

STATE OF OKLAHOMA

1st Session of the 56th Legislature (2017)

COMMITTEE SUBSTITUTE
FOR

HOUSE BILL NO. 2369

By: Osborn (Leslie) and Wallace
of the House

and

David and Fields of the
Senate

COMMITTEE SUBSTITUTE

An Act relating to revenue and taxation; defining terms; providing for filing of combined reports for purposes of the Oklahoma Income Tax Act; authorizing Tax Commission to adopt rules; authorizing determinations by Tax Commission with respect to unitary business; providing for exclusion of certain factors used in determinations of taxable income; imposing responsibility for tax based on apportioned or allocated income; prescribing requirements; prescribing methodology for computation of tax credits or deductions; prescribing formula for apportionable income amount; providing for determination of business income of combined group; authorizing filing of returns by combined group and prescribing procedures related thereto; providing for surety with respect to tax liability; providing for determination of taxable income by members of a unitary group; prescribing procedures; amending 68 O.S. 2011, Section 2367, which relates to filing of consolidated income tax returns; modifying reference to taxable years; providing for applicability of methods for designated tax years with respect to consolidated income tax returns; providing for codification; and providing effective dates.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

1 SECTION 1. NEW LAW A new section of law to be codified

2 in the Oklahoma Statutes as Section 2367.1 of Title 68, unless there
3 is created a duplication in numbering, reads as follows:

4 For purposes of this section:

5 A. "Person" means any individual, firm, partnership, general
6 partner of a partnership, limited liability company, registered
7 limited liability partnership, foreign limited liability
8 partnership, association, corporation whether or not the corporation
9 is, or would be if doing business in this state, subject to the
10 Oklahoma Income Tax Act, company, syndicate, estate, trust, business
11 trust, trustee, trustee in bankruptcy, receiver, executor,
12 administrator, assignee or organization of any kind.

13 B. "Taxpayer" means any person subject to a tax imposed by
14 Section 2355 of Title 68 of the Oklahoma Statutes or whose income
15 is, in whole or in part, subject to a tax imposed by any provision
16 of Section 2355 of Title 68 of the Oklahoma Statutes.

17 C. "Corporation" means any corporation as defined by the laws
18 of this state or organization of any kind treated as a corporation
19 for tax purposes under the laws of this state, wherever located,
20 which if it were doing business in this state would be a "taxpayer".
21 The business conducted by a partnership which is directly or
22 indirectly held by a corporation shall be considered the business of
23 the corporation to the extent of the corporation's distributive
24

1 share of the partnership income, inclusive of guaranteed payments to
2 the extent prescribed by rule.

3 D. "Partnership" means a general or limited partnership or
4 organization of any kind treated as a partnership for tax purposes
5 under the laws of this state.

6 E. "Unitary business" means a single economic enterprise that
7 is made up either of separate parts of a single business entity or
8 of a commonly controlled group of business entities that are
9 sufficiently interdependent, integrated and interrelated through
10 their activities so as to provide a synergy and mutual benefit that
11 produces a sharing or exchange of value among them and a significant
12 flow of value to the separate parts.

13 F. "Combined group" means the group of all persons whose income
14 and apportionment factors are required to be taken into account
15 pursuant to Section 2 of this act in determining the taxpayer's
16 share of the net business income or loss apportionable to this
17 state.

18 G. "United States" means the fifty states of the United States,
19 the District of Columbia and territories and possessions of the
20 United States.

21 H. "Tax haven" means a jurisdiction that, during the tax year
22 in question, has no or nominal effective tax on the relevant income
23 and:
24

1 1. Has laws or practices that prevent effective exchange of
2 information for tax purposes with other governments on taxpayers
3 benefiting from the tax regime;

4 2. Has tax regime which lacks transparency. A tax regime
5 lacks transparency if the details of legislative, legal or
6 administrative provisions are not open and apparent or are not
7 consistently applied among similarly situated taxpayers, or if the
8 information needed by tax authorities to determine a taxpayer's
9 correct tax liability, such as accounting records and underlying
10 documentation, is not adequately available;

11 3. Facilitates the establishment of foreign-owned entities
12 without the need for a local substantive presence or prohibits these
13 entities from having any commercial impact on the local economy;

14 4. Explicitly or implicitly excludes the jurisdiction's
15 resident taxpayers from taking advantage of the tax regime's
16 benefits or prohibits enterprises that benefit from the regime from
17 operating in the jurisdiction's domestic market; or

18 5. Has created a tax regime which is favorable for tax
19 avoidance, based upon an overall assessment of relevant factors,
20 including whether the jurisdiction has a significant untaxed
21 offshore financial/other services sector relative to its overall
22 economy.

