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# REPORT OF THE SALES, USE AND INCOME TAX SUBCOMMITTEE

(Newton, Stavrinakis, Dillard, Taylor & Hyde - Staff Contact: Teesha Trapp)

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## SENATE BILL 298

S. 298 -- Sen. Bennett: A BILL TO AMEND THE SOUTH CAROLINA CODE OF LAWS BY AMENDING SECTION 12-6-2320, RELATING TO ALTERNATE METHODS FOR THE ALLOCATION AND APPORTIONMENT OF INCOME FOR STATE INCOME TAX PURPOSES, SO AS TO SET FORTH A PROCESS FOR THE DEPARTMENT OF REVENUE AND TAXPAYERS TO ACCURATELY DETERMINE NET INCOME.

*Received by Ways and Means:* 4/4/23

***Summary of Bill:***

This bill revises provisions for alternate methods for the allocation and apportionment of income for state income tax purposes to establish a process for the Department of Revenue and taxpayers to determine the net income of a business accurately. The bill provides factors for evaluation that the Department of Revenue must use in determining filing status and provides for dispute resolution.

***Estimated Revenue Impact:***

The bill would reduce General Fund revenue on average by more than \$80,000,000 annually beginning in FY 2023-24.

***Subcommittee Action/Explanation***

Received FAVORABLE REPORT W/ AMENDMENT from subcommittee on 1/18/2024.

***Full Committee Action/Explanation***

***Other Notes/Comments:***

**SOUTH CAROLINA**  
**HOUSE AMENDMENT**

AMENDMENT NO. \_\_\_\_\_

David Good  
January 17, 2024

ADOPTED	REJECTED	TABLED	ADJOURN DEBATE	RECONSIDERED	ROO

\_\_\_\_\_  
Clerk of the House

ADOPTION NO. \_\_\_\_\_

**BILL NO: S. 298**

(Reference is to the original version)

Rep. Leon Stavrinakis proposes the following amendment (LC-298.DG0002H):

Amend the bill, as and if amended, SECTION 1, by striking Section 12-6-2320(B)(1), (2), (3), (4), and (5) and inserting:

(B)(1) Notice. When the department has reason to believe that any taxpayer conducts its trade or business in a manner as to fail to fairly represent the extent of the taxpayer's business activity in this State through the use of transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities, the department may, upon written notice to the taxpayer, require any information reasonably necessary to determine whether the taxpayer's intercompany transactions have economic substance and are at fair market value and for the accurate computation of the taxpayer's state net income properly attributable to its business activity in this State. The taxpayer must provide the information requested within ninety days of

the date of the notice.

(2) Adjust Net Income. If upon review of the information provided, the department finds that the taxpayer's intercompany transactions lack economic substance or are not at fair market value, the department may redetermine the state net income of the taxpayer properly attributable to its business activity in this State under subsection (A) by: (i) adding back, eliminating, or otherwise adjusting intercompany transactions to accurately compute the taxpayer's state net income, or, if such adjustments are not adequate under the circumstances to redetermine state net income, (ii) requiring the taxpayer to file a return that reflects the net income on a combined basis of all members of its affiliated group that are conducting a unitary business. The department shall consider and be authorized to use any reasonable method proposed by the taxpayer for redetermining its state net income attributable to its business activity in this State. In determining whether the taxpayer's intercompany transactions lack economic substance or are not at fair market value, the department shall consider each taxable year separately.

(3) Voluntary Redetermination. In addition to the authority granted under this subsection, if the department has reason to believe that any taxpayer's state net income properly attributable to its business activity in this State is not fairly represented on a separate return required by this subsection because of intercompany transactions, without making a finding that those transactions lack economic substance or are not at fair market value, the department and the taxpayer jointly may determine and agree to an alternative filing methodology that fairly represents state net income.

(4) Combined Return. If the department finds that a combined return is required under the provisions of subsection (A) and this subsection, the department may, upon written notice to the taxpayer, require the taxpayer to submit the combined return, and the taxpayer shall submit the combined return within ninety days of the date of the notice. The submission by the taxpayer of the combined return required by the department must not be deemed to be a return or construed as an agreement by the taxpayer that an assessment based on the combined return is correct or that additional tax is due by the department's deadline for submitting the combined return. The

department or the taxpayer may propose a combination of fewer than all members of the unitary group, and the department is authorized to consider whether such proposed combination is a reasonable means of redetermining state net income; provided, however, the department shall not require a combination of fewer than all members of the unitary group without the consent of the taxpayer.

