportionately from the sharable net business loss carryforwards of the corporations which contributed to the aggregate sharable amount. **(Example omitted.)**

(dm) Pre-2009 net business loss carryforwards. 1. For a combined group member's first taxable year beginning after December 31, 2011, the member may, after using the pre-2009 net business loss carryforward to offset its own income for the taxable year, and after using sharable losses to offset its own income for the taxable year, use 5 percent of the pre-2009 net business loss carryforward to offset the income of all other members of the combined group for the taxable year and for each of the 19 subsequent taxable years. **(Example omitted.)**

2. Except as provided in par. (g) . . . , the sharable pre-2009 net business loss carryforward under subd. 1. shall be

assigned to each combined group member in proportion to its share of combined unitary income as computed in subs. (6) to (8), net of any losses from separate entity items or loss carryforwards already applied. An amount may not be assigned to a combined group member whose share of combined unitary income is zero or less. Any remaining sharable amount becomes part of the combined group's pre-2009 net business loss carryforward that may be shared by all combined group members in subsequent years. **(Example omitted.)**

3. Notwithstanding the provisions of ss. 71.26 (4) (a) and 71.45 (4) (a), Stats., under ss. 71.26 (4) (b) and 71.45 (4) (b), Stats., any unused pre-2009 net business loss carryforward under subd. 1. may be offset against the income of the members of the combined group for the 20 taxable years that begin after December 31, 2011. **(Example omitted.)**

(e) *Departing combined group members.* Except as provided in subs. 1. and 2., if a corporation leaves a combined group or is no longer eligible to be a combined group member, the corporation's remaining net business loss carryforward may not be shared with any other combined groups but shall be available only to that corporation. The following exceptions apply:

1. If a subgroup of two or more corporations leaves a combined group on the same date and immediately thereafter the corporations become a separate combined group or together become members of a new combined group, those corporations may share their remaining sharable net business loss carryforwards attributable to the former combined group with one another. For purposes of the computations in par. (d), the new combined group's combined unitary income shall be used in place of the former combined group's combined unitary income. This subdivision also applies to combined groups that merge to become a new combined group by operation of the controlled group election as described in s. Tax 2.63 (2) (c).

2. If a corporation leaves a combined group or is no longer eligible to be a combined group member, but subsequently rejoins the combined group, the corporation may share its net business loss carryforward with that combined group to the extent

the carryforward otherwise qualifies as a sharable loss carryforward under par. (a).

DECISION

This appeal comes before the Commission on Cross-Motions for Summary Judgment. Summary judgment must be granted if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Maynard v. Port Publications, Inc.*, 98 Wis. 2d 555, 558, 297 N.W.2d 500 (1980), citing Wis. Stat. § 802.08(2). A party moving for summary judgment has the burden of establishing the absence of a genuine, that is, disputed, issue as to any material fact. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 565, 278 N.W.2d 857 (1979). Any evidentiary facts in an affidavit are to be taken as true unless contradicted by other opposing affidavits or proof. *Artmar, Inc. v. United Fire & Casualty Co.*, 34 Wis. 2d 181, 188, 148 N.W.2d 641, 644 (1967). The effect of counter-motions for summary judgment is an assertion by the parties that the facts are undisputed, that in effect the facts are stipulated, and that only issues of law are before the court. *Eichenseer v. Madison-Dane County Tavern League, Inc.*, 2008 WI 38, ¶4, 308 Wis. 2d 684, 748 N.W.2d 154.

Both parties stipulated to many of the facts and filed affidavits that pertained to many others. The legal issue presented is whether pre-2009 net business losses incurred by entities that were members of a combined reporting group beginning in 2009 can be shared with members of a new combined group when the incurring entities

leave the former combined group and join a new combined group. The Commission concludes that the case can be resolved under the summary judgment standard.

A brief history of corporate income reporting under the Wisconsin statutes is in order. As noted above, prior to the effective date of the 2009-2010 Wisconsin statutes, Wisconsin law made no provision for combined reporting of income of corporations. At that time, net business losses (NBLs) could be calculated and carried forward both before and after the enactment of combined income reporting in Wisconsin. A hypothetical scenario is examined below to illustrate what this means.

For the hypothetical example, imagine that Company A had an NBL of \$1,000,000.00 in 2005. It was permitted to carry that loss forward and use it to calculate its taxable income in subsequent years. Next imagine that Company A used \$250,000.00 of its carried forward NBL to reduce its income in 2006 and again in 2007 and incurred a further NBL in the amount of \$100,000.00 in 2008. Company A then went on to join Company B and Company C in a combined reporting group in 2009. Company A has \$600,000.00 of pre-2009 NBL remaining when it joins the combined reporting group in 2009. Companies A, B, and C report a net business loss for 2009 on their combined income for 2009 of \$300,000.00, with each reporting combined group member company having incurred \$100,000.00 of net business loss in 2009. At this point, Company A has \$700,000 of NBLs it is carrying forward, \$500,000 incurred prior to having joined the first combined reporting group, and \$200,000 incurred while it was a member of the initial combined reporting group. Companies A and B leave the combined group for 2010 and together join a new combined reporting group with Company D. Petitioner and Respondent's

dispute in this appeal centers on whether the \$500,000 in NBL that Company A brought to the first combined group and did not use while a member of the first combined group is shareable with Company D in the new combined reporting group.

