State of Arkansas
91st General Assembly
Regular Session, 2017

A Bill

HOUSE BILL 2100

By: Representative Jett

For An Act To Be Entitled

AN ACT TO AMEND THE MULTISTATE TAX COMPACT AND THE UNIFORM DIVISION OF INCOME FOR TAX PURPOSES ACT; TO AMEND AND MODERNIZE THE LAW CONCERNING THE APPORTIONMENT OF INCOME DERIVED FROM MULTISTATE OPERATIONS; TO CHANGE THE METHOD FOR SOURCING OF RECEIPTS FOR SERVICES AND INTANGIBLES FROM COST OF PERFORMANCE TO MARKET-BASED SOURCING; AND FOR OTHER PURPOSES.

Subtitle

TO AMEND AND MODERNIZE THE LAW CONCERNING THE APPORTIONMENT OF INCOME DERIVED FROM MULTISTATE OPERATIONS; TO CHANGE THE METHOD FOR SOURCING OF RECEIPTS FOR SERVICES AND INTANGIBLES.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF ARKANSAS:

SECTION 1. Arkansas Code § 26-5-101, Article IV, concerning the division of income under the Multistate Tax Compact, is amended to read as follows:

ARTICLE IV

Division of Income

1. As used in this Article, unless the context otherwise requires:

(a) ~~"Business income" means income arising from~~

~~transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operation;~~ "Apportionable income" means:

(1) All income that is apportionable under the United States Constitution and is not allocated under the laws of this state, including:

(A) Income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

(B) Income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business; and

(2) Any income that would be allocable to this state under the United States Constitution, but that is apportioned rather than allocated pursuant to the laws of this state;

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed;

(c) "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services;

(d) ~~[Repealed.]~~ "Financial institution" means the same as defined in § 26-51-1402;

(e) "~~Nonbusiness~~ Nonapportionable income" means all income other than ~~business~~ apportionable income;

(f) ~~"Public utility" means any business entity (1) which owns or operates any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, except by pipeline, or the production, transmission, sale, delivery, or furnishing of electricity, water, or steam; and (2) whose rates of charges for goods or services have been established or approved by a federal, state, or local government or governmental agency;~~

~~(g) "Sales"~~ "Receipts" means all gross receipts of the taxpayer not allocated under paragraphs 4 through 8 of this article and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be excluded;

~~(h)~~ (g) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof;

~~(i)~~ (h) "This state" means ~~the state in which the relevant tax return is filed or, in the case of application of this article to the apportionment and allocation of income for local tax purposes, the subdivision or local taxing district in which the relevant tax return is filed~~ the State of Arkansas.

2. Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a ~~public utility~~ financial institution or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this article. ~~If a taxpayer has income from business activity as a public utility but derives the greater percentage of his income from activities subject to this article, the taxpayer may elect to allocate and apportion his entire net income as provided in this article.~~

3. For purposes of allocation and apportionment of income under this article, a taxpayer is taxable in another state if (1) in that state ~~he~~ the taxpayer is subject to a net income tax, a franchise tax measured by net income, ~~a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not~~ or any other tax measured by income or other measure of business activity in the state and the taxpayer files the requisite tax return in the other state, or (2) the state has no net income tax, franchise tax measured by net income, or any other tax measured by income or other measure of business activity in the state as provided in this section and the taxpayer has activities in the other state that exceed those protected by 15 U.S.C. §§ 381 — 384.

4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute ~~nonbusiness~~ nonapportionable income, shall be allocated as provided in paragraphs 5 through 8 of this article.

5.(a) Net rents and royalties from real property located in this state are allocable to this state.

(b) Net rents and royalties from tangible personal property are allocable to this state: (1) if and to the extent that the property is utilized in this state, or (2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

6.(a) Capital gains and losses from sales of real property located in this state are allocable to this state.