(5) Written Statement of Findings. If the department makes an adjustment or requires a combined return under this section, the department shall provide the taxpayer with a written statement containing details of the facts, circumstances, and reasons for which the department has found that the taxpayer did not fairly represent its state net income properly attributable to its business activity in this State and the department's proposed method for computation of the taxpayer's state net income no later than ninety days following the issuance of a proposed assessment as provided in this section.

Amend the bill further, SECTION 1, by striking Section 12-6-2320(B)(9), (10), (11), (12), and (13) and inserting:

(9) Apportionment. If the department requires a combined return under this section, the combined state net income of the taxpayer and the members of the affiliated group of entities must be apportioned to this State by use of an apportionment formula that fairly represents the extent of taxpayer's business activity in this State and which fairly reflects the apportionment formula in Section 12-6-2295 applicable to the taxpayer and each member of the affiliated group included in the combined return.

(10) Affiliated Group Defined. For purposes of this section, an affiliated group is a group of two or more corporations or noncorporate entities in which more than fifty percent of the voting stock of each member corporation or ownership interest of each member noncorporate entity is directly or indirectly owned or controlled by a common owner or owners, either corporate or noncorporate, or by one or more of the member corporations or noncorporate entities. Nothing in this subsection may be construed to limit or negate the department's authority to add back,

eliminate, or otherwise adjust intercompany transactions involving the listed entities to accurately compute the taxpayer's state net income properly attributable to its business activity in this State, as provided in this subsection.

The following entities must not be included in a combined return:

(a) a taxpayer not required to file a federal income tax return;

(b) an insurance company, other than a captive insurance company: (i) which is subject to tax under Title 38; (ii) whose premiums are subject to tax under Chapter 7, Title 38 or a similar tax in another state; (iii) which is licensed as a reinsurance company; (iv) which is a life insurance company as defined in Section 816 of the Internal Revenue Code; or (v) which is an insurance company subject to tax imposed by Section 831 of the Internal Revenue Code. A "captive insurance company" means an insurer that is part of an affiliated group where the insurer receives more than fifty percent of its net written premiums or other amounts received as compensation for insurance from members of the affiliated group;

(c) a taxpayer exempt from taxation under Section 501 of the Internal Revenue Code;

(d) a foreign taxpayer as defined in Section 7701 of the Internal Revenue Code, other than a domestic branch thereof;

(e) a taxpayer with at least eighty percent of its gross income from all sources in the tax year being active foreign business income as defined in Section 861(c)(1)(B) of the Internal Revenue Code in effect as of July 1, 2021;

(f) any other entity not subject to tax under Section 12-6-530.

(11) Proposed Assessment or Refund. If the department redetermines the state net income of the taxpayer in accordance with this section by adjusting the state net income of the taxpayer or requiring a combined return, the department shall issue a proposed assessment or refund upon making the redetermination. When a refund is determined in whole or part by a proposed assessment to an affiliated group member under this section, the refund may not be issued until

the proposed assessment to the affiliated group member has become collectable. The amount of the refund shall reflect any changes made by the department under this section. Otherwise, the procedures for a proposed assessment or a refund in Chapter 60 are applicable to proposed assessments and refunds made under this section.

(12) Penalties. If a combined return required by this section is not timely submitted by a taxpayer, then the taxpayer is subject to the penalties provided in Section 12-60-430. Penalties may not be imposed on an assessment under this section except as expressly authorized in this section.

(13) Advice. A taxpayer may request in writing from the department specific advice regarding whether a redetermination of the taxpayer's state net income or a combined return would be required under this section under certain facts and circumstances. The department may request information from the taxpayer that is required to provide the specific advice. The department shall provide the specific advice within one hundred twenty days of the receipt of the requested information from the taxpayer. The department's advice under this item is not a department determination under the Revenue Procedures Act.

Amend the bill further, SECTION 1, by striking Section 12-6-2320(B)(16) and inserting:

(16) Appeals. If the taxpayer appeals a final determination by the department under this section to the Administrative Law Court in a contested tax case, the administrative law judge shall review de novo: (i) whether the separate income tax returns submitted by the taxpayer fail to fairly represent the extent of the taxpayer's business activity in this State through the use of intercompany transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities; (ii) whether the department's means of determining the taxpayer's state net income under this section is an appropriate means of determining the taxpayer's state net income properly attributable to this State; and (iii) if a combined return is required by the department, whether adjustments other than requiring the taxpayer to file a return

on a combined basis are adequate under the circumstances to redetermine state net income.