The Department argues 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.

Wisconsin Statute § 71.255(6) says that NBLs incurred in a taxable year which began before January 1, 2009, whether current or carried-forward, by a member of a combined reporting group may only be used by the incurring member of the combined reporting group, with certain exceptions. The exception of interest in this matter, found at Wis. Stat. § 71.255(6)(bm)2., states that, starting with the first taxable year beginning after December 31, 2011, for each taxable year that a corporation that is a member of a combined group has pre-2009 NBL carry-forward, the corporation may, after using the pre-2009 NBL carry-forward to offset its own income for the taxable year, and after using shareable losses to offset its own income for the taxable year, use up to 5 percent of the pre-2009 NBL carry-forward, until used or expired, to offset the Wisconsin income of all other members of the combined group on a proportionate basis, to the extent such income is attributable to the unitary business. There is a limitation placed on the sharing of pre-2009 NBLs, set forth at Wis. Stat. § 71.255(6)(bm)3. That limitation is that, if the corporation may no longer be included in the combined group, the corporation's pre-2009 NBL carry-forward shall only be available to that corporation. The relevant portion of the administrative rule the Department promulgated, apparently in anticipation of the

effective date of Wis. Stat. § 71.255, is Wis. Admin. Code § Tax 2.61(9)(e). This administrative rule allows a departing member of a combined group (Business A) to share its pre-2009 NBL carry-forward with another corporation (Business B) only when Business A left the same combined group at the same time as Business B and either 1) formed a new combined group consisting of Business A and Business B, or 2) together joined a 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 Petitioner argues that the applicable statutes differentiate between pre-2009 NBLs and post-2009 NBLs when setting forth how such losses may be shared on a carried forward basis. Petitioner points to Wis. Stat. § 71.26(4)(b) which authorizes a member of a combined group to share up to 5% of its pre-2009 NBL carry-forward with other members of its group, as long as it has already used its NBLs and any shareable NBLs to offset its own income. Petitioner argues that Wis. Stat. § 71.255(6)(bm)3. and Wis. Admin. Code Tax § 2.61(9)(e) only apply to post-2008 NBLs. Petitioner bases its position in this appeal on this argument. The plain language of Wis. Admin. Code § Tax 2.61(9)(e) does not differentiate between pre-2009 and post-2008 NBL carryforwards. The Commission determines that the rule as written applies to both pre-2009 and post-2008 NBL carryforwards.

The parties also disagree about whose behavior is restricted by Wis. Stat. § 71.255(6)(bm)3. The plain language of the statute is “if the corporation may no longer be included in the combined group . . . , the corporation’s pre-2009 net business loss carry-

forward shall be available only to that corporation.” Petitioner argues that the subsection restricts the use of NBLs by other members of the combined group which the corporation has left. The Department argues that the subsection restricts the use of NBLs by the corporation which has left a combined group. Since NBLs are tracked and carried forward separately by each group member and essentially belong to each individual member, Petitioner’s position makes the statutory language a nullity, which is to be avoided: former group members could not use a departed member’s NBL carryforward after a member has departed whether the statutory section existed or not, as the carried forward losses of the former group member would not be reported or available to the former group on any tax forms.

Petitioner also argues that, since Wisconsin first adopted combined reporting for corporate franchise tax purposes in 2009 (Wis. Stat. § 71.255), the statute as enacted only applied to the sharing of future losses within a combined group. Petitioner further argues that the administrative rule promulgated by the Department to administer Wis. Stat. § 71.255⁷ can, by extension, only refer to the sharing of such future losses, since pre-2009 NBLs could not be shared at the time the administrative rule was promulgated. When the Legislature created Wis. Stat. § 71.255(6)(bm)2. two years later, Petitioner’s argument continues, that was the first time a limitation was placed on the use of pre-2009 NBLs by other members of a combined group. Petitioner argues that, since the administrative regulation administering the statute was promulgated in May of 2010 and

⁷ Wis. Admin. Code § Tax 2.61(9)(3).

changed in August of 2010, but not changed after the statute was amended to add subsection (bm)2., the regulation is not applicable to actions taken under the newly amended statute. This argument ignores the addition of subsection (dm) to Wis. Admin. Code § Tax 2.61(9) in August of 2010 and fails. Taken to its logical conclusion, Petitioner's argument would result in the conclusion that Wis. Admin. Code § Tax 2.61(9)(e) cannot apply to any NBLs, since it was effective prior to any statutory section allowing sharing of losses within combined groups. Absurd results are to be avoided, and the Commission does not find the argument of Petitioner persuasive.