(b) Capital gains and losses from sales of tangible personal property are allocable to this state if (1) the property had a situs in this state at the time of the sale, or (2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

7. Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

8.(a) Patent and copyright royalties are allocable to this state: (1) if and to the extent that the patent or copyright is utilized by the payer in this state, or (2) if and to the extent that the patent copyright is utilized by the payer in the state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

9. All ~~business~~ apportionable income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus ~~double~~ two (2) times the ~~sales~~ receipts factor, and the denominator of which is four (4).

10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight (8) times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals.

12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period, but the tax administrator may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

13. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

14. Compensation is paid in this state if:

(a) The individual's service is performed entirely within

~~the~~ this state;

(b) The individual's service is performed both within and without ~~the~~ this state, but the service performed without ~~the~~ this state is incidental to the individual's service within ~~the~~ this state; or

(c) Some of the service is performed in ~~the~~ this state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in ~~the~~ this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

15. The ~~sales~~ receipts factor is a fraction, the numerator of which is the total ~~sales~~ receipts of the taxpayer in this state during the tax period, and the denominator of which is the total ~~sales~~ receipts of the taxpayer everywhere during the tax period.

16. ~~Sales~~ Receipts from the sale of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States Government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States Government or (2) the taxpayer is not taxable in the state of the purchaser.

17. ~~Sales, other than sales of tangible personal property, are in this state if:~~

~~(a) The income-producing activity is performed in this state; or~~

~~(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.~~

(a) Receipts, other than receipts described in subsection 16 of this section, are in this state if the taxpayer's market for the sales is in this state. The taxpayer's market for sales is in this state:

(1) In the case of sale, rental, lease, or license of real property, if and to the extent the property is located in this state;

(2) In the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in this state;

(3) In the case of sale of a service, if and to the extent the service is delivered to a location in this state; and

(4) In the case of intangible property:

(A) That is rented, leased, or licensed, if and to the extent the property is used in this state, provided that intangible property utilized in marketing a good or service to a consumer is used in this state if that good or service is purchased by a consumer who is in this state; and

(B) That is sold, if and to the extent the property is used in this state, provided that:

(i) A contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is used in this state if the geographic area includes all or part of this state;

(ii) Receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of such intangible property under subsection 17(a)(4)(B)(i) of this article; and

(iii) All other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the receipts factor.

(b) If the state or states of assignment under subsection 17(a) of this article cannot be determined, the state or states of assignment shall be reasonably approximated.

(c) If the taxpayer is not taxable in a state to which a receipt is assigned under subsection 17(a) or subsection 17(b) of this article, or if the state of assignment cannot be determined under subsection 17(a) of this article or reasonably approximated under subsection 17(b) of this article, such receipt shall be excluded from the denominator of the receipts factor.

(d) The Director of the Department of Finance and Administration may prescribe regulations as necessary or appropriate to carry out the purposes of this article.

18.(a) If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the ~~tax administrator~~ director may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

~~(a)~~ (1) Separate accounting;

~~(b)~~ (2) The exclusion of any one (1) or more of the factors;

~~(c)~~ (3) The inclusion of one (1) or more additional factors which will fairly represent the taxpayer's business activity in this state; or

~~(d)~~ (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(b)(1) If the allocation and apportionment provisions of this article do not fairly represent the extent of business activity in this state of taxpayers engaged in a particular industry or in a particular transaction or activity, the director may, in addition to the authority provided in subsection 18(a) of this article, establish appropriate rules or regulations for determining alternative allocation and apportionment methods for such taxpayers.

(2) A regulation adopted pursuant to this subsection 18(b) shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the director may require, adjustment pursuant to subsection 18(a) of this article.

(c) The party petitioning for, or the director requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer's income pursuant to subsection (a) of this article must prove:

(1) That the allocation and apportionment provisions of this article do not fairly represent the extent of the taxpayer's business activity in this state; and

(2) That the alternative to such provisions is reasonable.

