THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL
No. 1445 Session of 2019

INTRODUCED BY DALEY, McCLINTON, SAMUELSO, DeLUCA, HARKINS, FRANKEL, CALTAGIRONE, SCHLOSSBERG, ZABEL, RABB, MILLARD, HILL-EVANS, HOWARD, KENYATTA, COMITTA AND DRISCOLL,
MAY 13, 2019

REFERRED TO COMMITTEE ON FINANCE, MAY 13, 2019

AN ACT

Amending the act of March 4, 1971 (P.L.6, No.2), entitled "An act relating to tax reform and State taxation by codifying and enumerating certain subjects of taxation and imposing taxes thereon; providing procedures for the payment, collection, administration and enforcement thereof; providing for tax credits in certain cases; conferring powers and imposing duties upon the Department of Revenue, certain employers, fiduciaries, individuals, persons, corporations and other entities; prescribing crimes, offenses and penalties," in corporate net income tax, further providing for definitions, for imposition of tax, for reports and payment of tax and for consolidated reports; and, in general provisions, further providing for underpayment of estimated tax.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. Section 401(3)1(a), (b), (t) and (5) of the act of March 4, 1971 (P.L.6, No.2), known as the Tax Reform Code of 1971, are amended, (3)2(a)(9)(A) is amended by adding a unit, (3)1 and (3)4 are amended by adding phrases and the section is amended by adding clauses to read:

Section 401. Definitions.--The following words, terms, and phrases, when used in this article, shall have the meaning
ascribed to them in this section, except where the context clearly indicates a different meaning:

* * *

(3) "Taxable income." 1. (a) In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government before special deductions provided for in sections 241, 242, 243, 244, 245, 246, 247, 248, 249 and 250 of the Internal Revenue Code of 1986 (26 U.S.C. §§ 241, 242, 243, 244, 245, 246, 247, 248, 249 and 250), or in the case of a corporation participating in the filing of consolidated returns to the Federal Government or that is not required to file a return with the Federal Government, the taxable income which would have been returned to and ascertained by the Federal Government before special deductions provided for in sections 241, 242, 243, 244, 245, 246, 247, 248, 249 and 250 of the Internal Revenue Code of 1986 (26 U.S.C. §§ 241, 242, 243, 244, 245, 246, 247, 248, 249 and 250) if separate returns had been made to the Federal Government for the current and prior taxable years, subject, however, to any correction thereof, for fraud, evasion, or error as finally ascertained by the Federal Government.

(b) Additional deductions shall be allowed from taxable income on account of any dividends received from any other corporation but only to the extent that such dividends are included in taxable income as returned to and ascertained by the Federal Government. For tax years beginning on or after January 1, 1991, additional deductions shall only be allowed for amounts included, under section 78 of the Internal Revenue Code of 1986.
(Public Law 99-514, 26 U.S.C. § 78), in taxable income returned to and ascertained by the Federal Government and for the amount of any dividends received from a foreign corporation included in taxable income to the extent such dividends would be deductible in arriving at Federal taxable income if received from a domestic corporation. For taxable years beginning after December 31, 2019, the additional deduction with respect to dividends shall not be allowed for dividends between members of a unitary group.

* * *

(p.1) For taxable years after December 31, 2019, in the case of a corporation that is a member of a unitary business, the term "taxable income" shall mean the combined unitary income of the unitary business, as determined on a water's-edge basis.

