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SENATE BILL NO. 1353

Offered January 13, 2021

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A BILL to amend and reenact §§ 58.1-400.1, 58.1-406, 58.1-442, and 58.1-443 of the Code of Virginia and to amend the Code of Virginia by adding in Chapter 3 of Title 58.1 an article numbered 11, consisting of sections numbered 58.1-424 through 58.1-427, relating to corporate income tax; combined reporting requirements.

Patron—Marsden

Referred to Committee on Finance and Appropriations

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-400.1, 58.1-406, 58.1-442, and 58.1-443 of the Code of Virginia are amended and reenacted and that the Code of Virginia is amended by adding in Chapter 3 of Title 58.1 an article numbered 11, consisting of sections numbered 58.1-424 through 58.1-427, as follows:

§ 58.1-400.1. Minimum tax on telecommunications companies.

A. *For taxable years before January 1, 2022, a* ~~A~~ telecommunications company that is incorporated shall be subject to a minimum tax, instead of the corporate income tax imposed by § 58.1-400, at the applicable rate on its gross receipts for the calendar year which ends during the taxable year if the tax imposed by § 58.1-400 is less than the minimum tax imposed by this section. A telecommunications company that is organized as a limited liability company, partnership, corporation that has made an election under subchapter S of the Internal Revenue Code, or other entity treated as a pass-through entity shall be subject to the minimum tax in the manner prescribed by regulation.

The minimum tax shall be imposed at the rate of 0.5 percent of gross receipts.

B. In the case of an income tax return for a period of less than twelve months, the minimum tax shall be based on the gross receipts for the calendar year which ends during the taxable period or, if none, the most recent calendar year which ended before the taxable period. The minimum tax shall be prorated by the number of months in the taxable period.

C. The State Corporation Commission shall certify to the Department for each tax year as defined in § 58.1-2600 the name, address, and gross receipts for each telecommunications company. The Commission shall mail or otherwise deliver a copy of the certification to each affected telecommunications company.

D. The following words and terms, when used in this section, shall have the following meanings:

"Gross receipts" means all revenue from business done within the Commonwealth, including the proportionate part of interstate revenue attributable to the Commonwealth if such inclusion will result in annual gross receipts exceeding $5 million, with the following deductions:

1. Revenue billed on behalf of another such telephone company or person to the extent such revenues are later paid over to or settled with that company or person; and

2. Revenues received from a telecommunications company, or from a telephone utility company providing interstate communications service, for providing to the company any of the following: (i) unbundled network facilities, (ii) completion, origination or interconnection of telephone calls with the taxpayer's network, (iii) transport of telephone calls over taxpayer's network, or (iv) taxpayer's telephone services for resale.

"Telecommunications company" means a telephone company or other person holding a certificate of convenience and necessity granted by the State Corporation Commission authorizing telephone service; or a person authorized by the Federal Communications Commission to provide commercial mobile service as defined in § 332(d)(1) of the Communications Act of 1934, as amended, where such service includes cellular mobile radio communications services or broadband personal communications services; or a person holding a certificate issued pursuant to § 214 of the Communications Act of 1934, as amended, authorizing domestic telephone service and belonging to an affiliated group including a person holding a certificate of convenience and necessity granted by the State Corporation Commission authorizing telephone service; or a telegraph company or other person operating the apparatus necessary to communicate by telegraph. The term "affiliated group" shall have the meaning given in § 58.1-3700.1.

§ 58.1-406. Allocation and apportionment of income.

Any corporation having income from business activity ~~which~~ *that* is taxable both within and without the Commonwealth shall allocate and apportion its Virginia taxable income as provided in §§ 58.1-407 through 58.1-420 *or, as applicable, Article 11 (§ 58.1-424 et seq.).*

Article 11.

Combined Reporting Requirements.

§ 58.1-424. Definitions.

As used in this article, unless the context requires a different meaning:

"Combined group" means the group of all persons that must file a combined return as required by this article.

"Combined return" means a Virginia income tax return required to be filed for the combined group to the Tax Commissioner.

"Corporation" means any corporation as defined by the laws of the Commonwealth or organization of any kind treated as a corporation for tax purposes under the laws of the Commonwealth, wherever located, that, if it were doing business in the Commonwealth, would be a taxpayer. The business conducted by a partnership that is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the partnership income, inclusive of guaranteed payments to the extent prescribed by regulation.

"Internal Revenue Code" means the same as that term is defined under § 58.1-301.

