

HOUSE BILL NO. 721
INTRODUCED BY ERICKSON

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE LAWS RELATING TO WATER'S-EDGE ELECTIONS FOR CORPORATE INCOME TAX PURPOSES; INCLUDING TAXABLE INCOME SHIFTED TO A TAX HAVEN IN THE APPORTIONMENT OF INCOME FOR THE PURPOSES OF A WATER'S-EDGE ELECTION; IDENTIFYING CERTAIN TAX HAVENS AND ESTABLISHING PROCEDURES FOR IDENTIFYING TAX HAVENS; ALLOWING THE DEPARTMENT OF REVENUE TO PUBLISH A LIST OF TAXPAYERS MAKING A WATER'S-EDGE ELECTION; PROVIDING THAT A PORTION OF THE TAX COLLECTIONS FROM WATER'S-EDGE CORPORATIONS BE ALLOCATED TO THE DEPARTMENT OF PUBLIC HEALTH AND HUMAN SERVICES FOR FISCAL YEAR 2005; AMENDING SECTIONS ~~15-31-321~~, 15-1-501, ~~15-31-121~~, ~~15-31-322~~, ~~15-31-323~~, ~~15-31-324~~, ~~15-31-325~~; AND 15-31-326, ~~AND 15-31-511~~; MCA; AND PROVIDING AN APPLICABILITY DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

~~Section 1.~~ Section ~~15-31-321~~, MCA, is amended to read:

~~"15-31-321. Definitions.~~ As used in ~~15-31-321~~ through ~~15-31-326~~, unless the context requires otherwise, the following definitions apply:

~~(1) "Affiliated corporation" means a United States parent corporation and any subsidiary of which more than 50% of the voting stock is owned directly or indirectly by another corporate member of the water's-edge combined group.~~

~~(2) "Jurisdiction" means a country, colony, nation, protectorate, or other jurisdiction that may be considered a tax haven.~~

~~(3) "United States" means the 50 states of the United States and the District of Columbia.~~

~~(3) "Water's-edge combined group" means all corporations or entities included in the election of a taxpayer under ~~15-31-322~~."~~

SECTION 1. SECTION 15-1-501, MCA, IS AMENDED TO READ:

"15-1-501. Disposition of money from certain designated license and other taxes. (1) The state treasurer shall deposit to the credit of the state general fund in accordance with the provisions of subsection (3)

all money received from the collection of:

- (a) income taxes, interest, and penalties collected under chapter 30;
- (b) except as provided in 15-31-121, all taxes, interest, and penalties collected under chapter 31;
- (c) oil and natural gas production taxes distributed to the general fund under 15-36-324;
- (d) electrical energy producer's license taxes under chapter 51;
- (e) the retail telecommunications excise tax collected under Title 15, chapter 53, part 1;
- (f) liquor license taxes under Title 16;
- (g) fees from driver's licenses, motorcycle endorsements, and duplicate driver's licenses as provided in 61-5-121;
- (h) estate taxes under Title 72, chapter 16; and
- (i) fees based on the value of currency on deposit and tangible personal property held for safekeeping by a foreign capital depository as provided in 15-31-803.

(2) The department shall also deposit to the credit of the state general fund all money received from the collection of license taxes and all net revenue and receipts from all sources, other than certain fees, under the operation of the Montana Alcoholic Beverage Code.

(3) Notwithstanding any other provision of law, the distribution of tax revenue must be made according to the provisions of the law governing allocation of the tax that were in effect for the period in which the tax revenue was recorded for accounting purposes. Tax revenue must be recorded as prescribed by the department of administration, pursuant to 17-1-102(2) and (4), in accordance with generally accepted accounting principles.

(4) All refunds of taxes must be attributed to the funds in which the taxes are currently being recorded. All refunds of interest and penalties must be attributed to the funds in which the interest and penalties are currently being recorded."

SECTION 2. SECTION 15-31-121, MCA, IS AMENDED TO READ:

"15-31-121. Rate of tax -- minimum tax -- distribution of revenue. (1) Except as provided in subsection (2), the percentage of net income to be paid under 15-31-101 is 6 3/4% of all net income for the taxable tax period.