Renumber sections to conform.

Amend title to conform.



**SOUTH CAROLINA REVENUE AND FISCAL AFFAIRS OFFICE**  
**STATEMENT OF ESTIMATED FISCAL IMPACT**  
**(803)734-3780 • RFA.SC.GOV/IMPACTS**

*This fiscal impact statement is produced in compliance with the South Carolina Code of Laws and House and Senate rules. The focus of the analysis is on governmental expenditure and revenue impacts and may not provide a comprehensive summary of the legislation.*

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<b>Bill Number:</b>	S. 0298	Introduced on January 10, 2023
<b>Author:</b>	Bennett	
<b>Subject:</b>	Allocation and Apportionment	
<b>Requestor:</b>	Senate Finance	
<b>RFA Analyst(s):</b>	Jolliff	
<b>Impact Date:</b>	March 9, 2023	

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### **Fiscal Impact Summary**

This bill amends the current statutes in Section 12-6-2320 dealing with apportionment of income for income tax purposes and combined reporting.

This bill is expected to reduce General Fund revenue from corporate income taxes. The Department of Revenue (DOR) reports that approximately \$138,000,000 has been generated by enforced compliance in the last 3 to 4 years from 53 audits of companies under the current provisions regarding allocation and apportionment of income. Data on voluntary compliance are not available. Current law allows DOR to require companies to employ an alternative method to allocate and apportion income if the department determines that the methods used by the company do not fairly represent the extent of the taxpayer's business activity in the state. The bill provides new requirements that establish a significantly higher burden of proof for DOR than the current standard. DOR believes that the requirements will significantly impair the agency's ability to administer apportionment for multi-state companies. The agency anticipates that this bill will reduce General Fund income tax revenue in upcoming years by more than the amounts recently observed as this amount only represents a portion of all activity. Further, the burden of proof for the agency established by the bill is likely to reduce voluntary compliance as well. Assuming voluntary compliance is reduced by amounts similar to enforced compliance, the bill would reduce General Fund corporate income tax revenue on average by more than \$80,000,000 annually beginning in FY 2023-24.

We anticipate that the bill may reduce the number of cases heard by the Administrative Law Court (ALC) or the potential burden on the ALC based on the increased burden of proof and findings of fact required by DOR. However, we do not anticipate the change will significantly impact the overall caseload or expenditures.

### **Explanation of Fiscal Impact**

#### **Introduced on January 10, 2023**

#### **State Expenditure**

This bill amends the current statutes in Section 12-6-2320 dealing with apportionment of income for income tax purposes and combined reporting. The bill will not impact expenditures for DOR to implement the required changes.



We anticipate that the bill may reduce the number of cases heard by the ALC or the potential burden on court based on the increased burden of proof and findings of fact required by DOR. However, we do not anticipate the change will significantly impact the overall caseload or expenditures. If the ALC provides a different response, we will update this impact statement.

### **State Revenue**

This bill amends the current statutes in Section 12-6-2320 dealing with apportionment of income for income tax purposes and combined reporting.

The Department of Revenue (DOR) reports that approximately \$138,000,000 has been generated in the last 3 to 4 years from 53 audits of companies under the current provisions regarding allocation and apportionment of income. Current law allows DOR to require companies to employ an alternative method to allocate and apportion income if the department determines that the methods used by the company do not fairly represent the extent of the taxpayer's business activity in the state.

DOR believes that the bill will significantly reduce the agency's ability to affect apportionment of income for multi-state companies. The bill provides specific new requirements for determining another method to effectuate an equitable allocation and apportionment of the taxpayer's income. These specifics include a burden of proof and a finding of fact that is typically reserved for litigation. The requirements establish a significantly higher bar than the current audit standard. The agency anticipates that this burden of proof will largely hinder the agency's ability to require a company to accurately calculate the activity and taxable income in South Carolina.