"Net deferred tax asset" means that deferred tax assets exceed the deferred tax liabilities of the combined group, as computed in accordance with generally accepted accounting principles.

"Net deferred tax liability" means deferred tax liabilities that exceed the deferred tax assets of the combined group, as computed in accordance with generally accepted accounting principles.

"Partnership" means an organization of any kind treated as a partnership for tax purposes under the laws of the Commonwealth.

"Person" means an individual, firm, partnership, general partner of a partnership, limited liability company, registered limited liability partnership, foreign limited liability partnership, association, corporation, company, syndicate, estate, trust, business trust, trustee, trustee in bankruptcy, receiver, executor, administrator, assignee, or organization of any kind.

"Taxpayer" means any person subject to the tax imposed pursuant to Article 10 (§ 58.1-400 et seq.).

"Unitary business" means a single economic enterprise made up either of separate parts of a single business entity or of a commonly controlled group of business entities or of a unitary group of business entities or of a group of affiliate business entities 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 that part of the business that meets the definition in this section and is conducted by a taxpayer through the taxpayer's interest in a partnership, whether the interest in that partnership is held directly or indirectly through a series of partnerships or other pass-through entities. A "unitary business" shall not include persons subject to, or that would be subject to if doing business in the Commonwealth, the insurance premiums license tax under Chapter 25 (§ 58.1-2500 et seq.) or the bank franchise tax under Chapter 12 (§ 58.1-1200 et seq.).

"United States" means the 50 states of the United States of America, the District of Columbia, and United States' territories and possessions.

§ 58.1-425. Imposition of combined reporting; elections; exclusions.

A. For taxable years beginning on or after January 1, 2022, corporations that are members of a unitary business shall file a combined return as a combined group to the Department. The combined return must be filed under the name and federal employer identification number of the parent corporation if the parent corporation is a member of the combined group. If there is no parent corporation, or if the parent corporation is not a member of the combined group, the members of the combined group shall choose a member to file the return. The filing member must remain the same in subsequent years unless the filing member is no longer the parent corporation or is no longer a member of the combined group. Members of the combined group are jointly and severally liable for the tax liability of the combined group included in the combined return.

A unitary business is required to file a combined return on a water's edge basis unless the combined group elects the consolidated group or worldwide combination method pursuant to subsections B or C. The water's edge combined return shall take into account the income and apportionment factors of only the members otherwise included in the combined group as follows:

1. The entire income and apportionment factors of any member incorporated in the United States, excluding such a member if eighty percent or more of its average property, payroll and sales factor are located outside the United States, the District of Columbia, and any territory or possession of the United States;

2. The entire income and apportionment factors of a member, regardless of the place incorporated or formed, if the average of its property, payroll, and sales factors within the United States is 20 percent or more;

3. The entire income and apportionment factors of any member that is a domestic international sales corporation pursuant to §§ 991 through 994 of the Internal Revenue Code as amended, or a foreign sales corporation pursuant to §§ 921 through 927 of the Internal Revenue Code as amended.

B. Consolidated Group Election. An affiliated group of corporations, pursuant to § 1504 of the Internal Revenue Code, may elect to be treated as a combined group with respect to the combined reporting requirements imposed by this section. Such election may be made only if all corporations that at any time during the taxable year have been members of the combined group consent to be included in such group. The election is effective only if made on a timely filed original return and is binding for the taxable year plus an additional five taxable years unless revocation is approved by the Tax Commissioner. Subsequent elections may be made in the same manner and for the same applicable period.

C. Worldwide Combination Election. A unitary group may elect to file a worldwide combined return comprised of the appropriate income and apportionment factors of all the members of a unitary group irrespective of the country in which the corporations are incorporated or conduct business activity. The election is effective only if made on a timely filed original return and is binding for the taxable year plus an additional five taxable years unless revocation is approved by the Tax Commissioner. Subsequent elections may be made in the same manner and for the same applicable period.

§ 58.1-426. Determination of taxable net income for a combined group.