The plain language of the administrative rule says that a departing group member may not share that member's "remaining net business loss carryforward" with any other combined groups with two exceptions. In this appeal, the "AHI Entities" departed a combined group with NBL carryforward amounts on their books and joined a new combined group. Pursuant to Wis. Admin. Code § Tax 2.61(9)(e), the "AHI Entities" were not permitted to use the NBL carryforward amounts on their books with any entity other than the other AHI Entity that joined the new combined group.

CONCLUSIONS OF LAW

1. Petitioner Lincare Holdings is not entitled to use pre-2009 carried forward net business losses incurred by a member of its corporate group which incurred the losses prior to joining the corporate group, and previously belonged to a different combined reporting group, pursuant to Wis. Stat. § 71.255 (6)(bm)2. and Wis. Admin. Code § Tax 2.61(9)(e).

2. Petitioner Lincare Holdings has not met its burden of proving the Department's tax assessment was incorrect.

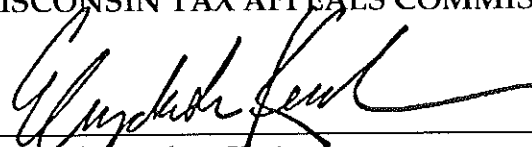
ORDER

Based upon the foregoing,

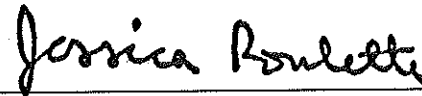
IT IS HEREBY ORDERED that the Department's Motion for Summary Judgment is granted, and the Petitioner's Motion for Summary Judgment is denied.

Dated at Madison, Wisconsin, this 15th day of December, 2023.

WISCONSIN TAX APPEALS COMMISSION



Elizabeth Kessler, Chair



Jessica Roulette, Commissioner



Kenneth P. Adler, Commissioner

ATTACHMENT: NOTICE OF APPEAL INFORMATION

ⁱ Wis. Stat. § 71.255 Combined reporting.

(6) CREDITS, NET BUSINESS LOSSES, AND POST-APPORTIONMENT DEDUCTIONS.

(a) Except as provided in pars. (b) and (c), no tax credit, Wisconsin net business loss carry-forward, or other post-apportionment deduction earned by one member of the combined group, but not fully used by or allowed to that member, may be used in

whole or in part by another member of the combined group or applied in whole or in part against the total income of the combined group. A member of a combined group may use a carry-forward of a credit, Wisconsin net business loss carry-forward, or other post-apportionment deduction otherwise allowable under s. 71.26 or 71.45, that was incurred by that same member in a taxable year beginning before January 1, 2009.

(b)

1. Subject to the limitations provided under s. 71.26 (3) (n), for each taxable year that a corporation has a net business loss carry-forward, as provided under s. 71.26 (4) or 71.45 (4), that was computed on a combined report for a combined group's unitary business for a taxable year beginning on or after January 1, 2009, the corporation may, after using such net business loss carry-forward to offset its own income for the taxable year, use any remaining net business loss carry-forward to offset the income of all other members of the combined group on a proportionate basis, to the extent such income is attributable to that same unitary business.

2. Unless otherwise provided by the department by rule, if the corporation may no longer be included in the combined group, as determined under this section, the corporation's net business loss carry-forward shall be available only to that corporation.

(c)

1. Subject to the limitations provided under s. 71.26 (3) (n), for each taxable year that a corporation that is a member of a combined group has an unused credit or credit carry-forward under s. 71.28 (4) or (5) or 71.47 (4) or (5), the corporation may, after using that credit or credit carry-forward to offset its own tax liability for the taxable year, use that credit or credit carry-forward to offset the tax liability of all other members of the combined group on a proportionate basis, to the extent such tax liability is attributable to the unitary business.

2. Unless otherwise provided by the department by rule, if the corporation may no longer be included in the combined group, as determined by this section, the corporation's unused credits shall be available only to that corporation.

ii **Wis. Stat. § 71.26 Income Computation**

(4) **NET BUSINESS LOSS CARRY-FORWARD.** A corporation . . . may offset against its Wisconsin net business income any Wisconsin net business loss sustained in any of the next 15 preceding taxable years, if the corporation was subject to taxation under this chapter in the taxable year in which the loss was sustained, to the extent not offset by other items of Wisconsin income in the loss year and by Wisconsin net business income of any year between the loss year and the taxable year for which an offset is claimed. For purposes of this subsection Wisconsin net business income or loss shall consist of all the income attributable to the operation of a trade or business in this state, less the business expenses allowed as deductions in computing net income. The Wisconsin net business income or loss of corporations engaged in business within and without the state shall be determined under s. 71.25 (6) and (10) to (12). Nonapportionable losses having a Wisconsin situs

under s. 71.25 (5) (b) shall be included in Wisconsin net business loss; and nonapportionable income having a Wisconsin situs under s. 71.25 (5) (b), whether taxable or exempt, shall be included in other items of Wisconsin income and Wisconsin net business income for purposes of this subsection.

iii . . .