(d) The same burden of proof shall apply whether the taxpayer is petitioning for, or the director is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income.

(e) Notwithstanding subsection 18(d) of this article, if the director demonstrates that in any two (2) of the prior five (5) tax years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for such other tax years, then the director shall not bear the burden of proof in imposing a different method pursuant to subsection 18(a) of this article.

(f) If the director requires a different method pursuant to subsection 18(a) of this article to effectuate an equitable allocation and apportionment of the taxpayer's income, the director may not impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer's reasonable reliance solely on the allocation and apportionment provisions of this article.

(g) A taxpayer that has received written permission from the director to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the director reasonably relied.

SECTION 2. Arkansas Code §§ 26-51-701 – 26-51-704 are amended to read as follows:

26-51-701. Definitions.

As used in this Act, unless the context otherwise requires:

(a) ~~"Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operation~~ "Apportionable income" means:

(1) All income that is apportionable under the United States Constitution and is not allocated under the laws of this state, including:

(A) income arising from transactions and activity in the regular course of the taxpayer's trade or business; and

(B) income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business; and

(2) Any income that would be allocable to this state under the United States Constitution, but that is apportioned rather than allocated pursuant to the laws of this state.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services.

(d) ~~[Repealed.]~~ "Financial institution" means the same as defined in § 26-51-1402.

(e) "~~Nonbusiness~~ Nonapportionable income" means all income other than ~~business~~ apportionable income.

(f) ~~"Public utility" means any business entity which owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, oil, oil products, or gas.~~

~~(g) "Sales"~~ "Receipts" means all gross receipts of the taxpayer not allocated under §§ 26-51-704 — 26-51-708 and that are received from transactions and activity in the regular course of the taxpayer's trade or business; except that receipts of a taxpayer from hedging transactions and from the maturity, redemption, sale, exchange, loan or other disposition of cash or securities shall be excluded.

~~(h)~~ (g) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

(h) "This state" means the State of Arkansas.

26-51-702. Apportionment of net income authorized.

Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a ~~public utility~~ financial institution or the rendering of purely personal services by an individual, shall allocate and apportion his net income as provided in this

Act.

26-51-703. Taxpayer taxable in another state.

For purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if (1) in that state the taxpayer is subject to a net income tax, a franchise tax measured by net income, or any other tax measured by income or other measure of business activity in the state and the taxpayer files the requisite tax return in the other state, or (2) the state has no net income tax, franchise tax measured by net income, or any other tax measured by income or other measure of business activity in the state as provided in subdivision (1) of this section and the taxpayer has activities in the other state that exceed those protected by 15 U.S.C. §§ 381 – ~~385~~ 384.

26-51-704. ~~Nonbusiness~~ Nonapportionable income.

Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute ~~nonbusiness~~ nonapportionable income, shall be allocated as provided in §§ 26-51-705 – 26-51-708.

SECTION 3. Arkansas Code § 26-51-709 is amended to read as follows:

26-51-709. ~~Business~~ Apportionable income.

All ~~business~~ apportionable income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus ~~double~~ two (2) times the ~~sales~~ receipts factor, and the denominator of which is four (4).

SECTION 4. Arkansas Code §§ 26-51-715 – 26-51-718 are amended to read as follows:

26-51-715. ~~Sales~~ Receipts factor.

The ~~sales~~ receipts factor is a fraction, the numerator of which is the total ~~sales~~ receipts of the taxpayer in this state during the tax period, and the denominator of which is the total ~~sales~~ receipts of the taxpayer everywhere during the tax period.

26-51-716. ~~Sales~~ Receipts from sales of tangible personal property.

~~Sales~~ Receipts from sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a purchaser, other than the United States ~~government~~ Government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States ~~government~~ Government or (2) the taxpayer is not taxable in the state of the purchaser.

26-51-717. ~~Sales — Income-producing activity~~ Receipts — Market for sales.