(2) For a taxpayer making a water's-edge election, the percentage of net income to be paid under 15-31-101 is 7% of all taxable net income for the taxable tax period.

(3) Each corporation subject to taxation under this part shall pay a minimum tax of not less than \$50.

(4) For fiscal year 2005, the tax collected from water's-edge corporations must be deposited as follows:

- (a) \$375,000 in the state special revenue fund to the credit of the department of public health and human services for state matching funds to maximize federal funds for medicaid health services; and
- (b) the balance in the state general fund."

Section 3. Section 15-31-322, MCA, is amended to read:

"15-31-322. Water's-edge election -- inclusion of tax havens. ~~(1)(1)~~ Notwithstanding any other provisions of law, a taxpayer subject to the taxes imposed under this chapter may apportion its income under this section. A return under a water's-edge election must include the income and apportionment factors of the following affiliated corporations only:

~~(1)(a)(1)(A)~~ a corporation incorporated in the United States in a unitary relationship with the taxpayer and eligible to be included in a federal consolidated return as described in ~~sections 26 U.S.C. 1501 through 1505 of the Internal Revenue Code~~ that has more than 20% of its payroll and property assignable to locations inside the United States. For purposes of determining eligibility for inclusion in a federal consolidated return under this subsection ~~(1)(a)(A)~~, the 80% stock ownership requirements of ~~section 26 U.S.C. 1504 of the Internal Revenue Code~~ must be reduced to ownership of over 50% of the voting stock directly or indirectly owned or controlled by an includable corporation.

~~(2)(b)(2)(B)~~ domestic international sales corporations, as described in ~~sections 26 U.S.C. 991 through 994 of the Internal Revenue Code~~, and foreign sales corporations, as described in ~~sections 26 U.S.C. 921 through 927 of the Internal Revenue Code~~;

~~(3)(c)(3)(C)~~ export trade corporations, as described in ~~sections 26 U.S.C. 970 and 971 of the Internal Revenue Code~~;

~~(4)(d)(4)(D)~~ foreign corporations deriving gain or loss from disposition of a United States real property interest to the extent recognized under ~~section 26 U.S.C. 897 of the Internal Revenue Code~~;

~~(5)(e)(5)(E)~~ a corporation incorporated outside the United States if over 50% of its voting stock is owned directly or indirectly by the taxpayer and if more than 20% of the average of its payroll and property is assignable to a location inside the United States; or

~~(f)(6)(F)~~ a corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax haven, including ANDORRA, ANGUILLA, ANTIGUA AND BARBUDA, ARUBA, THE BAHAMAS, BAHRAIN, Barbados, BELIZE, Bermuda, BRITISH VIRGIN ISLANDS, Cayman Islands, COOK ISLANDS, Turks and Caicos Islands, DOMINICA, GIBRALTAR, GRENADA, GUERNSEY-SARK-ALDERNEY, ISLE OF MAN, JERSEY, LIBERIA, LIECHTENSTEIN, Luxemburg, MALDIVES, MARSHALL ISLANDS, MONACO, MONTSERRAT, NAURU, Netherlands Antilles, NIUE, Panama, Switzerland,

~~Venezuela, and any other jurisdiction that the department determines is a tax haven~~ SAMOA, SEYCHELLES, ST. KITTS AND NEVIS, ST. LUCIA, ST. VINCENT AND THE GRENADINES, TONGA, U.S. VIRGIN ISLANDS, AND VANUATU.

~~(2) For the purposes of subsection (1)(f), a tax haven is a jurisdiction to which a corporation shifts income earned in the United States. The department shall consider one or more of the following factors as evidence that a jurisdiction is a tax haven:~~

~~(a) the proportion of profits reported to the jurisdiction by a corporation incorporated or earning income in the United States substantially exceeds the proportion of the property, payroll, or sales that the corporation maintains in a jurisdiction;~~

~~(b) the jurisdiction provides tax sheltering methods for reporting income that was earned in the United States; and~~

~~(c) other factors that the department considers as evidence that a jurisdiction is a tax haven.~~