1 SECTION 2. NEW LAW A new section of law to be codified

2 in the Oklahoma Statutes as Section 2367.2 of Title 68, unless there
3 is created a duplication in numbering, reads as follows:

4 A. A taxpayer engaged in a unitary business with one or more
5 other corporations shall file a combined report which includes the
6 income, determined under subsection D of Section 3 of this act, and
7 apportionment factors, determined under provisions on apportionment
8 factors and subsection C of Section 3 of this act, of all
9 corporations that are members of the unitary business and such other
10 information as required by the Tax Commission.

11 B. The Tax Commission may, by rule, require the combined report
12 include the income and associated apportionment factors of any
13 persons that are not included pursuant to subsection A of this
14 section, but that are members of a unitary business, in order to
15 reflect proper apportionment of income of entire unitary businesses.
16 Authority to require combination by rule under this section includes
17 authority to require combination of persons that are not, or would
18 not be if doing business in this state, subject to the provisions of
19 the Oklahoma Income Tax Act. In addition, if the Commission
20 determines that the reported income or loss of a taxpayer engaged in
21 a unitary business with any person not included pursuant to
22 subsection A of this section represents an avoidance or evasion of
23 tax by such taxpayer, the Commission may on a case-by-case basis
24 require all or any part of the income and associated apportionment

1 factors of such person be included in the taxpayer's combined
2 report.

3 C. With respect to inclusion of associated apportionment
4 factors pursuant to subsection B of this section, the Commission may
5 require the exclusion of any one or more of the factors, the
6 inclusion of one or more additional factors which will fairly
7 represent the taxpayer's business activity in this state, or the
8 employment of any other method to effectuate a proper reflection of
9 the total amount of income subject to apportionment and an equitable
10 allocation and apportionment of the taxpayer's income.

11 SECTION 3. NEW LAW A new section of law to be codified
12 in the Oklahoma Statutes as Section 2367.3 of Title 68, unless there
13 is created a duplication in numbering, reads as follows:

14 A. Each taxpayer member is responsible for tax based on its
15 taxable income or loss apportioned or allocated to this state, which
16 shall include:

17 1. Its share of any business income apportionable to this
18 state of each of the combined groups of which it is a member,
19 determined under subsection C of this section;

20 2. Its share of any business income apportionable to this
21 state of a distinct business activity conducted within and without
22 the state wholly by the taxpayer member, determined under Section
23 2358 of Title 68 of the Oklahoma Statutes;

1 3. Its income from a business conducted wholly by the taxpayer
2 member entirely within the state;

3 4. Its income sourced to this state from the sale or exchange
4 of capital or assets and from involuntary conversions, as determined
5 under subparagraph g of paragraph 2 of subsection D of this section;

6 5. Its nonbusiness income or loss allocable to this state,
7 determined under the provisions for allocation of nonbusiness
8 income;

9 6. Its income or loss allocated or apportioned in an earlier
10 year, required to be taken into account as state source income
11 during the income year, other than a net operating loss; and

12 7. Its net operating loss carryover or carryback. If the
13 taxable income computed pursuant to this section results in a loss
14 for a taxpayer member of the combined group, that taxpayer member
15 has an Oklahoma net operating loss subject to the net operating loss
16 limitations, carryforward and carryback provisions of Section 2358
17 of Title 68 of the Oklahoma Statutes. Such net operating loss is
18 applied as a deduction in a prior or subsequent year only if that
19 taxpayer has Oklahoma source positive net income, whether or not the
20 taxpayer is or was a member of a combined reporting group in the
21 prior or subsequent year.

