

STATE OF OKLAHOMA

1st Session of the 57th Legislature (2019)

HOUSE BILL 2182

By: Brewer

AS INTRODUCED

An Act relating to revenue and taxation; defining terms; requiring certain types of business entities to file combined income tax returns; authorizing Tax Commission to prescribe certain combined reporting requirements by administrative rules; prescribing authorized scope of rules for combined reporting; prescribing procedures for certain apportionment factors; prescribing requirements related to allocated or apportioned income; prescribing requirements related to tax credits or deductions related to combined group reporting; prescribing formula for computation of apportionable income; defining business income of a combined group and prescribing method for computation; prescribing procedures related to election for purposes of filing combined returns; providing for imposition of tax liability based upon election; providing for water's-edge election and computation of apportionable income; prescribing procedures for computation; imposing requirement related to effect of water's-edge election; authorizing Tax Commission to disregard water's-edge election in certain circumstances; prescribing time periods related to election treatment; providing for codification; and providing an effective date.

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 As used in this act:

5 1. "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 2. "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 3. "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
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1 share of the partnership income, inclusive of guaranteed payments to
2 the extent prescribed by rule;

3 4. "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 5. "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 an exchange of value among them and a
12 significant flow of value to the separate parts;

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

18 7. "United States" means the fifty (50) states of the United
19 States, the District of Columbia and United States territories and
20 possessions; and

21 8. "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:

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- 1 a. has laws or practices that prevent effective exchange
2 of information for tax purposes with other governments
3 on taxpayers benefiting from the tax regime,
- 4 b. has a tax regime which lacks transparency. A tax
5 regime lacks transparency if the details of
6 legislative, legal or administrative provisions are
7 not open and apparent or are not consistently applied
8 among similarly situated taxpayers, or if the
9 information needed by tax authorities to determine a
10 taxpayer's correct tax liability, such as accounting
11 records and underlying documentation, is not
12 adequately available,
- 13 c. facilitates the establishment of foreign-owned
14 entities without the need for a local substantive
15 presence or prohibits these entities from having any
16 commercial impact on the local economy,
- 17 d. explicitly or implicitly excludes the jurisdiction's
18 resident taxpayers from taking advantage of the tax
19 regime's benefits or prohibits enterprises that
20 benefit from the regime from operating in the
21 jurisdiction's domestic market, or
- 22 e. has created a tax regime which is favorable for tax
23 avoidance, based upon an overall assessment of
24 relevant factors, including whether the jurisdiction

1 has a significant untaxed offshore financial/other
2 services sector relative to its overall economy.

3 SECTION 2. NEW LAW A new section of law to be codified
4 in the Oklahoma Statutes as Section 2367.2 of Title 68, unless there
5 is created a duplication in numbering, reads as follows:

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

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

1 tax by such taxpayer, the Commission may, on a case-by-case basis,
2 require all or any part of the income and associated apportionment
3 factors of such person be included in the taxpayer's combined
4 report.

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

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

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

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

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

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

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

9 5. Its nonbusiness income or loss allocable to this state,
10 determined under the provisions for allocation of nonbusiness
11 income;

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

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

1 B. Except where otherwise provided, no tax credit or post-
2 apportionment deduction earned by one member of the group, but not
3 fully used by or allowed to that member, may be used in whole or in
4 part by another member of the group or applied in whole or in part
5 against the total income of the combined group; and a post-
6 apportionment deduction carried over into a subsequent year as to
7 the member that incurred it, and available as a deduction to that
8 member in a subsequent year, will be considered in the computation
9 of the income of that member in the subsequent year, regardless of
10 the composition of that income as apportioned, allocated or wholly
11 within this state.

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

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

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

1 associated with the combined group's unitary business wherever
2 located. The property, payroll and sales of a partnership shall be
3 included in the determination of the partner's apportionment
4 percentage in proportion to a ratio the numerator of which is the
5 amount of the partner's distributive share of the partnership's
6 unitary income included in the income of the combined group in
7 accordance with subparagraph c of paragraph 2 of subsection D of
8 this section and the denominator of which is the amount of the
9 partnership's total unitary income.

10 D. The business income of a combined group is determined as
11 follows:

12 1. From the total income of the combined group, determined
13 under paragraph 2 of this subsection, subtract any income, and add
14 any expense or loss, other than the business income, expense or loss
15 of the combined group;

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

22 a. for any member incorporated in the United States, or
23 included in a consolidated federal corporate income
24 tax return, the income to be included in the total

1 income of the combined group shall be the taxable
2 income for the corporation after making appropriate
3 adjustments under Section 2358 of Title 68 of the
4 Oklahoma Statutes,

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

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

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

20 (c) adjustments shall be made to the profit and
21 loss statement to conform it to the tax
22 accounting standards required by the
23 Oklahoma Income Tax Act,
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1 (d) except as otherwise provided by rule, the
2 profit and loss statement of each member of
3 the combined group and the apportionment
4 factors related thereto, whether United
5 States or foreign, shall be translated into
6 the currency in which the parent company
7 maintains its books and records, and
8 (e) income apportioned to this state shall be
9 expressed in United States dollars.

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

1 to shareholders and subject to review by an
2 independent auditor. If above statements do not
3 reasonably approximate income as determined under
4 the Oklahoma Income Tax Act, the Commission may
5 accept those statements with appropriate
6 adjustments to approximate that income,

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

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

21 e. except as otherwise provided by rule, business income
22 from an intercompany transaction between members of
23 the same combined group shall be deferred in a manner
24 similar to 26 CFR 1.1502-13. Upon the occurrence of

1 any of the following events, deferred business income
2 resulting from an intercompany transaction between
3 members of a combined group shall be restored to the
4 income of the seller and shall be apportioned as
5 business income earned immediately before the event:

6 (1) the object of a deferred intercompany transaction
7 is:

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

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

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

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

20 f. a charitable expense incurred by a member of a
21 combined group shall, to the extent allowable as a
22 deduction pursuant to Internal Revenue Code Section
23 170, be subtracted first from the business income of
24 the combined group (subject to the income limitations

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

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

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

1 classes), and each class of net business gain or
2 loss separately apportioned to each member using
3 the member's apportionment percentage determined
4 under subsection C of this section,

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

17 (3) any resulting state source income (or loss, if
18 the loss is not subject to the limitations of
19 Internal Revenue Code Section 1211) of a taxpayer
20 member produced by the application of the
21 preceding subsections shall then be applied to
22 all other state source income or loss of that
23 member, and
24

1 (4) any resulting state source loss of a member that
2 is subject to the limitations of Section 1211
3 shall be carried forward or carried back by that
4 member, and shall be treated as state source
5 short-term capital loss incurred by that member
6 for the year for which the carryover or carryback
7 applies, and

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

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

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

1 report, and agrees to act as agent on behalf of those taxpayers for
2 the year of the election for tax matters relating to the combined
3 report for that year. If for any reason the surety is unwilling or
4 unable to perform its responsibilities, tax liability may be
5 assessed against the taxpayer members.

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

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

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

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

1 3. The entire income and apportionment factors of any member
2 which is a domestic international sales corporation as described in
3 Internal Revenue Code Sections 991 to 994, inclusive; or any member
4 which is an export trade corporation, as described in Internal
5 Revenue Code Sections 970 to 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 reinstated 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 year of the expiration
20 of the election and is binding for a period of ten (10) years,
21 subject to the same conditions as applied to the original election.
22 If no withdrawal is properly made, the water's-edge election shall
23 be in place for an additional ten-year period, subject to the same
24 conditions as applied to the original election.

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SECTION 6. This act shall become effective November 1, 2019.

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