

STATE OF OKLAHOMA

1st Session of the 57th Legislature (2019)

HOUSE BILL 1864

By: Fugate

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:

SECTION 1. NEW LAW

A new section of law to be codified in the Oklahoma Statutes as Section 2367.1 of Title 68, unless there is created a duplication in numbering, reads as follows:

As used in this act:

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

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

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

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 an exchange of value among them and a
12 significant 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 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 G. "United States" means the fifty (50) states of the United
19 States, the District of Columbia and United States territories and
20 possessions.

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 a 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
10 other 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 state
18 of each of the combined groups of which it is a member, determined
19 under subsection B of this section;

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

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

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

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

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

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

23 B. Except where otherwise provided, no tax credit or post-
24 apportionment deduction earned by one member of the group, but not

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

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

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

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

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

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

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

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

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

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.

5 (e) Income apportioned to this state shall be
6 expressed in United States dollars.

7 (2) In lieu of the procedures set forth in division
8 (1) of this subparagraph, and subject to the
9 determination of the Commission that it
10 reasonably approximates income as determined
11 under the Oklahoma Income Tax Act, any member not
12 included in subparagraph a of this paragraph may
13 determine its income on the basis of the
14 consolidated profit and loss statement which
15 includes the member and which is prepared for
16 filing with the Securities and Exchange
17 Commission by related corporations. If the
18 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 CFR 1.1502-13. Upon the occurrence of
22 any of the following events, deferred business income
23 resulting from an intercompany transaction between
24 members of a combined group shall be restored to the

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

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

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

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

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

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

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

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

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

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

1 the member's apportionment percentage determined
2 under subsection C of this section.

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

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

22 (4) Any resulting state source loss of a member that
23 is subject to the limitations of Section 1211
24 shall be carried forward or carried back by that

1 member, and shall be treated as state source
2 short-term capital loss incurred by that member
3 for the year for which the carryover or carryback
4 applies.

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

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

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

1 unable to perform its responsibilities, tax liability may be
2 assessed against the taxpayer members.

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

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

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

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

22 3. The entire income and apportionment factors of any member
23 which is a domestic international sales corporation as described in
24 Internal Revenue Code Sections 991 to 994, inclusive; or any member

1 which is an export trade corporation, as described in Internal
2 Revenue Code Sections 970 to 971, inclusive;

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

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

19 6. Any member that earns more than twenty percent (20%) of its
20 income, directly or indirectly, from intangible property or service-
21 related activities that are deductible against the business income
22 of other members of the combined group, to the extent of that income
23 and the apportionment factors related thereto; and
24

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

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

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

21 3. In the discretion of the Commission, a water's-edge election
22 may be disregarded in part or in whole, and the income and
23 apportionment factors of any member of the taxpayer's unitary group
24 may be included in the combined report without regard to the

1 provisions of this section if any member of the unitary group fails
2 to comply with any provision of this act or if a person otherwise
3 not included in the water's-edge combined group was availed of with
4 a substantial objective of avoiding state income tax.

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

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

57-1-5545 MAH 01/14/19