A. The taxable net income of the combined group shall be calculated by:

1. Determining the total combined group income or loss, before net operating loss deduction, by:

a. The combined group calculating its taxable income or loss consistent with the application of §§ 1501 through 1564 of the Internal Revenue Code and accompanying regulations.

b. The income or loss of the members as determined under subdivision A 1 a are combined, eliminating items of income, expense, gain, and loss from transactions between members of the combined group, and by applying the consolidated filing rules under § 1.1502-75 of the Internal Revenue Code and agency regulations as if the combined group was a consolidated filing group;

2. The aggregate amount of any of the combined group's nonapportionable items of income, expense, gain, or loss, and reduced by the determination made under subdivision A 1;

3. The Commonwealth's share of the combined group's ordinary apportionable income or loss, determined by multiplying the result of determinations made in subdivisions 1 and 2 by the combined group's apportionment factor as determined pursuant to § 58.1-408 and §§ 58.1-417 through 58.1-422.3, as applicable. To the extent members of the same combined group are subject to different methods of apportionment, each member of the group shall determine its apportionment consistent with the required method prescribed by the Commonwealth:

a. For purposes of determining the sales factor pursuant to subdivision 2, the numerator of the factor includes amounts sourced to the state for the combined group's unitary business, regardless of the separate entity to which those factors may be attributed;

b. If a member of the combined group holds a partnership interest from which it derives apportionable income, the share of the partnership's apportionment factor or factors, as applicable, to be included in the apportionment factor or factors of the group is determined by multiplying the partnership's factor or factors by a ratio the numerator of which is the amount of the partnership's apportionable income properly included in the member's income, whether received directly or indirectly, and including any guaranteed payments, and the denominator of which is the amount of the partnership's total apportionable income. If a member of the combined group directly or indirectly receives an allocation of a partnership tax item, such as an item of loss or expense, where it is impossible to determine the member's share of apportionable income, the Department may provide rules for inclusion of particular partnership factors, or portions of factors, in the combined group's factors; and

c. In computing the apportionment percentage of the combined group, each member shall eliminate intercompany transactions;

4. Adding the combined group nonapportionable income specifically allocable to the Commonwealth under § 58.1-408;

5. Adding together the determinations of subdivisions 1 through 4 to determine the combined group net income or loss before net operating loss deduction;

6. The combined group's taxable net income after any net operating loss deduction, determined by deducting from the amount of combined group net income computed under subdivision 5 an allowable amount of the combined group's net operating loss carryover, which shall be:

a. The total of the combined group losses determined under subdivision 5 for prior years to the extent such losses have not been used to offset the combined group's net income; plus

b. The net operating loss carryover of any members of the group created before the effective date of this article, but only to the extent that the net operating loss carryover was generated by a member of the group that existed as part of the unitary business. Net operating loss carryovers created by members of the group prior to the enactment of combined reporting shall be converted from preapportioned to postapportioned amounts by multiplying the amount of such losses by the apportionment factor of the

group member generating the loss for the year immediately prior to the enactment of combined reporting. Following conversion, such losses may be used against combined group income; plus

c. The net operating loss carryover of any members of the group acquired following the enactment of combined reporting to the extent those acquired members were taxpayers in the Commonwealth during the previous taxable year; and

7. Tax credits generated by any person within or member of the combined group on or after January 1, 2022, may be used to offset the Virginia tax liability of the combined group as determined by subdivisions 1 through 6. Tax credits earned in taxable years prior to January 1, 2022, may be carried over and used to offset the Virginia income tax liability of the combined group to the extent the person generating the credit becomes a part of a unitary business filing a combined return.

B. The Department shall prescribe and amend, from time to time, rules and regulations as necessary in order that the tax liability of any group of corporations filing as a combined group and each corporation in the combined group, liable to taxation under this chapter, may be determined, computed, assessed, collected, and adjusted in a manner as to clearly reflect the aggregate income of the combined group and the individual income of each member of the combined group. Such rules and regulations shall include but are not limited to issues such as the inclusion or exclusion of a corporation in the combined group, the characterization and sourcing of each member's income, and which activities constitute the conduct of a unitary business.

§ 58.1-427. Deduction for change to net deferred tax assets and liabilities.

A. If the provisions of this article result in an aggregate increase to the members' net deferred tax liability, an aggregate decrease to the members' net deferred tax asset, or an aggregate change from a net deferred tax asset to a net deferred tax liability, the combined group shall be entitled to a deduction, pursuant to the foregoing subsections.

B. For 10 years beginning with the combined group's first income tax return filed in or after the taxable year beginning on January 1, 2022, a combined group shall be entitled to a deduction from combined group entire net income equal to one-tenth of the amount necessary to offset the increase in the net deferred tax liability, decrease in the net deferred tax asset, or aggregate change from a net deferred tax asset to a net deferred tax liability, as applicable. Such increase in the net deferred tax liability, decrease in the net deferred tax asset, or the aggregate change from a net deferred tax asset to a net deferred tax liability shall be computed based on the change that would result from the imposition of the unitary reporting requirements under this article without the deduction provided by this section.

