**A** **BILL**

TO AMEND SECTION 12‑6‑2320, CODE OF LAWS OF SOUTH CAROLINA, 1976, 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 1976 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 value, the department may redetermine the state net income of the corporation properly attributable to its business carried on in the State under subsection (A) by: (i) adding back, eliminating, or otherwise adjusting intercompany transactions to accurately compute the corporation’s state net income properly attributable to its business carried on in the State, or, if such adjustments are not adequate under the circumstances to redetermine state net income, (ii) requiring the corporation 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 corporation for redetermining its state net income attributable to its business carried on in the State. In determining whether the corporation’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 corporation’s state net income properly attributable to its business carried on in this State is not accurately reported 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 corporation jointly may determine and agree to an alternative filing methodology that accurately reports state net income. The department is authorized to allow any reasonable method for redetermining the corporation’s state net income attributable to its business carried on in this State.

(4) Combined Return. If the department finds as a fact that a combined return is required under the provisions of subsection (A) and this subsection, the department may, upon written notice to the corporation, require the corporation to submit the combined return, and the corporation shall submit the combined return within ninety days of the date of the notice. The submission by the corporation of the combined return required by the department must not be deemed to be a return or construed as an agreement by the corporation 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 corporation 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 corporation.

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

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

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

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

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

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

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

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

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

(9) Apportionment. If the department requires a combined return under this section, the combined state net income of the corporation and the members of the affiliated group of entities must be apportioned to this State by use of an apportionment formula that accurately reports the state net income properly attributable to the corporation’s business carried on in the State and which fairly reflects the apportionment formula in Section 12‑6‑2295 applicable to the corporation 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 corporation’s state net income properly attributable to its business carried on in the State, as provided in this subsection.

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

(a) a corporation 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 corporation exempt from taxation under section 501 of the Internal Revenue Code;

(d) an ‘S’ corporation;

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

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

(g) a corporation 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.

(11) Proposed Assessment or Refund. If the department redetermines the state net income of the corporation in accordance with this section by adjusting the state net income of the corporation 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 corporation, then the corporation 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 corporation may request in writing from the department specific advice regarding whether a redetermination of the corporation’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.

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

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

(16) Appeals. If the corporation 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 report state net income properly attributable to its business carried on 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 corporation’s state net income under this section is an appropriate means of determining the corporation’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 corporation to file a return on a combined basis are adequate under the circumstances to redetermine state net income.

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

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

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

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

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

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

(a)(i) the taxpayer is planning a new facility in this State or an expansion of an existing facility and the new or expanded facility results in a total investment of at least ten million dollars and the creation of at least two hundred new full‑time jobs, with an average cash compensation level for the new jobs of more than three times the per capita income of this State at the time the jobs are filled which must be within five years of the Advisory Coordinating Council for Economic Development’s certification. Per capita income for the State shall be determined by using the most recent data available from the Revenue and Fiscal Affairs Office; or

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

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

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

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

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

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

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