

Amendment - 1st Reading/2nd House-blue - Requested by: Jim Hamilton - (H)
Appropriations

- 2023

68th Legislature 2023

Drafter: Megan Moore, 406-444-4496

SB0246.002.002

1 SENATE BILL NO. 246
2 INTRODUCED BY D. ZOLNIKOV, J. ELLSWORTH
3
4 A BILL FOR AN ACT ENTITLED: "AN ACT REVISING LAWS RELATED TO THE WATER'S-EDGE ELECTION
5 FOR CORPORATE INCOME TAX PURPOSES; ELIMINATING THE LIST OF COUNTRIES THAT ARE
6 CONSIDERED TAX HAVENS FROM THE INCOME AND APPORTIONMENT FACTORS; PROVIDING FOR A
7 LIST OF FACTORS TO BE CONSIDERED TO DETERMINE WHETHER A TAXING JURISDICTION IS A TAX
8 HAVEN; PROVIDING THAT A WATER'S-EDGE ELECTION RETURN MUST INCLUDE THE INCOME AND
9 APPORTIONMENT FACTORS OF AN AFFILIATED CORPORATION INCORPORATED IN A TAX HAVEN;
10 ELIMINATING REPORTING REQUIREMENTS; PROVIDING DEFINITIONS; EXPANDING RULEMAKING
11 AUTHORITY; AMENDING SECTIONS 15-31-321, 15-31-322, 15-31-323, 15-31-324, 15-31-325, AND 15-31-
12 326, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE AND A RETROACTIVE APPLICABILITY
13 DATE."

14
15 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

16
17 **Section 1.** Section 15-31-321, MCA, is amended to read:

18 **"15-31-321. Definitions.** As used in 15-31-321 through 15-31-326, unless the context requires
19 otherwise, the following definitions apply:

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

23 ~~(2) "Individual state" means one of the 50 states of the United States, the District of Columbia, or~~
24 ~~any territory or possession of the United States.~~

25 (2) "Tax haven" means a jurisdiction that, during the tax year in question:

26 (a) has no or nominal effective tax on the relevant income; and

27 (b) (i) has laws or practices that prevent effective exchange of information for tax purposes with

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1 other governments on taxpayers benefiting from the tax regime:

2 (ii) has tax regime that lacks transparency, which occurs if:

3 (A) the details of legislative, legal, or administrative provisions are not open and apparent or are
4 not consistently applied among similarly situated taxpayers; or

5 (B) the information needed by tax authorities to determine a taxpayer's correct tax liability, such as
6 accounting records and underlying documentation, is not adequately available;

7 (iii) facilitates the establishment of foreign-owned entities without the need for a local substantive
8 presence or prohibits these entities from having any commercial impact on the local economy;

9 (iv) explicitly or implicitly excludes the jurisdiction's resident taxpayers from taking advantage of the
10 tax regime's benefits or prohibits enterprises that benefit from the regime from operating in the jurisdiction's
11 domestic market; or

12 (v) has created a tax regime that is favorable for tax avoidance, based upon an overall
13 assessment of relevant factors, including whether the jurisdiction has a significant untaxed offshore financial or
14 other services sector, or both relative to its overall economy.

15 ~~(2)(3)(2)(3)~~ "United States" means the 50 states of the United States, and the District of Columbia,
16 and any territory or possession of the United States.

17 ~~(3)(4)(3)(4)~~ "Water's-edge combined group" means all corporations or entities included in the
18 election of a taxpayer under 15-31-322."

19

20 **Section 2.** Section 15-31-322, MCA, is amended to read:

21 **"15-31-322. Water's-edge election -- ~~inclusion of tax havens~~ -- inclusion of tax havens.** (4)

22 Notwithstanding any other provisions of law, a taxpayer subject to the taxes imposed under this chapter may
23 apportion its income under this section. A return under a water's-edge election must include the income and
24 apportionment factors of the following affiliated corporations only:

25 ~~(a)~~(1) a corporation incorporated in the United States in a unitary relationship with the taxpayer and
26 eligible to be included in a federal consolidated return as described in 26 U.S.C. 1501 through 1505 that has
27 more than 20% of its payroll and property assignable to locations inside the United States. For purposes of

1 determining eligibility for inclusion in a federal consolidated return under this subsection (1)(a), the 80% stock
2 ownership requirements of 26 U.S.C. 1504 must be reduced to ownership of over 50% of the voting stock
3 directly or indirectly owned or controlled by an includable corporation.