(9) NET BUSINESS LOSSES.

A combined group member may carry forward its net business loss as provided in ss. 71.26 (4) and 71.45 (4), Stats. A net business loss carryforward is an attribute of the separate corporation rather than of the combined group. However, s. 71.255 (6) (b), Stats., provides that a combined group member may share all or a portion of its net business loss carryforward with the other members of its combined group if certain conditions are met. This subsection explains which net business loss carryforwards are sharable, how to compute the sharable amount, and how to apply the shared losses. The following rules apply:

(a) *Sharable loss carryforwards.* A combined group member may share its net business loss carryforward with other combined group members to the extent that all of the following conditions are met:

1. The net business loss originated in a taxable year beginning on or after January 1, 2009 and is attributable to combined unitary income included in a combined report.
2. The member originally computed the net business loss in the combined report for the same combined group as the combined group that will use the shared loss carryforward, regardless of whether corporations have joined or left the combined group in the intervening years.
3. The member is still a member of the combined group described in subd. 2. for the year the loss carryforward will be shared.

(b) *Non-sharable loss carryforwards.* A combined group member's net business loss carryforward that cannot be shared with other combined group members includes amounts attributable to the following:

1. Net business losses that originated in a taxable year beginning before January 1, 2009.
2. Net business losses attributable to separate entity items.
3. Net business losses attributable to a different unitary business.

(c) *Order of carryforwards.* A combined group member shall apply net business loss carryforwards in the order that the underlying net business loss was incurred. If the net business loss carryforward to be used consists of both a sharable amount and a non-sharable amount incurred in the same taxable year, the amount of sharable and non-sharable carryforward used shall be determined on a pro rata basis according to the amount of each type of carryforward available from that year.

(d) *Method of sharing.* The amount of net business loss carryforward eligible for sharing shall be computed and assigned as follows:

1. Each combined group member shall first apply its total available net business loss carryforward against its total Wisconsin income as computed under sub. (5) (a) to (g), including net income or loss attributable to separate entity items. A combined group

member's net business loss carryforward shall be considered used against its net income from separate entity items before its share of combined unitary income.

2. Each member shall then separate any remaining net business loss carryforward into the sharable amount and the non-sharable amount, as applicable, using the ordering rules in par. (c). The sharable net business loss carryforward amounts for each combined group member shall then be aggregated, except that any combined group member that elects not to share its sharable amount as provided in par. (h) may exclude some or all of its sharable amount from the aggregate sharable amount.

3. Except as provided in par. (g), relating to insurance companies, the aggregate sharable amount shall be assigned to each combined group member in proportion to its share of combined unitary income as computed in subs. (6) to (8), net of any losses from separate entity items or loss carryforwards already applied. The sharable amount may only be assigned to a member to the extent the member's share of combined unitary income has not already been offset by losses taken into account under subd. 1. An amount may not be assigned to a combined group member whose share of combined unitary income, net of any losses already applied by the member under subd. 1., is zero or less.

4. Any remaining sharable amount remains an attribute of the corporation that originally incurred the loss. The aggregate sharable amount used under subd. 3. shall be considered used proportionately from the sharable net business loss carryforwards of the corporations which contributed to the aggregate sharable amount.

(e) *Departing combined group members.* Except as provided in subds. 1. and 2., if a corporation leaves a combined group or is no longer eligible to be a combined group member, the corporation's remaining net business loss carryforward may not be shared with any other combined groups but shall be available only to that corporation. The following exceptions apply:

1. If a subgroup of two or more corporations leaves a combined group on the same date and immediately thereafter the corporations become a separate combined group or together become members of a new combined group, those corporations may share their remaining sharable net business loss carryforwards attributable to the former combined group with one another. For purposes of the computations in par. (d), the new combined group's combined unitary income shall be used in place of the former combined group's combined unitary income. This subdivision also applies to combined groups that merge to become a new combined group by operation of the controlled group election as described in s. Tax 2.63 (2) (c).

2. If a corporation leaves a combined group or is no longer eligible to be a combined group member, but subsequently rejoins the combined group, the corporation may share its net business loss carryforward with that combined group to the extent the carryforward otherwise qualifies as a sharable loss carryforward under par. (a).