The agency anticipates that this bill will reduce General Fund income tax revenue in upcoming years by more than the amounts recently observed as this amount only represents a portion of all activity. Further, the burden of proof for the agency established by the bill is likely to reduce voluntary compliance as well. Assuming that voluntary compliance is reduced by amounts similar to enforced compliance, the bill would reduce General Fund revenue on average by more than \$80,000,000 annually beginning in FY 2023-24.

### **Local Expenditure**

N/A

### **Local Revenue**

N/A



Frank A. Rainwater, Executive Director

**South Carolina General Assembly**  
125th Session, 2023-2024

**S. 298**

**STATUS INFORMATION**

General Bill

Sponsors: Senators Bennett, Turner, Kimbrell, Campsen and Adams

Document Path: LC-0036DG23.docx

Introduced in the Senate on January 10, 2023

Introduced in the House on April 4, 2023

Currently residing in the House Committee on **Ways and Means**

Summary: Allocation and apportionment

**HISTORY OF LEGISLATIVE ACTIONS**

<u>Date</u>	<u>Body</u>	<u>Action Description with journal page number</u>
12/7/2022	Senate	Prefiled
12/7/2022	Senate	Referred to Committee on <b>Finance</b>
1/10/2023	Senate	Introduced and read first time (Senate Journal-page 184)
1/10/2023	Senate	Referred to Committee on <b>Finance</b> (Senate Journal-page 184)
3/22/2023	Senate	Committee report: Favorable <b>Finance</b> (Senate Journal-page 8)
3/24/2023		Scrivener's error corrected
3/28/2023	Senate	Special order, set for March 8, 2023 (Senate Journal-page 95)
3/29/2023	Senate	Read second time (Senate Journal-page 55)
3/29/2023	Senate	Roll call Ayes-34 Nays-6 (Senate Journal-page 55)
3/30/2023	Senate	Read third time and sent to House (Senate Journal-page 49)
4/4/2023	House	Introduced and read first time (House Journal-page 10)
4/4/2023	House	Referred to Committee on <b>Ways and Means</b> (House Journal-page 10)

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**VERSIONS OF THIS BILL**

12/07/2022

03/22/2023

03/24/2023

1 ~~Indicates Matter Stricken~~

2 Indicates New Matter

3

4 COMMITTEE REPORT

5 March 22, 2023

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**S. 298**

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Introduced by Senators Bennett and Turner

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9 S. Printed 03/22/23--S.

[SEC 3/24/2023 12:56 PM]

10 Read the first time January 10, 2023

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**THE COMMITTEE ON SENATE FINANCE**

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To who was referred a Bill (S. 298) to amend the South Carolina Code of Laws by amending Section

16

12-6-2320, relating to alternate methods for the allocation and apportionment of income for state

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income, etc., respectfully

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**REPORT:**

That they have duly and carefully considered the same, and recommend that the same do pass:

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HARVEY PEELER for Committee.

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**A BILL**

TO AMEND THE SOUTH CAROLINA CODE OF LAWS BY AMENDING SECTION 12-6-2320, RELATING TO ALTERNATE METHODS FOR THE ALLOCATION AND APPORTIONMENT OF INCOME FOR STATE INCOME TAX PURPOSES, SO AS TO SET FORTH A PROCESS FOR THE DEPARTMENT OF REVENUE AND TAXPAYERS TO ACCURATELY DETERMINE NET INCOME.

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. Section 12-6-2320 of the S.C. Code is amended to read:

Section 12-6-2320. (A) If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) separate accounting;
- (2) the exclusion of one or more of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in the State; or
- (4) the employment of any other method, in accordance with subsection (B), to effectuate an equitable allocation and apportionment of the taxpayer's income.

(B)(1) Notice. When the department has reason to believe that any corporation conducts its trade or business in a manner as to fail to accurately report its state net income properly attributable to its business carried on in the State through the use of transactions that lack economic substance or are not at fair market value between members of an affiliated group of entities, the department may, upon written notice to the corporation, require any information reasonably necessary to determine whether the corporation's intercompany transactions have economic substance and are at fair market value and for the accurate computation of the corporation's state net income properly attributable to its business carried on in the State. The corporation must provide the information requested within ninety days of the date of the notice.