22 B. Except where otherwise provided, no tax credit or
23 postapportionment deduction earned by one member of the group but
24 not fully used by or allowed to that member may be used in whole or

1 in part by another member of the group or applied in whole or in
2 part against the total income of the combined group; and a
3 postapportionment deduction carried over into a subsequent year as
4 to the member that incurred it and available as a deduction to that
5 member in a subsequent year will be considered in the computation of
6 the income of that member in the subsequent year, regardless of the
7 composition of that income as apportioned, allocated or wholly
8 within this state.

9 C. The taxpayer's share of the business income apportionable to
10 this state of each combined group of which it is a member shall be
11 the product of:

12 1. The business income of the combined group, determined under
13 subsection D of this section; and

14 2. The taxpayer member's apportionment percentage, determined
15 under provisions of Section 2358 of Title 68 of the Oklahoma
16 Statutes on apportionment factors, including in the property,
17 payroll and sales factor numerators the taxpayer's property, payroll
18 and sales, respectively, associated with the combined group's
19 unitary business in this state and including in the denominator the
20 property, payroll and sales of all members of the combined group,
21 including the taxpayer, which property, payroll and sales are
22 associated with the combined group's unitary business wherever
23 located. The property, payroll and sales of a partnership shall be
24 included in the determination of the partner's apportionment

1 percentage in proportion to a ratio, the numerator of which is the
2 amount of the partner's distributive share of partnership's unitary
3 income included in the income of the combined group in accordance
4 with subparagraph c of paragraph 2 of subsection D of this section
5 and the denominator of which is the amount of the partnership's
6 total unitary income.

7 D. The business income of a combined group is determined as
8 follows:

9 1. From the total income of the combined group, determined
10 under paragraph 2 of this section, subtract any income and add any
11 expense or loss other than the business income, expense or loss of
12 the combined group;

13 2. Except as otherwise provided, the total income of the
14 combined group is the sum of the income of each member of the
15 combined group determined under federal income tax laws, as adjusted
16 for state purposes, as if the member were not consolidated for
17 federal purposes. The income of each member of the combined group
18 shall be determined as follows:

19 a. for any member incorporated in the United States or
20 included in a consolidated federal corporate income
21 tax return, the income to be included in the total
22 income of the combined group shall be the taxable
23 income for the corporation after making appropriate
24

1 adjustments under Section 2358 of Title 68 of the
2 Oklahoma Statutes,

3 b. (1) for any member not included in subparagraph a of
4 this paragraph, the income to be included in the
5 total income of the combined group shall be
6 determined as follows:

7 (a) a profit and loss statement shall be
8 prepared for each foreign branch or
9 corporation in the currency in which the
10 books of account of the branch or
11 corporation are regularly maintained,

12 (b) adjustments shall be made to the profit and
13 loss statement to conform it to the
14 accounting principles generally accepted in
15 the United States for the preparation of
16 such statements except as modified by this
17 rule,

18 (c) adjustments shall be made to the profit and
19 loss statement to conform it to the tax
20 accounting standards required by the
21 Oklahoma Income Tax Act,

22 (d) except as otherwise provided by rule, the
23 profit and loss statement of each member of
24 the combined group, and the apportionment

1 factors related thereto, whether United
2 States or foreign, shall be translated into
3 the currency in which the parent company
4 maintains its books and records, and

5 (e) income apportioned to this state shall be
6 expressed in United States dollars, and

7 (2) in lieu of the procedures set forth in division
8 (1) of subparagraph b of this paragraph, and
9 subject to the determination of the Commission
10 that it reasonably approximates income as
11 determined under the Oklahoma Income Tax Act, any
12 member not included in subparagraph a of
13 paragraph 2 of this subsection may determine its
14 income on the basis of the consolidated profit
15 and loss statement which includes the member and
16 which is prepared for filing with the Securities
17 and Exchange Commission by related corporations.
18 If the member is not required to file with the
19 Securities and Exchange Commission, the
20 Commission may allow the use of the consolidated
21 profit and loss statement prepared for reporting
22 to shareholders and subject to review by an
23 independent auditor. If above statements do not
24 reasonably approximate income as determined under

1 the Oklahoma Income Tax Act, the Commission may
2 accept those statements with appropriate
3 adjustments to approximate that income,

4 c. if a unitary business includes income from a
5 partnership, the income to be included in the total
6 income of the combined group shall be the member of
7 the combined group's direct and indirect distributive
8 share of the partnership's unitary business income,

