

## New Mississippi Law Addresses Alternative Apportionment and Combined Reporting

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### Overview

Mississippi Governor Bryant recently signed into law House Bill 799 (H.B. 799),<sup>1</sup> which includes the following changes to Mississippi law (effective beginning January 1, 2015<sup>2</sup>):

- Requires both the taxpayer and the Mississippi Commissioner of Revenue (the "Commissioner") to satisfy a "preponderance of the evidence" standard in order to apply an alternative method of apportionment for income and franchise tax purposes.
- Requires the Commissioner to satisfy a "preponderance of the evidence" standard in order to require the filing of a combined corporate income tax return.
- Prohibits the Commissioner from requiring combined reporting until regulations are enacted specifying the criteria for meeting the preponderance of the evidence standard.

In this Tax Alert we summarize these and other related law changes.

### Use of Alternative Apportionment

In 2013 the Mississippi Supreme Court, in *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue*, upheld a Chancery Court ruling that affirmed the Commissioner's use of an alternative apportionment method that applied market-based sourcing principles to compute a consumer credit reporting company's sales factor.<sup>3</sup> The Supreme Court also concluded that the party petitioning the court for relief from this imposed apportionment method bears the burden of proof by "a preponderance of the evidence" to show that the method was improper.<sup>4</sup>

In response to *Equifax*, which placed the burden of proof on the taxpayer seeking relief from alternative apportionment asserted by the Commissioner, H.B. 799 amends the apportionment statutes to shift the burden of proof to the proponent of an alternative apportionment method. H.B. 799 adds a new provision specifying that if the allocation and apportionment provisions under the applicable statute or regulations do not fairly represent the taxpayer's<sup>5</sup> business activity in Mississippi, the taxpayer may request or the Commissioner may require the use of an alternative apportionment method.<sup>6</sup> The new law also adds that the party requesting or requiring, as applicable, an alternative method bears the burden of proving by a "preponderance of the evidence" in any administrative or judicial proceeding that:

- the standard apportionment methods set forth under statute or administrative regulations do not fairly represent the extent of the taxpayer's business activity in Mississippi, and
- the proposed alternative method more fairly represents that activity than any other reasonable method available.<sup>7</sup>

The new law specifies further that:

- The alternative apportionment provisions are intended to be invoked "only in limited and unique, nonrecurring circumstances where the standard apportionment provisions . . . produce unanticipated results that do not fairly represent the extent of the taxpayer's business activity in this state."<sup>8</sup>

<sup>1</sup> 2014 Miss. H.B. 799 (Apr. 10, 2014). A copy of the adopted law is accessible at: <http://billstatus.ls.state.ms.us/documents/2014/pdf/HB/0700-0799/HB0799SG.pdf>.

<sup>2</sup> H.B. 799, Sec. 20.

<sup>3</sup> *Equifax, Inc. and Equifax Credit Information Services, Inc. v. Mississippi Department of Revenue*, 125 So.3d 36, 46 (2013).

<sup>4</sup> *Equifax*, 125 So.3d at 43-44.

<sup>5</sup> Miss. Code Ann. § 27-7-23 applies to "foreign corporations and other organizations which have obtained a certificate of authority from the Secretary of State to do business, or corporations or organizations which are in fact doing business in Mississippi." See, Miss. Code Ann. § 27-7-23(c)(1).

<sup>6</sup> H.B. 799, Sec. 1, adding Miss. Code Ann. § 27-7-23(c)(2)(B).

<sup>7</sup> H.B. 799, Sec. 1, adding Miss. Code Ann. § 27-7-23(c)(2)(C).