* * *

(t) (1) Except as provided in paragraph (2), (3) or (4) for taxable years beginning after December 31, 2014, and in addition to any authority the department has on the effective date of this paragraph to deny a deduction related to a fraudulent or sham transaction, no deduction shall be allowed for an intangible expense or cost, or an interest expense or cost, paid, accrued or incurred directly or indirectly in connection with one or more transactions with an affiliated entity. In calculating taxable income under this paragraph, when the taxpayer is engaged in one or more transactions with an affiliated entity that was subject to tax in this Commonwealth or another state or possession of the United States on a tax base that included the intangible expense or cost, or the interest expense or cost, paid, accrued or incurred by the taxpayer, the taxpayer shall receive a credit against tax due in
this Commonwealth in an amount equal to the apportionment factor
of the taxpayer in this Commonwealth multiplied by the greater
of the following:
(A) the tax liability of the affiliated entity with respect
to the portion of its income representing the intangible expense
or cost, or the interest expense or cost, paid, accrued or
incurred by the taxpayer; or
(B) the tax liability that would have been paid by the
affiliated entity under subparagraph (A) if that tax liability
had not been offset by a credit.
The credit issued under this paragraph shall not exceed the
taxpayer's liability in this Commonwealth attributable to the
net income taxed as a result of the adjustment required by this
paragraph.
(2) The adjustment required by paragraph (1) shall not apply
to a transaction that did not have as [the] a principal purpose
the avoidance of tax due under this article and was done at
arm's length rates and terms.
(3) The adjustment required by paragraph (1) shall not apply
to a transaction between a taxpayer and an affiliated entity
domiciled in a foreign nation which has in force a comprehensive
income tax treaty with the United States providing for the
allocation of all categories of income subject to taxation, or
the withholding of tax, on royalties, licenses, fees and
interest for the prevention of double taxation of the respective
nations' residents and the sharing of information.
(4) The adjustment required by paragraph (1) shall not apply
to a transaction where an affiliated entity directly or
indirectly paid, accrued or incurred a payment to a person who
is not an affiliated entity, if the payment is paid, accrued or
incurred on the intangible expense or cost, or interest expense or cost, and is equal to or less than the taxpayer's proportional share of the transaction. The taxpayer's proportional share shall be based on relative sales, assets, liabilities or another reasonable method.

(5) The adjustment required under paragraph (1) shall not apply to a transaction between the taxpayer and an affiliated entity, where the taxpayer and the affiliated entity file a combined report in this State.

2. In case the entire business of any corporation, other than a corporation engaged in doing business as a regulated investment company as defined by the Internal Revenue Code of 1986, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, as defined in subclause 1 hereof, and may be determined as follows:

(a) Division of Income.

* * *

(9) (A) Except as provided in subparagraph (B):

* * *

(vi) (a) For taxable years beginning after December 31, 2019, all business income of a unitary business shall be apportioned to this State by multiplying the income by the member's sales factor, the numerator of which shall be the member's sales attributable to this State, and the denominator of which shall be the combined sales of all members of the unitary business. In computing the sales of each member for purposes of apportionment, the following sales are excluded from the numerator and denominator:
(I) receipts from transactions between or among members of the unitary business that are deferred under 26 CFR 1.1502-13 (relating to intercompany transactions) for Federal taxable income purposes; and

(II) the taxable income of each member that is excluded from the unitary business pursuant to the definition of water's-edge basis.

(b) The Pennsylvania sales of each nontaxable member shall be determined based upon the apportionment rules applicable to the member and shall be aggregated. Each taxable member of the group shall include in its sales factor numerator a portion of the aggregate Pennsylvania sales of nontaxable members based on a ratio, the numerator of which is the taxable member's Pennsylvania sales and the denominator of which is the aggregate Pennsylvania sales of all the taxable members of the group.

(c) Nonbusiness income of each member of a unitary business shall be allocated as provided in paragraphs (5) through (8) of phrase (a) of subclause 2 of this definition. A member of the unitary business is subject to tax on its apportioned share of all business income of the unitary business, plus its nonbusiness income or loss allocated to this State, minus the member's net loss deduction.

(d) The Secretary of Revenue has the authority and responsibility to make adjustments to ensure that a corporation does not incur an unfair penalty nor realize an unfair benefit because it is required to compute its combined business income as provided herein. Fairness shall be measured by whether the corporation's income allocated and apportioned to this State fairly reflects the corporation's share of the unitary business conducted in this State in the taxable year.
(e) The Secretary of Revenue has the authority to distribute, apportion or allocate gross income, deductions, credits or allowances between and among two or more corporations, persons, entities, members or unitary businesses, whether or not incorporated, whether or not organized in the United States and whether or not affiliated, if:
   (I) the corporations, persons, entities, members or unitary businesses are owned or controlled directly or indirectly by the same interests within the meaning of section 482 of the Internal Revenue Code (26 U.S.C. § 482); and
   (II) the Secretary of Revenue determines that the distribution, apportionment or allocation is necessary in order to reflect an arm's length standard within the meaning of 26 CFR 1.482-1 (relating to allocation of income and deductions among taxpayers) and to reflect clearly the income of those corporations, persons, entities, members or unitary businesses.

(f) The Secretary of Revenue shall apply the administrative and judicial interpretations of section 482 of the Internal Revenue Code (26 U.S.C. § 482) in administering this section.

(g) For taxable years beginning after December 31, 2019, any member of a unitary group that would otherwise apportion its business income under phrase (b), (c), (d) or (e) of subclause 2 of this definition shall determine its apportionment formula using a single sales fraction.