(2) Adjust Net Income. If upon review of the information provided, the department finds as a fact that the corporation's intercompany transactions lack economic substance or are not at fair market

1 value, the department may redetermine the state net income of the corporation properly attributable to  
2 its business carried on in the State under subsection (A) by: (i) adding back, eliminating, or otherwise  
3 adjusting intercompany transactions to accurately compute the corporation's state net income properly  
4 attributable to its business carried on in the State, or, if such adjustments are not adequate under the  
5 circumstances to redetermine state net income, (ii) requiring the corporation to file a return that reflects  
6 the net income on a combined basis of all members of its affiliated group that are conducting a unitary  
7 business. The department shall consider and be authorized to use any reasonable method proposed by  
8 the corporation for redetermining its state net income attributable to its business carried on in the State.  
9 In determining whether the corporation's intercompany transactions lack economic substance or are  
10 not at fair market value, the department shall consider each taxable year separately.

11 (3) Voluntary Redetermination. In addition to the authority granted under this subsection, if the  
12 department has reason to believe that any corporation's state net income properly attributable to its  
13 business carried on in this State is not accurately reported on a separate return required by this  
14 subsection because of intercompany transactions, without making a finding that those transactions lack  
15 economic substance or are not at fair market value, the department and the corporation jointly may  
16 determine and agree to an alternative filing methodology that accurately reports state net income. The  
17 department is authorized to allow any reasonable method for redetermining the corporation's state net  
18 income attributable to its business carried on in this State.

19 (4) Combined Return. If the department finds as a fact that a combined return is required under  
20 the provisions of subsection (A) and this subsection, the department may, upon written notice to the  
21 corporation, require the corporation to submit the combined return, and the corporation shall submit  
22 the combined return within ninety days of the date of the notice. The submission by the corporation of  
23 the combined return required by the department must not be deemed to be a return or construed as an  
24 agreement by the corporation that an assessment based on the combined return is correct or that  
25 additional tax is due by the department's deadline for submitting the combined return. The department  
26 or the corporation may propose a combination of fewer than all members of the unitary group, and the  
27 department is authorized to consider whether such proposed combination is a reasonable means of  
28 redetermining state net income; provided, however, the department shall not require a combination of  
29 fewer than all members of the unitary group without the consent of the corporation.

30 (5) Written Statement of Findings. If the department makes an adjustment or requires a combined  
31 return under this section, the department shall provide the corporation with a written statement  
32 containing details of the facts, circumstances, and reasons for which the department has found as a fact  
33 that the corporation did not accurately report its state net income properly attributable to its business  
34 carried on in the State and the department's proposed method for computation of the corporation's state  
35 net income no later than ninety days following the issuance of a proposed assessment as provided in  
36 this section.

1       (6) Members of Affiliated Group. The department may require a combined return under this  
2 section regardless of whether the members of the affiliated group are or are not doing business in this  
3 State.

4       (7) Economic Substance. A transaction has economic substance if: (i) the transaction, or the series  
5 of transactions of which the transaction is a part, has one or more reasonable business purposes other  
6 than the creation of state income tax benefits; and (ii) the transaction, or the series of transactions of  
7 which the transaction is a part, has economic effects beyond the creation of state income tax benefits.  
8 In determining whether a transaction has economic substance, all of the following apply:

9       (a) Reasonable business purposes and economic effects include, but are not limited to, any  
10 material benefit from the transaction other than state income tax benefits not allowable under item (2).

11       (b) In determining whether to require a combined return, whether the transaction has economic  
12 effects beyond the creation of state income tax benefits may be satisfied by demonstrating material  
13 business activity of the entities involved in the transaction.

14       (c) If state income tax benefits resulting from a transaction, or a series of transactions of which  
15 the transaction is a part, are consistent with legislative intent, such state income tax benefits must be  
16 considered in determining whether the transaction has business purpose and economic substance.

17       (d) Centralized cash management of an affiliated group as defined in item (10) shall not  
18 constitute evidence of an absence of economic substance.

19       (e) Achieving a financial accounting benefit shall not be taken into account as a reasonable  
20 business purpose for entering into a transaction if the origin of such financial accounting benefit is a  
21 reduction of state income tax.

22       (8) Allocation of Income and Deductions. In determining whether transactions between members  
23 of the affiliated group of entities are not at fair market value, the department shall apply the standards  
24 contained in the regulations adopted under Section 482 of the Internal Revenue Code.

25       (9) Apportionment. If the department requires a combined return under this section, the combined  
26 state net income of the corporation and the members of the affiliated group of entities must be  
27 apportioned to this State by use of an apportionment formula that accurately reports the state net income  
28 properly attributable to the corporation's business carried on in the State and which fairly reflects the  
29 apportionment formula in Section 12-6-2295 applicable to the corporation and each member of the  
30 affiliated group included in the combined return.