~~Sales, other than sales of tangible personal property, are in this state if:~~

~~(a) the income-producing activity is performed in this state; or~~

~~(b) the income-producing activity is performed both within and without the state, in which event the portion of income allocable to this state shall be the percentage that is used in the formula for allocating income to Arkansas during the year of the sale.~~

(a) Receipts, other than receipts of sales of tangible personal property, are in this state if the taxpayer's market for the sales is in this state. The taxpayer's market for sales is in this state:

(1) in the case of sale, rental, lease, or license of real property, if and to the extent the property is located in this state;

(2) in the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in this state;

(3) in the case of sale of a service, if and to the extent the service is delivered to a location in this state; and

(4) in the case of intangible property:

(A) that is rented, leased, or licensed, if and to the extent the property is used in this state, provided that intangible property utilized in marketing a good or service to a consumer is used in this state if that good or service is purchased by a consumer in this state; and

(B) that is sold, if and to the extent the property is used in this state, provided that:

(i) a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is used in this state if the geographic area includes all or part of this state;

(ii) receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of such intangible property under subdivision (a)(4)(B)(i) of this section; and

(iii) all other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the receipts factor.

(b) If the state or states of assignment under subsection (a) of this section cannot be determined, the state or states of assignment shall be reasonably approximated.

(c) If the taxpayer is not taxable in a state to which a receipt is assigned under subsection (a) or subsection (b) of this section, or if the state of assignment cannot be determined under subsection (a) of this section or reasonably approximated under subsection (b) of this section, such receipts shall be excluded from the denominator of the receipts factor.

(d) The Director of the Department of Finance and Administration may prescribe regulations as necessary or appropriate to carry out the purposes of this section.

26-51-718. Procedure when allocation does not fairly represent taxpayer’s business activity.

(a) If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer’s business activity in this state, the taxpayer may petition for or the Director of the Department of Finance and Administration may require, in respect to all or any part of the taxpayer’s business activity, if reasonable:

~~(a)~~ (1) separate accounting;

~~(b)~~ (2) the exclusion of any one (1) or more of the factors;

~~(c)~~ (3) the inclusion of one (1) or more additional factors which will fairly represent the taxpayer’s business activity in this state; or

~~(d)~~ (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer’s income.

(b)(1) If the allocation and apportionment provisions of this Act do not fairly represent the extent of business activity in this state of taxpayers engaged in a particular industry or in a particular transaction or activity, the director may, in addition to the authority provided in subsection (a) of this section, establish appropriate rules or regulations for determining alternative allocation and apportionment methods for such taxpayers.

(2) A regulation adopted pursuant to this section shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the director may require, adjustment pursuant to subsection (a) of this section.

(c) The party petitioning for, or the director requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer’s income pursuant to subsection (a) of this section must prove:

(1) that the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer’s business activity in this state; and

(2) that the alternative to such provisions is reasonable.

(d) The same burden of proof shall apply whether the taxpayer is petitioning for, or the director is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer’s income.

(e) Notwithstanding subsection (d) of this section, if the director demonstrates that in any two (2) of the prior five (5) tax years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for such other tax years, then the director shall not bear the burden of proof in imposing a different method pursuant to subsection (a) of this section.

(f) If the director requires a different method pursuant to subsection (a) of this section to effectuate an equitable allocation and apportionment of the taxpayer’s income, the director may not impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer’s reasonable reliance solely on the allocation and apportionment provisions of this act.

(g) A taxpayer who has received written permission from the director to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the director reasonably relied.

SECTION 5. Arkansas Code § 26-51-722 is repealed.

~~26-51-722. Effective date.~~

~~The provisions of this Act shall be applicable to all income earned or accrued in the income years, both calendar and fiscal, beginning on or after January 1, 1961.~~

SECTION 6. EFFECTIVE DATE. This Act is effective for tax years beginning on and after January 1, 2018.