9 d. all dividends paid by one to another of the members of
10 the combined group shall, to the extent those
11 dividends are paid out of the earnings and profits of
12 the unitary business included in the combined report,
13 in the current or an earlier year, be eliminated from
14 the income of the recipient. This provision shall not
15 apply to dividends received from members of the
16 unitary business which are not a part of the combined
17 group,

18 e. except as otherwise provided by rule, business income
19 from an intercompany transaction between members of
20 the same combined group shall be deferred in a manner
21 similar to 26 C.F.R., Section 1.1502-13. Upon the
22 occurrence of any of the following events, deferred
23 business income resulting from an intercompany
24 transaction between members of a combined group shall

1 be restored to the income of the seller and shall be
2 apportioned as business income earned immediately
3 before the event:

4 (1) the object of a deferred intercompany transaction
5 is:

6 (a) resold by the buyer to an entity that is not
7 a member of the combined group,

8 (b) resold by the buyer to an entity that is a
9 member of the combined group for use outside
10 the unitary business in which the buyer and
11 seller are engaged, or

12 (c) converted by the buyer to a use outside the
13 unitary business in which the buyer and
14 seller are engaged, or

15 (2) the buyer and seller are no longer members of the
16 same combined group, regardless of whether the
17 members remain unitary,

18 f. a charitable expense incurred by a member of a
19 combined group shall, to the extent allowable as a
20 deduction pursuant to Internal Revenue Code Section
21 170, be subtracted first from the business income of
22 the combined group (subject to the income limitations
23 of that section applied to the entire business income
24 of the group), and any remaining amount shall then be

1 treated as a nonbusiness expense allocable to the
2 member that incurred the expense (subject to the
3 income limitations of that section applied to the
4 nonbusiness income of that specific member). Any
5 charitable deduction disallowed under the foregoing
6 rule, but allowed as a carryover deduction in a
7 subsequent year, shall be treated as originally
8 incurred in the subsequent year by the same member,
9 and the rules of this section shall apply in the
10 subsequent year in determining the allowable deduction
11 in that year,

12 g. gain or loss from the sale or exchange of capital
13 assets, property described by Internal Revenue Code,
14 Section 1231(a)(3), and property subject to an
15 involuntary conversion, shall be removed from the
16 total separate net income of each member of a combined
17 group and shall be apportioned and allocated as
18 follows:

19 (1) for each class of gain or loss (short-term
20 capital, long-term capital, Internal Revenue
21 Code, Section 1231, and involuntary conversions)
22 all members' business gain and loss for the class
23 shall be combined (without netting between such
24 classes), and each class of net business gain or

1 loss separately apportioned to each member using
2 the member's apportionment percentage determined
3 under subsection C of this section,

4 (2) each taxpayer member shall then net its
5 apportioned business gain or loss for all
6 classes, including any such apportioned business
7 gain and loss from other combined groups, against
8 the taxpayer member's nonbusiness gain and loss
9 for all classes allocated to this state, using
10 the rules of Internal Revenue Code, Sections 1231
11 and 1222, without regard to any of the taxpayer
12 member's gains or losses from the sale or
13 exchange of capital assets, Section 1231
14 property, and involuntary conversions which are
15 nonbusiness items allocated to another state,

16 (3) any resulting state source income (or loss, if
17 the loss is not subject to the limitations of
18 Internal Revenue Code, Section 1211) of a
19 taxpayer member produced by the application of
20 the preceding subsections shall then be applied
21 to all other state source income or loss of that
22 member, and

23 (4) any resulting state source loss of a member that
24 is subject to the limitations of Internal Revenue

1 Code, Section 1211 shall be carried forward or
2 carried back by that member and shall be treated
3 as state source short-term capital loss incurred
4 by that member for the year for which the
5 carryover or carryback applies, and

6 h. any expense of one member of the unitary group which
7 is directly or indirectly attributable to the
8 nonbusiness or exempt income of another member of the
9 unitary group shall be allocated to that other member
10 as corresponding nonbusiness or exempt expense, as
11 appropriate.