C. The deferred tax impact determined under subsection B shall be converted into an annual deferred tax deduction amount by:

1. Dividing the deferred tax impact determined in this section by the rate determined under §§ 58.1-400, 58.1-400.1, and 58.1-400.3;

2. Dividing the amount determined pursuant to subdivision 1 by the Virginia unitary business apportionment factor that was used by the combined group in the calculation of the deferred tax assets and deferred tax liabilities as provided for under this article and §§ 58.1-408, 58.1-422, and 58.1-422.1.

The resulting amount determined pursuant to subdivision 2 shall be the total net deferred tax deduction available over the 10-year period as described in subsection E.

D. The deduction calculated under this section shall not be adjusted as a result of any events happening subsequent to its determination, including but not limited to any disposition or abandonment of assets. Such deduction shall be determined without regard to any effect on federal tax liability and shall not alter the tax basis of any asset. If the deduction under this section is greater than the combined group's entire net income, any excess deduction shall be carried forward and applied as a deduction to the combined group's entire net income in future periods until fully utilized.

E. Any combined group intending to claim a deduction under this section shall file a statement with the Tax Commissioner on or before July 1 of the taxable year subsequent to the first taxable year for which a combined return is required. Such statement shall specify the total amount of the deduction that the combined group claims on such form and in such manner as prescribed by the Department. No deduction shall be allowed pursuant to this section for any taxable year except to the extent claimed on a timely filed statement not in violation of any provision of this section.

§ 58.1-442. Separate, combined or consolidated returns of affiliated corporations.

A. Corporations which are affiliated within the meaning of § 58.1-302 may, for any taxable ~~year~~ *year beginning prior to January 1, 2022,* file separate returns, file a combined return or file a consolidated return of net income for the purpose of this chapter, and the taxes thereunder shall be computed and determined upon the basis of the type of return filed. Following an election to file on a separate, consolidated, or combined basis all returns thereafter filed shall be upon the same basis unless permission to change is granted by the Department.

B. For the purpose of subsection A:

1. A consolidated return shall mean a single return for a group of corporations affiliated within the meaning of § 58.1-302, prepared in accordance with the principles of § 1502 of the Internal Revenue

Code and regulations promulgated thereunder. Permission to file a consolidated return shall not be denied to a group of affiliated corporations filing a consolidated federal return solely because two or more members of such affiliated group would be required to use different apportionment factors if separate returns were filed. The Tax Commissioner shall promulgate regulations setting forth the manner in which such an affiliated group shall compute its Virginia taxable income.

2. A combined return shall mean a single return for a group of corporations affiliated within the meaning of § 58.1-302, in which income or loss is separately determined in accordance with subdivisions a through dbelow:

a. Virginia taxable income or loss is computed separately for each corporation;

b. Allocable income is allocated to the state of commercial domicile separately for each corporation;

c. Apportionable income or loss is computed, utilizing separate apportionment factors for each corporation;

d. Income or loss computed in accordance with items a through c above is combined and reported on a single return for the affiliated group.

C. Notwithstanding subsection A, a group of corporations may apply to the Tax Commissioner for permission to change the basis of the type of return filed (i) from consolidated to separate or (ii) from separate or combined to consolidated, if such corporations are affiliated within the meaning of § 58.1-302 and the affiliated group of which they are members, as it has existed from time to time, has filed on the same basis for at least the preceding 20 years. Permission shall be granted if:

1. For the taxable year immediately preceding the taxable year for which the new election would be applicable, there would have been no decrease in tax liability computed under the proposed election as compared to the affiliated group's former filing method; and

2. The affiliated group agrees to file returns computing its Virginia income tax liability under both the new filing method and the former method and will pay the greater of the two amounts for the taxable year in which the new election is effective and for the immediately succeeding taxable year.

§ 58.1-443. Prohibition of worldwide consolidation or combination.

Notwithstanding any other provisions of this chapter, the Department shall not require, ~~and no~~ *but a* corporation may elect, that a consolidation or combination of an affiliated group *or combined group of a unitary business pursuant to Article 11 (§ 58.1-424 et seq.)* include any controlled foreign corporation, the income of which is derived from sources without the United States.

2. That the provisions of this act shall be effective for taxable years beginning on or after January 1, 2022.