31       (10) Affiliated Group Defined. For purposes of this section, an affiliated group is a group of two  
32 or more corporations or noncorporate entities in which more than fifty percent of the voting stock of  
33 each member corporation or ownership interest of each member noncorporate entity is directly or  
34 indirectly owned or controlled by a common owner or owners, either corporate or noncorporate, or by  
35 one or more of the member corporations or noncorporate entities. Nothing in this subsection may be  
36 construed to limit or negate the department's authority to add back, eliminate, or otherwise adjust

1 intercompany transactions involving the listed entities to accurately compute the corporation's state net  
2 income properly attributable to its business carried on in the State, as provided in this subsection.

3 The following entities must not be included in a combined return:

4 (a) a corporation not required to file a federal income tax return;

5 (b) an insurance company, other than a captive insurance company: (i) which is subject to tax  
6 under Title 38; (ii) whose premiums are subject to tax under Chapter 7, Title 38 or a similar tax in  
7 another state; (iii) which is licensed as a reinsurance company; (iv) which is a life insurance company  
8 as defined in Section 816 of the Internal Revenue Code; or (v) which is an insurance company subject  
9 to tax imposed by Section 831 of the Internal Revenue Code. A "captive insurance company" means  
10 an insurer that is part of an affiliated group where the insurer receives more than fifty percent of its net  
11 written premiums or other amounts received as compensation for insurance from members of the  
12 affiliated group;

13 (c) a corporation exempt from taxation under Section 501 of the Internal Revenue Code;

14 (d) an "S" corporation;

15 (e) a foreign corporation as defined in Section 7701 of the Internal Revenue Code, other than a  
16 domestic branch thereof;

17 (f) a partnership, limited liability company, or other entity not taxed as a corporation;

18 (g) a corporation with at least eighty percent of its gross income from all sources in the tax year  
19 being active foreign business income as defined in Section 861(c)(1)(B) of the Internal Revenue Code  
20 in effect as of July 1, 2021.

21 (11) Proposed Assessment or Refund. If the department redetermines the state net income of the  
22 corporation in accordance with this section by adjusting the state net income of the corporation or  
23 requiring a combined return, the department shall issue a proposed assessment or refund upon making  
24 the redetermination. When a refund is determined in whole or part by a proposed assessment to an  
25 affiliated group member under this section, the refund may not be issued until the proposed assessment  
26 to the affiliated group member has become collectable. The amount of the refund shall reflect any  
27 changes made by the department under this section. Otherwise, the procedures for a proposed  
28 assessment or a refund in Chapter 60 are applicable to proposed assessments and refunds made under  
29 this section.

30 (12) Penalties. If a combined return required by this section is not timely submitted by a  
31 corporation, then the corporation is subject to the penalties provided in Section 12-60-430. Penalties  
32 may not be imposed on an assessment under this section except as expressly authorized in this section.

33 (13) Advice. A corporation may request in writing from the department specific advice regarding  
34 whether a redetermination of the corporation's state net income or a combined return would be required  
35 under this section under certain facts and circumstances. The department may request information from  
36 the taxpayer that is required to provide the specific advice. The department shall provide the specific

1 advice within one hundred twenty days of the receipt of the requested information from the taxpayer.

2 (14) Extension. The department and the taxpayer may extend any time limit contained in this  
3 subsection by mutual agreement.

4 (15) Other Tax Adjustments. Nothing in this section may be construed to limit or negate the  
5 department's authority to make tax adjustments as otherwise permitted by law.

6 (16) Appeals. If the corporation appeals a final determination by the department under this section  
7 to the Administrative Law Court in a contested tax case, the administrative law judge shall review de  
8 novo: (i) whether the separate income tax returns submitted by the taxpayer fail to report state net  
9 income properly attributable to its business carried on in this State through the use of intercompany  
10 transactions that lack economic substance or are not at fair market value between members of an  
11 affiliated group of entities; (ii) whether the department's means of determining the corporation's state  
12 net income under this section is an appropriate means of determining the corporation's state net income  
13 properly attributable to this State; and (iii) if a combined return is required by the department, whether  
14 adjustments other than requiring the corporation to file a return on a combined basis are adequate under  
15 the circumstances to redetermine state net income.