* * *

4. * * *

(h) Subject to the limitations of this subclause, any member of a unitary business that has unused net loss from taxable years that began prior to January 1, 2020, or that generates net losses while a member of a unitary business may only take the
net loss deduction for taxable years beginning after December 31, 2019, and only to the extent of the member's share of combined unitary income after the apportionment and may not be used by other members of the same unitary business.

(i) Any net loss realized for a taxable year that begins after December 31, 2019, unused by a corporation which subsequently becomes a member of another unitary business, may only be used by that corporation.

* * *

(5) "Taxable year." [The taxable year which the corporation, or any consolidated group with which the corporation participates in the filing of consolidated returns, actually uses in reporting taxable income to the Federal Government. With regard to the tax imposed by Article IV of this act (relating to the Corporate Net Income Tax), the terms "annual year," "fiscal year," "annual or fiscal year," "tax year" and "tax period" shall be the same as the corporation's taxable year, as defined in this paragraph.]

1. Except as set forth in subclause 2, the taxable year which the corporation, or any consolidated group with which the corporation participates in the filing of consolidated returns, actually uses in reporting taxable income to the Federal Government, or which the corporation would have used in reporting taxable income to the Federal Government had it been required to report its taxable income to the Federal Government. With regard to the tax imposed by Article IV, the terms "annual year," "fiscal year," "annual or fiscal year," "tax year" and "tax period" shall be the same as the corporation's taxable year, as defined in this subclause or subclause 2.

2. All members of a unitary business shall have a common
taxable year for purposes of computing tax due under this article. The taxable year for such purposes is the common taxable year adopted, in a manner prescribed by the department, by all members of the unitary business. The common taxable year must be used by all members of the unitary business in the year of adoption and all future years unless otherwise permitted by the department.

* * *

(11) "Tax haven." Means any of the following:

(A) Andorra.
(B) Anguilla.
(C) Antigua and Barbuda.
(D) Aruba.
(E) The Bahamas.
(F) Bahrain.
(G) Barbados.
(H) Belize.
(I) Bermuda.
(J) The British Virgin Islands.
(K) The Cayman Islands.
(L) The Cook Islands.
(M) Cyprus.
(N) Dominica.
(O) Gibraltar.
(P) Grenada.
(Q) Guernsey-Sark-Alderney.
(R) The Isle of Man.
(S) Jersey.
(T) Liberia.
(U) Liechtenstein.
(V) Luxembourg.
(W) Malta.
(X) The Marshall Islands.
(Y) Mauritius.
(Z) Monaco.
(AA) Montserrat.
(BB) Nauru.
(CC) Netherlands Antilles.
(DD) Niue.
(EE) Panama.
(FF) Samoa.
(GG) San Marino.
(HH) Seychelles.
(II) St. Kitts and Nevis.
(JJ) St. Lucia.
(KK) St. Vincent and the Grenadines.
(LL) Turks and Caicos Islands.
(MM) Vanuatu.
(NN) A jurisdiction that is identified as a tax haven by the Organization for Economic Co-operation and Development.

(12) "Unitary business." A single economic enterprise that is made up of separate parts of a single corporation, of a commonly controlled group of corporations, or both, that are sufficiently interdependent, integrated and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. A unitary business includes all those parts and corporations that are included in a unitary business under the Constitution of the United States.

20190HB1445PN1793 - 10 -
(13) "Water's-edge basis." A system of reporting that includes the business income and apportionment factors of certain entities of a unitary business, described as follows:

(A) Any member incorporated in the United States or formed under the laws of any state of the United States, the District of Columbia, any territory or possession of the United States or the Commonwealth of Puerto Rico.

(B) Any member, regardless of the place incorporated or formed, if at least twenty per cent of the member's sales factor is within the United States, and the following shall apply:

(i) For purposes of determining whether at least twenty per cent of a member's sales factor is within the United States, the calculation must be performed on a stand-alone basis. Sales shall be gross figures without eliminations for transactions with members of any unitary business.

(ii) Whether sales are within the United States is based on the sales factor sourcing rules contained in section 401(3).

(C) Any member which is one of the following:

(i) A domestic international sales corporation as described in sections 991, 992, 993 and 994 of the Internal Revenue Code of 1986 (26 U.S.C. §§ 991, 992, 993 and 994).