~~(2) THE DEPARTMENT SHALL REPORT BIENNIALLY TO THE REVENUE AND TRANSPORTATION INTERIM COMMITTEE WITH AN UPDATE OF COUNTRIES THAT MAY BE CONSIDERED A TAX HAVEN UNDER SUBSECTION (1)(F)."~~

Section 4. Section 15-31-323, MCA, is amended to read:

"15-31-323. Apportionment factors -- inclusion of tax havens. (1) For purposes of 15-31-322(1) and ~~(5)(1)(a)(1) through (1)(e) (5)(1)(A) THROUGH (1)(E)~~, the location of payroll and property is determined under the individual state's laws and regulations that set forth the apportionment formulas used to assign net income subject to taxes on or measured by net income. If a state does not impose a tax on or measured by net income, apportionment is determined under this chapter.

~~(2) For the purposes of 15-31-322(1)(f)(6)(1)(F), income shifted to a tax haven, to the extent taxable, is considered income subject to apportionment."~~

Section 5. Section 15-31-324, MCA, is amended to read:

"15-31-324. Water's-edge election period -- consent -- change of election. (1) A water's-edge election may be made by a taxpayer and is effective only if every affiliated corporation subject to the taxes imposed under this chapter consents to the election. Consent by the common parent of an affiliated group constitutes consent of all members of the group. An affiliated corporation that becomes subject to taxes under this chapter ~~subsequent to~~ after the water's-edge election is considered to have consented to the election. THE ELECTION MUST DISCLOSE THE IDENTITY OF THE TAXPAYER AND THE IDENTITY OF ANY AFFILIATED CORPORATION, INCLUDING AN AFFILIATED CORPORATION INCORPORATED IN A TAX HAVEN AS SET FORTH IN 15-31-322(6)(1)(F), IN WHICH

THE TAXPAYER OWNS DIRECTLY OR INDIRECTLY MORE THAN 50% OF THE VOTING STOCK OF THE AFFILIATED CORPORATION.

(2) ~~Each~~ Except as provided in subsections (3) and (4), each water's-edge election must be for 3-year renewable periods; ~~except as follows:~~

~~(a) No water's-edge election may be made for an income year beginning before October 1, 1987.~~

~~(b)~~(3) A water's-edge election may be changed by a taxpayer ~~prior to~~ before the end of each 3-year period only with the permission of the department of revenue. In granting a change of election, the department shall impose reasonable conditions that are necessary to prevent the avoidance of tax or clearly reflect income for the election period prior to the change.

~~(4) A taxpayer subject to the provisions of 15-31-322(1)(f)(6)(1)(F) WHO HAS A WATER'S-EDGE ELECTION THAT IS IN EFFECT FOR TAX PERIODS BEGINNING BOTH BEFORE AND AFTER [THE EFFECTIVE DATE OF THIS ACT] may change a water's-edge~~ RESCIND THE election made in FOR any tax period beginning before AFTER [the effective date of this act]."

~~Section 5.~~ Section 15-31-325, MCA, is amended to read:

~~"15-31-325. Treatment of dividends.~~ For purposes of 15-31-321 through 15-31-326, dividends must be treated as follows:

~~(1) Dividends received from corporations incorporated outside the United States, to the extent taxable, are considered income subject to apportionment.~~

~~(2) The after-tax net income of United States corporations excluded from eligibility as affiliated corporations under 15-31-322(1)(a) and possession corporations described in sections 26 U.S.C. 931 through 934 and 936 of the Internal Revenue Code are considered dividends received from corporations incorporated outside the United States.~~

~~(3) Amounts included in income under sections 26 U.S.C. 951 through 962 and 964 of the Internal Revenue Code are considered dividends from corporations incorporated outside the United States.~~

~~(4) Eighty percent of all dividends apportionable under this section must be excluded from income subject to apportionment.~~

~~(5) "Deemed" distributions, as set forth in section 26 U.S.C. 78 of the Internal Revenue Code, and corresponding amounts with respect to dividends considered received under subsection (2) of this section must be excluded from the income of the water's-edge combined group.~~

~~(6) The dividends apportionable under this section are in lieu of any expenses attributable to dividend~~

income:

~~———— (7) A dividend from a corporation required to be combined in the water's-edge combined group must be eliminated from the calculation of apportionable income."~~

Section 6. Section 15-31-326, MCA, is amended to read:

"15-31-326. Domestic disclosure spreadsheet -- inclusion of tax havens. (1) The department of revenue may require taxpayers a taxpayer making a water's-edge election to submit within 6 months after the taxpayer files its federal income tax return a domestic disclosure spreadsheet to provide full disclosure of the income reported to each state for the year, the tax liability for each state, the method used for allocating or apportioning income to the states, and the identity of the water's-edge corporate group and those of its United States affiliated corporations.