16 (C)(1) For the purposes of this chapter, the department may enter into an agreement with the  
17 taxpayer establishing the allocation and apportionment of the taxpayer's income for a period not to  
18 exceed five years, if the following conditions are met:

19 (a) the taxpayer is planning a new facility in this State or an expansion of an existing facility;

20 (b) the taxpayer asks the department to enter into a contract under this subsection reciting an  
21 allocation and apportionment method; and

22 (c) after reviewing the taxpayer's proposal and planned new facility or expansion, the Advisory  
23 Coordinating Council for Economic Development certifies that the new facility or expansion will have  
24 a significant beneficial economic effect on the region for which it is planned and that its benefits to the  
25 public exceed its costs to the public. It is within the Advisory Coordinating Council for Economic  
26 Development's sole discretion to determine whether a new facility or expansion has a significant  
27 economic effect on the region for which it is planned.

28 (2) For the purposes of this subsection the word "taxpayer" includes any one or more of the  
29 members of a controlled group of corporations authorized to file a consolidated return under Section  
30 12-6-5020. Also, the word "taxpayer" includes a person who bears a relationship to the taxpayer as  
31 described in Section 267(b) of the Internal Revenue Code.

32 (3) Notwithstanding the provisions of item (1), the department may enter into an agreement with  
33 the taxpayer establishing the allocation and apportionment of the taxpayer's income for a period not to  
34 exceed ten years if the following conditions are met:

35 (a)(i) the taxpayer is planning a new facility in this State or an expansion of an existing facility  
36 and the new or expanded facility results in a total investment of at least ten million dollars and the



1 creation of at least two hundred new full-time jobs, with an average cash compensation level for the  
2 new jobs of more than three times the per capita income of this State at the time the jobs are filled  
3 which must be within five years of the Advisory Coordinating Council for Economic Development's  
4 certification. Per capita income for the State shall be determined by using the most recent data available  
5 from the Revenue and Fiscal Affairs Office; or

6 (ii) the taxpayer is planning a new facility in this State and invests at least seven hundred fifty  
7 million dollars in real or personal property or both in a single county in this State and creates at least  
8 three thousand eight hundred full-time new jobs, as those terms are defined in Section 12-6-3360(M),  
9 within the county. The taxpayer has seven years from the date it makes the notification provided for in  
10 subitem (b) of this item to make the required investment and create the required number of jobs;

11 (b) the taxpayer asks the department to enter into a contract under this subsection reciting an  
12 allocation and apportionment method; and

13 (c) after reviewing the taxpayer's proposal and planned new facility or expansion, the Advisory  
14 Coordinating Council for Economic Development certifies that the new facility or expansion will have  
15 a significant beneficial economic effect on the region for which it is planned and that its benefits to the  
16 public exceed its costs to the public. It is within the Advisory Coordinating Council for Economic  
17 Development's sole discretion to determine whether a new facility or expansion has a significant  
18 economic effect on the region for which it is planned.

19 (4) The taxpayer may begin operating under the agreement beginning with the tax year in which  
20 the agreement is executed. If the taxpayer fails to meet the requirements of subitem (3)(a)(ii), the  
21 department may assess any tax due as a result of the taxpayer's failure to meet the requirements of  
22 subitem (3)(a)(ii). For any subsequent year that the taxpayer fails to maintain three thousand eight  
23 hundred full-time new jobs, then the department may assess any tax due for that year.

24 ~~(C)~~(D) Notwithstanding the provisions of this section, a taxpayer who is constructing or operating a  
25 qualified recycling facility as defined in Section 12-6-3460 may petition the department for the use of  
26 separate accounting with respect to all or any part of the taxpayer's or taxpayer's subsidiaries' business  
27 activities or for the use of any other method to determine the taxpayer's or taxpayer's subsidiaries'  
28 taxable income. The department shall forward the petition with its comments concerning the economic  
29 impact of the suggested method to the Advisory Coordinating Council for Economic Development.  
30 The department may approve the petition upon certification of the Advisory Coordinating Council for  
31 Economic Development that the benefits to the public exceed the costs to the public.

32  
33 SECTION 2. This act takes effect upon approval by the Governor and applies to all open tax periods  
34 excluding assessments under judicial review by the South Carolina Court of Appeals or Supreme Court  
35 as of the date of the Governor's approval.

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