

Water's-edge reporting mandated absent affirmative election to report based on worldwide unitary combined reporting basis; initiation and withdrawal of worldwide combined reporting election.

11-24-13f(a) Water's-edge reporting. --

Absent an election under subsection (b) of this section to report based upon a worldwide unitary combined reporting basis, taxpayer members of a unitary group shall determine each of their apportioned shares of the net business income or loss of the combined group on a water's-edge unitary combined reporting basis. In determining tax under this article and article twenty-three of this chapter on a water's-edge unitary combined reporting basis, taxpayer members shall take into account all or a portion of the income and apportionment factors of only the following members otherwise included in the combined group pursuant to section thirteen-a of this article:

11-24-13f(a)(1) The entire income and apportionment factors of any member incorporated in the United States or formed under the laws of any state, the District of Columbia or any territory or possession of the United States;

11-24-13f(a)(2) The entire income and apportionment factors of any member, regardless of the place incorporated or formed, if the average of its property, payroll and sales factors within the United States is twenty percent or more;

11-24-13f(a)(3) The entire income and apportionment factors of any member which is a domestic international sales corporation as described in Internal Revenue Code Sections 991 to 994, inclusive; a foreign sales corporation as described in Internal Revenue Code Sections 921 to 927, inclusive; or any member which is an export trade corporation, as described in Internal Revenue Code Sections 970 to 971, inclusive;

11-24-13f(a)(4) Any member not described in subdivision (1), (2) or (3) of this subsection shall include its business income which is effectively connected, or treated as effectively connected under the provisions of the Internal Revenue Code, with the conduct of a trade or business within the United States and, for that reason, subject to federal income tax;

11-24-13f(a)(5) Any member that is a "controlled foreign corporation", as defined in Internal Revenue Code Section 957, to the extent of the income of that member that is defined in Section 952 of Subpart F of the Internal Revenue Code (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 shall be excluded if such income was subject to an effective rate of income tax imposed by a foreign country greater than ninety percent of the maximum rate of tax specified in Internal Revenue Code Section 11;

11-24-13f(a)(6) Any member that earns more than twenty percent of its income, directly or indirectly, from intangible property or service-related activities that are deductible against the business income of other members of the water's-edge group, to the extent of that income and the apportionment factors related thereto; and

11-24-13f(a)(7) The entire income and apportionment factors of any member that is doing business in a tax haven defined as being engaged in activity sufficient for that tax haven jurisdiction to impose a tax under United States constitutional standards. If the member's business activity within a tax haven is entirely outside the scope of the laws, provisions and practices that cause the jurisdiction to meet the criteria set forth in the definition of a tax haven, the activity of the member shall be treated as not having been conducted in a tax haven.

11-24-13f(b) Initiation and withdrawal of election to report based on worldwide unitary combined reporting. --

11-24-13f(b)(1) An election to report West Virginia tax based on worldwide unitary combined reporting is effective only if made on a timely filed, original return for a tax year by every member of the unitary business subject to tax under this article. The Tax Commissioner shall develop rules governing the impact, if any, on the scope or application of a worldwide unitary combined reporting election, including termination or deemed election, resulting from a change in the composition of the unitary group, the combined group, the taxpayer members and any other similar change.

11-24-13f(b)(2) The election shall constitute consent to the reasonable production of documents and taking of depositions in accordance with the provisions of this code.

11-24-13f(b)(3) In the discretion of the Tax Commissioner, a worldwide unitary combined reporting election may be disregarded, in part or in whole, and the income and apportionment factors of any member of the taxpayer's unitary group may be included in or excluded from the combined report without regard to the provisions of this section, if any member of the unitary group fails to comply with any provision of this article.

11-24-13f(b)(4) In the discretion of the Tax Commissioner, the Tax Commissioner may mandate worldwide unitary combined reporting, in part or in whole, and the income and apportionment factors of any member of the taxpayer's unitary group may be included in or excluded from the combined report without regard to the provisions of this section, if any member of the unitary group fails to comply with any provision of this article or if a person otherwise not included in the water's-edge combined group was availed of with a substantial objective of avoiding state income tax.

11-24-13f(b)(5) A worldwide unitary combined reporting election is binding for and applicable to the tax year it is made and all tax years thereafter for a period of ten years. It may be withdrawn or reinstated after withdrawal, prior to the expiration of the ten-year period, only upon written request for reasonable cause based on extraordinary hardship due to unforeseen changes in state tax statutes, law or policy and only with the written permission of the Tax Commissioner. If the Tax Commissioner grants a withdrawal of election, he or she shall impose reasonable conditions necessary to prevent the evasion of tax or to clearly reflect income for the election period prior to or after the withdrawal. Upon the expiration of the ten-year period, a taxpayer may withdraw from the worldwide unitary combined reporting election. Withdrawal must be made in writing within one year of the expiration of the election and is binding for a period of ten years, subject to the same conditions as applied to the original election. If no withdrawal is properly made, the worldwide unitary combined reporting election shall be in place for an additional ten-year period, subject to the same conditions as applied to the original election.

11-24-3a(26) "Tax haven" means a jurisdiction that, for a particular tax year in question: (A) Is identified by the Organization for Economic Cooperation and Development as a tax haven or as having a harmful preferential tax regime; or (B) a jurisdiction that has no, or nominal, effective tax on the relevant income and: (i) That has laws or practices that prevent effective exchange of information for tax purposes with other governments regarding taxpayers subject to, or benefitting from, the tax regime; (ii) that lacks transparency, for purposes of this definition, a tax regime lacks transparency if the details of legislative, legal or administrative provisions are not open to public scrutiny and apparent or are not consistently applied among similarly situated taxpayers; (iii) facilitates the establishment of

foreign-owned entities without the need for a local substantive presence or prohibits these entities from having any commercial impact on the local economy; (iv) explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's domestic market; or (v) has created a tax regime which is favorable for tax avoidance, based upon an overall assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or other services sector relative to its overall economy. For purposes of this definition, the phrase "tax regime" means a set or system of rules, laws, regulations or practices by which taxes are imposed on any person, corporation or entity, or on any income, property, incident, indicia or activity pursuant to governmental authority.