4 (b)(2) domestic international sales corporations, as described in 26 U.S.C. 991 through 994, and
5 foreign sales corporations, as described in 26 U.S.C. 921 through 927;

6 (c)(3) export trade corporations, as described in 26 U.S.C. 970 and 971;

7 (d)(4) foreign corporations deriving gain or loss from disposition of a United States real property
8 interest to the extent recognized under 26 U.S.C. 897; or

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

12 (f) ~~a corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax~~
13 ~~haven, including Andorra, Anguilla, Antigua and Barbuda, Aruba, the Bahamas, Bahrain, Barbados, Belize,~~
14 ~~Bermuda, British Virgin Islands, Cayman Islands, Cook Islands, Cyprus, Dominica, Gibraltar, Grenada,~~
15 ~~Guernsey Sark Alderney, Isle of Man, Jersey, Liberia, Liechtenstein, Luxembourg, Malta, Marshall Islands,~~
16 ~~Mauritius, Monaco, Montserrat, Nauru, Netherlands Antilles, Niue, Panama, Samoa, San Marino, Seychelles,~~
17 ~~St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Turks and Caicos Islands, U.S. Virgin Islands,~~
18 ~~and Vanuatu; or~~

19 (6) a corporation that is in a unitary relationship with the taxpayer and that is incorporated in a tax
20 haven.

21 (2) ~~The department shall report biennially, in accordance with 5-11-210, to the revenue interim~~
22 ~~committee with an update of countries that may be considered a tax haven under subsection (1)(f)."~~

23

24 **Section 3.** Section 15-31-323, MCA, is amended to read:

25 **"15-31-323. Apportionment factors --inclusion of tax havens -- inclusion of tax havens.** (1) For
26 purposes of 15-31-322(1)(a) through (1)(e), the location of payroll and property is determined under the
27 individual state's laws and regulations that set forth the apportionment formulas used to assign net income

1 subject to taxes on or measured by net income. If a ~~an individual~~ A state does not impose a tax on or measured
2 by net income, apportionment is determined under this chapter.

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

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

7

8 **Section 4.** Section 15-31-324, MCA, is amended to read:

9 **"15-31-324. Water's-edge election period -- consent -- change of election.** (1) A water's-edge
10 election may be made by a taxpayer and is effective only if every affiliated corporation subject to the taxes
11 imposed under this chapter consents to the election. Consent by the common parent of an affiliated group
12 constitutes consent of all members of the group. An affiliated corporation that becomes subject to taxes under
13 this chapter after the water's-edge election is considered to have consented to the election. The election must
14 disclose the identity of the taxpayer and the identity of any affiliated corporation, ~~including an affiliated~~
15 ~~corporation incorporated in a tax haven as set forth in 15-31-322(1)(f),~~ including an affiliated corporation
16 incorporated in a tax haven as set forth in 15-31-322(6), in which the taxpayer owns directly or indirectly more
17 than 50% of the voting stock of the affiliated corporation.

18 (2) Except as provided in ~~subsections~~ subsection (3) and (4), each water's-edge election must be
19 for 3-year renewable periods.

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

24 (4) ~~A taxpayer subject to the provisions of 15-31-322(1)(f) who has a water's-edge election that is in~~
25 ~~effect for tax periods beginning both before and after October 1, 2003, may rescind the election for any tax~~
26 ~~period beginning after October 1, 2003."~~

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

2 **"15-31-325. Treatment of dividends.** For purposes of 15-31-321 through 15-31-326, dividends must
3 be treated as follows:

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

6 (2) The after-tax net income of United States corporations excluded from eligibility as affiliated
7 corporations under 15-31-322(4) and possession corporations described in sections 931 through 934 and 936
8 of the Internal Revenue Code are considered dividends received from corporations incorporated outside the
9 United States.

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

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

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

17 (6) The dividends apportionable under this section are in lieu of any expenses attributable to
18 dividend income.

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

21

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

23 **"15-31-326. Domestic disclosure spreadsheet --inclusion of tax havens.** (1) The department may
24 require a taxpayer making a water's-edge election to submit within 6 months after the taxpayer files its federal
25 income tax return a domestic disclosure spreadsheet to provide full disclosure of the income reported to each
26 individual state for the year, the tax liability for each individual state, the method used for allocating or
27 apportioning income to the individual states, and the identity of the water's-edge corporate group and those of

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1 its United States affiliated corporations.

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

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

6
7 NEW SECTION. Section 7. Effective date. [This act] is effective on passage and approval.

8
9 NEW SECTION. Section 8. Retroactive applicability. [This act] applies retroactively, within the
10 meaning of 1-2-109, to tax years beginning after December 31, 2022.

11 - END -