(D) Any member not described in subparagraph (A), (B) or (C) shall include the portion of the member's business income.
derived from or attributable to sources within the United States, as determined under the Internal Revenue Code of 1986 (26 U.S.C. § 1 et seq.) without regard to Federal treaties, and its apportionment factors related thereto.

(E) Any member that is a "controlled foreign corporation" as defined in section 957 of the Internal Revenue Code of 1986 (26 U.S.C. § 957), to the extent the business income of that member is income defined in section 952 of the Internal Revenue Code of 1986 (26 U.S.C. § 952) as Subpart F income, not excluding lower-tier subsidiaries' distributions of such income which were previously taxed, determined without regard to Federal treaties, and the apportionment factors related to that income; any item of income received by a controlled foreign corporation and the apportionment factors related to such income shall be excluded if the corporation establishes to the satisfaction of the Secretary of Revenue that such income was subject to an effective rate of income tax imposed by a foreign country greater than ninety per cent of the maximum rate of tax specified in section 11 of the Internal Revenue Code of 1986 (26 U.S.C. § 11). The effective rate of income tax determination shall be based upon the methodology set forth under 26 CFR 1.954-1 (relating to foreign base company income).

(vi) Any member that is not described in subparagraph (A), (B), (C), (D) or (E) and that is incorporated in or is doing business in a tax haven. The business income of the combined unitary income and apportionment factors of a corporation doing business in a tax haven shall be excluded if the corporation establishes to the satisfaction of the Secretary of Revenue that the member's income was subject to an effective rate of income tax imposed by a country greater than ninety per cent of the

(14) "Commonly controlled group." For a corporation, the corporation is a member of a group of two or more corporations and more than fifty per cent of the voting stock or controlling interest of each member of the group is directly or indirectly owned by a common owner or by common owners, either corporate or noncorporate, or by one or more of the member corporations of the group.

(15) "Combined unitary income." The aggregate taxable income or loss of all members of a unitary business, subject to apportionment, except:

(A) Income from an intercompany transaction between members of a unitary business shall be deferred in a manner similar to 26 CFR 1.1502-13 (relating to intercompany transactions) for Federal taxable income purposes.

(B) Dividends paid by one member of a unitary business to another to the extent those dividends are included in business income of the payee corporation.

(C) Income of the following corporations is not included in the determination of combined business income:

(i) any entity subject to taxation under Article VII, VIII, IX or XV;

(ii) any entity specified in the definition of "institution" in section 701.5 that would be subject to taxation under Article VII, were it doing business in this State, as defined in section 701.5;

(iii) any entity commonly known as a title insurance company that would be subject to taxation under Article VIII, were it incorporated in this State.
(iv) any entity specified as an insurance company, association or exchange in Article IX that would be subject to taxation under Article IX, were it transacting insurance business in this State;

(v) any entity specified in the definition of "institution" in section 1501 that would be subject to taxation under Article XV, were it located, as defined in section 1501, in this State; or

(vi) any entity that is a small corporation as defined in section 301(s.2).

(16) "Member." A corporation that is a member of a unitary business. The term does not include a corporation listed in clause (15)(C).

Section 2. Section 402(b) of the act is amended to read:

Section 402. Imposition of Tax.--

(b) The annual rate of tax on corporate net income imposed by subsection (a) for taxable years beginning for the calendar year or fiscal year on or after the dates set forth shall be as follows:

<table>
<thead>
<tr>
<th>Taxable Year</th>
<th>Tax Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>January 1, 1995, [and</td>
<td></td>
</tr>
<tr>
<td>each taxable year</td>
<td></td>
</tr>
<tr>
<td>thereafter] through</td>
<td></td>
</tr>
<tr>
<td>December 31, 2019</td>
<td>9.99%</td>
</tr>
<tr>
<td>January 1, 2020,</td>
<td></td>
</tr>
<tr>
<td>through December</td>
<td></td>
</tr>
<tr>
<td>31, 2020</td>
<td>8.99%</td>
</tr>
<tr>
<td>January 1, 2021,</td>
<td></td>
</tr>
<tr>
<td>through December</td>
<td></td>
</tr>
<tr>
<td>31, 2021</td>
<td>8.29%</td>
</tr>
</tbody>
</table>
January 1, 2022, through December 31, 2022

January 1, 2023, through December 31, 2023

January 1, 2024, and each taxable year thereafter

* * *

Section 3. Section 403 of the act is amended by adding subsections to read:

Section 403. Reports and Payment of Tax.--* * *

(a.1) (1) Each corporation that is a member of a unitary business that consists of two or more corporations, unless excluded by the provisions of this article, shall file as part of a combined annual report. The corporations of the unitary business shall designate one member that is subject to tax under this article to file the combined annual report and to act as agent on behalf of all other members of the unitary business. Each corporation that is a member of a unitary business is liable for its tax liability under this article. The agent is also liable for the aggregate amount of the unitary business' tax liability pursuant to this article.