(2) The department may require a taxpayer subject to the provisions of 15-31-322(1)(f)(6)(1)(F) to disclose the same information for tax havens as is required for states in subsection (1)."

~~———— **Section 7.** Section 15-31-511, MCA, is amended to read:~~

~~———— **"15-31-511. Confidentiality of tax records.** (1) Except as provided in this section in accordance with a proper judicial order or as otherwise provided by law, it is unlawful to divulge or make known in any manner:~~

~~———— (a) the amount of income or any particulars set forth or disclosed in any return or report required under this chapter or any other information relating to taxation secured in the administration of this chapter; or~~

~~———— (b) any federal return or information in or disclosed on or disclosure contained in a federal return or report required by law or rule of the department of revenue under this chapter.~~

~~———— (2) (a) An officer or employee charged with custody of returns and reports required by this chapter may not be ordered to produce any of them or evidence of anything contained in them in any administrative proceeding or action or proceeding in any court, except:~~

~~———— (i) in an action or proceeding in which the department is a party under the provisions of this chapter; or~~

~~———— (ii) in any other tax proceeding or on behalf of a party to an action or proceeding under the provisions of this chapter when the returns or reports or facts shown in them are directly pertinent to the action or proceeding.~~

~~———— (b) If the production of a return, report, or information contained in them is ordered, the court shall limit production of and the admission of returns, reports, or facts shown in them to the matters directly pertinent to the action or proceeding.~~

~~———— (3) This section does not prohibit:~~

- ~~——— (a) the delivery of a certified copy of any return or report filed in connection with a return to the taxpayer who filed the return or report or to the taxpayer's authorized representative;~~
- ~~——— (b) the publication of statistics prepared in a manner that prevents the identification of particular returns, reports, or items from returns or reports;~~
- ~~——— (c) the inspection of returns and reports by the attorney general or other legal representative of the state in the course of an administrative proceeding or litigation under this chapter;~~
- ~~——— (d) the publication of a list of all corporations or entities included in a taxpayer's water's-edge election under 15-31-322;~~
- ~~——— (e) access to information under subsection (4); or~~
- ~~——— (e)(f) the director of revenue department from permitting a representative of the commissioner of internal revenue of the United States or a representative of a proper officer of any state imposing a tax on the income of a taxpayer to inspect the returns or reports of a corporation. The department may also furnish those persons abstracts of income, returns, and reports; information concerning any item in a return or report; and any item disclosed by an investigation of the income or return of a corporation. The director of revenue department may not furnish that information to a person representing the United States or another state unless the United States or the other state grants substantially similar privileges to an officer of this state charged with the administration of this chapter.~~
- ~~——— (4) The department shall on request:~~
- ~~——— (a) allow the inspection of returns and reports by the legislative auditor, but the information furnished to the legislative auditor is subject to the same restrictions on disclosure outside that office as provided in subsection (1); and~~
- ~~——— (b) deliver corporation income tax data to the legislative fiscal analyst and the office of budget and program planning, but the information furnished to the legislative fiscal analyst and the office of budget and program planning is subject to the same restrictions on disclosure outside those offices as provided in subsection (1);~~
- ~~——— (5) A person convicted of violating this section shall be fined not to exceed more than \$1,000 or be imprisoned in the county jail for a term not to exceed 1 year, or both. If a public servant, as defined in 45-2-101, is convicted of violating this section, the person forfeits office and may not hold any public office or public employment in the state for a period of 1 year after conviction."~~

NEW SECTION. **Section 7. Applicability.** [This act] applies to tax periods beginning after December

31, 2003.

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