12 SECTION 4. NEW LAW A new section of law to be codified
13 in the Oklahoma Statutes as Section 2367.4 of Title 68, unless there
14 is created a duplication in numbering, reads as follows:

15 As a filing convenience and without changing the respective
16 liability of the group members, members of a combined reporting
17 group may annually elect to designate one taxpayer member of the
18 combined group to file a single return in the form and manner
19 prescribed by the Tax Commission, in lieu of filing their own
20 respective returns, provided that the taxpayer designated to file
21 the single return consents to act as surety with respect to the tax
22 liability of all other taxpayers properly included in the combined
23 report and agrees to act as agent on behalf of those taxpayers for
24 the year of the election for tax matters relating to the combined

1 report for that year. If for any reason the surety is unwilling or
2 unable to perform its responsibilities, tax liability may be
3 assessed against the taxpayer members.

4 SECTION 5. NEW LAW A new section of law to be codified
5 in the Oklahoma Statutes as Section 2367.5 of Title 68, unless there
6 is created a duplication in numbering, reads as follows:

7 A. Taxpayer members of a unitary group that meet the
8 requirements of subsection B of this section may elect to determine
9 each of their apportioned shares of the net business income or loss
10 of the combined group pursuant to a water's-edge election. Under
11 such election, taxpayer members shall take into account all or a
12 portion of the income and apportionment factors of only the
13 following members otherwise included in the combined group pursuant
14 to Section 2 of this act, as described below:

15 1. The entire income and apportionment factors of any member
16 incorporated in the United States or formed under the laws of any
17 state, the District of Columbia or any territory or possession of
18 the United States;

19 2. The entire income and apportionment factors of any member,
20 regardless of the place incorporated or formed, if the average of
21 its property, payroll and sales factors within the United States is
22 twenty percent (20%) or more;

23 3. The entire income and apportionment factors of any member
24 which is a domestic international sales corporation as described in

1 Internal Revenue Code, Sections 991 to 994, inclusive; a foreign
2 sales corporation as described in Internal Revenue Code, Sections
3 921 to 927, inclusive; or any member which is an export trade
4 corporation as described in Internal Revenue Code, Sections 970 to
5 971, inclusive;

6 4. Any member not described in paragraphs 1 through 3 of this
7 subsection, inclusive, shall include the portion of its income
8 derived from or attributable to sources within the United States, as
9 determined under the Internal Revenue Code without regard to federal
10 treaties, and its apportionment factors related thereto;

11 5. Any member that is a "controlled foreign corporation" as
12 defined in Internal Revenue Code, Section 957, to the extent of the
13 income of that member that is defined in Section 952 of Subpart F of
14 the Internal Revenue Code ("Subpart F income") not excluding lower-
15 tier subsidiaries' distributions of such income which were
16 previously taxed, determined without regard to federal treaties, and
17 the apportionment factors related to that income; any item of income
18 received by a controlled foreign corporation shall be excluded if
19 such income was subject to an effective rate of income tax imposed
20 by a foreign country greater than ninety percent (90%) of the
21 maximum rate of tax specified in Internal Revenue Code, Section 11;

22 6. Any member that earns more than twenty percent (20%) of its
23 income, directly or indirectly, from intangible property or service-
24 related activities that are deductible against the business income

1 of other members of the combined group, to the extent of that income
2 and the apportionment factors related thereto; and

3 7. The entire income and apportionment factors of any member
4 that is doing business in a tax haven, where "doing business in a
5 tax haven" is defined as being engaged in activity sufficient for
6 that tax haven jurisdiction to impose a tax under United States
7 constitutional standards. If the member's business activity within
8 a tax haven is entirely outside the scope of the laws, provisions
9 and practices that cause the jurisdiction to meet the criteria
10 established in Section 1 of this act, the activity of the member
11 shall be treated as not having been conducted in a tax haven.

12 B. 1. A water's-edge election is effective only if made on a
13 timely filed, original return for a tax year by every member of the
14 unitary business subject to tax under the Oklahoma Income Tax Act.
15 The Tax Commission shall develop rules governing the impact, if any,
16 on the scope or application of a water's-edge election, including
17 termination or deemed election, resulting from a change in the
18 composition of the unitary group, the combined group, the taxpayer
19 members and any other similar change;

20 2. Such election shall constitute consent to the reasonable
21 production of documents and taking of depositions in accordance with
22 provisions of Title 12 of the Oklahoma Statutes;

23 3. In the discretion of the Commission, a water's-edge election
24 may be disregarded in part or in whole, and the income and