<sup>8</sup> *Id.*

- The Commissioner is prohibited from assessing any penalties related to a deficiency arising from the required use of an alternative apportionment method unless the Commissioner establishes by a "preponderance of the evidence that the taxpayer's apportionment method was without reasonable basis or was not in accordance with existing statutes or regulations."<sup>9</sup>

## Combined Corporate Income Tax Returns

Prior to the January 1, 2015 effective date of H.B. 799, the Commissioner is authorized under Miss. Code Ann. § 27-7-37 to require combined reporting "if he believes" that either of the following factors exists:

- that the intercompany transactions of a corporation subject to Mississippi's corporate income tax that is affiliated with a corporation that is not subject to such tax "have resulted in the shifting of taxable income" to such non-taxable corporation; or
- that the intercompany transactions among affiliated corporations that are subject to Mississippi's corporate income tax "have resulted in the shifting of taxable income" between members of the affiliated group.<sup>10</sup>

Effective January 1, 2015, the new law deletes the phrase "if he believes" and substitutes in its place a preponderance of the evidence standard, thus requiring the Commissioner, as a prerequisite to requiring combined reporting, to "establish by a preponderance of the evidence" that either of the two factors discussed above exist.<sup>11</sup> The new law also prohibits the Commissioner from using its discretionary authority to mandate the filing of a combined return until administrative "regulations . . . have been enacted specifying the criteria and circumstances that form the basis for meeting the preponderance of the evidence standard."<sup>12</sup> Last, the new law prohibits the Commissioner from assessing any penalties related to a deficiency arising from its discretionary authority to mandate combined filing unless it establishes "by preponderance of the evidence that the taxpayer's filing method was without reasonable basis or the intercompany transactions at issue lacked any material nontax business purpose."<sup>13</sup>

## Additional Changes

In this Tax Alert we do not provide a comprehensive review of all H.B. 799 changes.<sup>14</sup> The new law makes various other law changes, including:

- Amends the commencement date of the period during which a taxpayer is required to respond to a notice of assessment to the date the Commissioner mails or hand delivers the notice. Prior to this amendment, the date of the notice served as the commencement date.
- Reduces the interest rate on tax assessments, estimated tax payments, and refunds from 1% to ½% per month. This change is phased in over a five-year period.

These additional changes are effective beginning January 1, 2015, and apply to individual taxes, corporate income and franchise taxes, and sales and use taxes.<sup>15</sup> Also, the new law changes several procedural provisions regarding the Board of Review and Board of Tax Appeals that also go into effect on January 1, 2015, and apply only to assessments, refund claims, and other issues that arise after that effective date.

## Contacts

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<sup>9</sup> H.B. 799, Sec. 1, adding Miss. Code Ann. § 27-7-23(c)(2)(D).

<sup>10</sup> Miss. Code Ann. § 27-7-37(2)(a).

<sup>11</sup> H.B. 799, Sec. 3, amending Miss. Code Ann. § 27-7-37(2)(a). The amendment appears in renumbered subsection (2)(a)(ii). Note that the taxpayer privilege of filing combined income tax returns in Mississippi continues to only be available for an affiliated group where all members are subject to income tax in Mississippi. Miss. Code Ann. § 27-7-37(2)(a)(i).

<sup>12</sup> H.B. 799, Sec. 3, adding Miss. Code Ann. § 27-7-37(2)(a)(iii).

<sup>13</sup> H.B. 799, Sec. 3, adding Miss. Code Ann. § 27-7-37(2)(a)(iv).

<sup>14</sup> For example, the alternative apportionment changes summarized on the first page of this Tax Alert apply to "Corporations and organizations" as described in Miss. Code Ann. § 27-7-23(c)(1). The new law also makes similar changes with respect to "financial institutions," which we do not address in this Tax Alert. See, H.B. 799, Sec. 2, adding Miss. Code Ann. § 27-7-24(4)(d), (5).

<sup>15</sup> H.B. 799, Sec. 4, amending Miss. Code Ann. § 27-7-53; H.B. 799, Sec. 5, amending Miss. Code Ann. § 27-7-51; H.B. 799, Sec. 14, amending Miss. Code Ann. § 27-65-39; H.B. 799, Sec. 7, amending Miss. Code Ann. § 27-7-327; H.B. 799, Sec. 6, amending Miss. Code Ann. § 27-7-315.

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