(2) The oath or affirmation of the designated member's president, vice president or other principal officer and of the member's treasurer or assistant treasurer shall constitute the oath or affirmation of each corporation that is a member of that unitary business.

(3) The designated member shall transmit to the department

20190HB1445PN1793 - 15 -
upon a form prescribed by the department an annual combined report under oath or affirmation of the member's president, vice president or other principal officer and of the member's treasurer or assistant treasurer.

(4) In addition to the information required in subsection (a), the report shall set forth:

(i) All corporations included in the unitary business.

(ii) All necessary data, both in the aggregate and for each corporation of the unitary business, that sets forth the determination of tax liability for each corporation of the unitary business.

(iii) Any other information that the department may require.

(a.2) A corporation that is a member of a unitary business of two or more corporations must determine the corporation's business income and apportionment factors on a water's-edge basis.

* * *

Section 4. Section 404 of the act is amended to read:

Section 404. Consolidated Reports.--The department shall not permit any corporation owning or controlling, directly or indirectly, any of the voting capital stock of another corporation or of other corporations, subject to the provisions of this article, to make a consolidated report, showing the combined net income.

Section 5. Section 3003.3(d) of the act is amended and the section is amended by adding a subsection to read:

Section 3003.3. Underpayment of Estimated Tax.--* * *

(d) Notwithstanding the provisions of [the preceding subsections,] this section, other than as set forth in subsection (d.1), interest with respect to any underpayment of
any installment of estimated tax shall not be imposed if the
total amount of all payments of estimated tax made on or before
the last date prescribed for the payment of such installment
equals or exceeds the amount which would have been required to
be paid on or before such date if the estimated tax were an
amount equal to the tax computed at the rates applicable to the
taxable year, including any minimum tax imposed, but otherwise
on the basis of the facts shown on the report of the taxpayer
for, and the law applicable to, the safe harbor base year,
adjusted for any changes to sections 401, 601, 602 and 1101
enacted for the taxable year, if a report showing a liability
for tax was filed by the taxpayer for the safe harbor base year.
If the total amount of all payments of estimated tax made on or
before the last date prescribed for the payment of such
installment does not equal or exceed the amount required to be
paid per the preceding sentence, but such amount is paid after
the date the installment was required to be paid, then the
period of underpayment shall run from the date the installment
was required to be paid to the date the amount required to be
paid per the preceding sentence is paid. Provided, that if the
total tax for the safe harbor base year exceeds the tax shown on
such report by ten per cent or more, the total tax adjusted to
reflect the current tax rate shall be used for purposes of this
subsection. In the event that the total tax for the safe harbor
base year exceeds the tax shown on the report by ten per cent or
more, interest resulting from the utilization of such total tax
in the application of the provisions of this subsection shall
not be imposed if, within forty-five days of the mailing date of
each assessment, payments are made such that the total amount of
all payments of estimated tax equals or exceeds the amount which
would have been required to be paid on or before such date if the estimated tax were an amount equal to the total tax adjusted to reflect the current tax rate. In any case in which the taxable year for which an underpayment of estimated tax may exist is a short taxable year, in determining the tax shown on the report or the total tax for the safe harbor base year, the tax will be reduced by multiplying it by the ratio of the number of installment payments made in the short taxable year to the number of installment payments required to be made for the full taxable year.

(d.1) With respect to any underpayment of an installment of estimated corporate net income tax for any tax year that begins in taxable year 2020 or 2021 by a corporation required to file a combined report pursuant to section 403(a.1)(1), interest shall not be imposed if the total amount of all payments of estimated corporate net income tax made on or before the last date prescribed for the payment of such installment equals or exceeds the amount which would have been required to be paid on or before such date if the estimated tax were an amount equal to the combined tax shown on the reports of all the members of the unitary business for the safe harbor base year computed at the rate applicable to the taxable year.

Section 6. The amendment of sections 401, 402, 403, 404 and 3003.3 of the act shall apply to taxable years beginning after December 31, 2018.

Section 7. This act shall take effect July 1, 2019, or immediately, whichever is later.