1 apportionment factors of any member of the taxpayer's unitary group
2 may be included in the combined report without regard to the
3 provisions of this section if any member of the unitary group fails
4 to comply with any provision of this act or if a person otherwise
5 not included in the water's-edge combined group was availed of with
6 a substantial objective of avoiding state income tax;

7 4. A water's-edge election is binding for and applicable to the
8 tax year it is made and all tax years thereafter for a period of ten
9 (10) years. It may be withdrawn or reinstituted after withdrawal,
10 prior to the expiration of the ten-year period, only upon written
11 request for reasonable cause based on extraordinary hardship due to
12 unforeseen changes in state tax statutes, law or policy and only
13 with the written permission of the Commission. If the Commission
14 grants a withdrawal of election, the Commission shall impose
15 reasonable conditions as necessary to prevent the evasion of tax or
16 to clearly reflect income for the election period prior to or after
17 the withdrawal. Upon the expiration of the ten-year period, a
18 taxpayer may withdraw from the water's-edge election. Such
19 withdrawal must be made in writing within one (1) year of the
20 expiration of the election and is binding for a period of ten (10)
21 years, subject to the same conditions as applied to the original
22 election. If no withdrawal is properly made, the water's-edge
23 election shall be in place for an additional ten-year period,
24 subject to the same conditions as applied to the original election.

1 SECTION 6. NEW LAW A new section of law to be codified
2 in the Oklahoma Statutes as Section 2367.6 of Title 68, unless there
3 is created a duplication in numbering, reads as follows:

4 The Oklahoma Tax Commission shall adopt rules in order to
5 implement the provisions of this act.

6 SECTION 7. AMENDATORY 68 O.S. 2011, Section 2367, is
7 amended to read as follows:

8 Section 2367. ~~The~~ A. Effective for tax years beginning on or
9 before December 31, 2018, the provisions of the Internal Revenue
10 Code, 26 U.S.C., Section 1 et seq., applicable to consolidated
11 corporate income tax returns, shall not apply to taxpayers under
12 this act, except that:

13 1. If two or more corporations file federal income tax returns
14 on a consolidated basis, and if all of such corporations derive all
15 of their income from sources within Oklahoma, then such corporations
16 shall be required to file consolidated returns for purposes of
17 determining their Oklahoma income tax liability.

18 2. If two or more corporations file federal income tax returns
19 on a consolidated basis, and if one or more of such corporations
20 derive a portion of their income from sources outside the State of
21 Oklahoma, then such corporations shall not be required to file
22 consolidated returns for purposes of determining their Oklahoma
23 income tax liability except as hereinafter provided in ~~subsection~~
24 paragraph 3 of this section subsection.

1 3. The Oklahoma Tax Commission shall permit an affiliated group
2 of corporations described in ~~subsection~~ paragraph 2 of this ~~section~~
3 subsection to elect to file a consolidated return for Oklahoma
4 income tax purposes provided such group files an appropriate
5 election in accordance with regulations to be promulgated by the Tax
6 Commission. If an affiliated group of corporations elects to file a
7 consolidated Oklahoma income tax return under the provisions of this
8 section, such election shall be binding and the affiliated group of
9 corporations shall be required to file a consolidated Oklahoma
10 income tax return for future tax years unless the Oklahoma Tax
11 Commission releases the affiliated group of corporations from such
12 election. If an affiliated group of corporations elects to file a
13 consolidated Oklahoma income tax return under the provisions of this
14 subsection, the group's consolidated income, loss or deductions
15 shall be determined on a component member by component member basis
16 in accordance with the provisions of Sections 2358 and 2362 of this
17 title.

18 B. Effective for tax years beginning on or after January 1,
19 2019, the provisions of the Internal Revenue Code of 1986, as
20 amended, 26 U.S.C., Section 1 et seq., applicable to consolidated
21 corporate income tax returns, shall not apply to taxpayers under
22 this act and the provisions of Section 1 of this act shall be
23 applicable with respect to consolidated corporate income tax
24 returns.

1 SECTION 8. Section 6 of this act shall become effective
2 November 1, 2017.

3 SECTION 9. Sections 1 through 5 and 7 of this act shall become
4 effective January 1, 2019.

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