

141.202 Requirement of taxpayer engaged in a unitary business with one or more other corporations to file a combined report -- Administrative regulations -- Taxable years beginning on or after January 1, 2019.

- (1) This section shall apply to taxable years beginning on or after January 1, 2019.
- (2) As used in this section:
 - (a) "Combined group" means the group of all corporations whose income and apportionment factors are required to be taken into account as provided in subsection (3) of this section in determining the taxpayer's share of the net income or loss apportionable to this state. A combined group shall include only corporations, the voting stock of which is more than fifty percent (50%) owned, directly or indirectly, by a common owner or owners;
 - (b) "Corporation" has the same meaning as in KRS 141.010, including an organization of any kind treated as a corporation for tax purposes under KRS 141.040, wherever located, which if it were doing business in this state would be a taxpayer, and the business conducted by a pass-through entity which is directly or indirectly held by a corporation shall be considered the business of the corporation to the extent of the corporation's distributive share of the pass-through entity income, inclusive of guaranteed payments;
 - (c) "Doing business in a tax haven" means being engaged in activity sufficient for that tax haven jurisdiction to impose a tax under United States constitutional standards;
 - (d) 1. "Tax haven" means a jurisdiction that, during the taxable year has no or nominal effective tax on the relevant income and:
 - a. Has laws or practices that prevent effective exchange of information for tax purposes with other governments on taxpayers benefitting from the tax regime;
 - b. Has a tax regime which lacks transparency. A tax regime lacks transparency if the details of legislative, legal, or administrative provisions are not open and apparent or are not consistently applied among similarly situated taxpayers, or if the information needed by tax authorities to determine a taxpayer's correct tax liability, such as accounting records and underlying documentation, is not adequately available;
 - c. 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;
 - d. 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
 - e. 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.

2. "Tax haven" does not include a jurisdiction that has entered into a comprehensive income tax treaty with the United States, which the Secretary of the Treasury has determined is satisfactory for purposes of Section 1(h)(11)(C)(i)(II) of the Internal Revenue Code;
 - (e) "Taxpayer" means any corporation subject to the tax imposed under this chapter;
 - (f) "Unitary business" means a single economic enterprise that is made up either of separate parts of a single corporation or of a commonly controlled group of corporations that are sufficiently interdependent, integrated, and interrelated through their activities so as to provide a synergy and mutual benefit that produces a sharing or exchange of value among them and a significant flow of value to the separate parts. For purposes of this section, the term "unitary business" shall be broadly construed, to the extent permitted by the United States Constitution; and
 - (g) "United States" means the fifty (50) states of the United States, the District of Columbia, and United States' territories and possessions.
- (3) (a) Except as provided in KRS 141.201, a taxpayer engaged in a unitary business with one (1) or more other corporations shall file a combined report which includes the income, determined under subsection (5) of this section, and the apportionment fraction, determined under KRS 141.120 and paragraph (d) of this subsection, of all corporations that are members of the unitary business, and any other information as required by the department. The combined report shall be filed on a waters-edge basis under subsection (8) of this section.
 - (b) The department may, by administrative regulation, require that the combined report include the income and associated apportionment factors of any corporations that are not included as provided by paragraph (a) of this subsection, but that are members of a unitary business, in order to reflect proper apportionment of income of the entire unitary businesses. Authority to require combination by administrative regulation under this paragraph includes authority to require combination of corporations that are not, or would not be combined, if the corporation were doing business in this state.
 - (c) In addition, if the department determines that the reported income or loss of a taxpayer engaged in a unitary business with any corporation not included as provided by paragraph (a) of this subsection represents an avoidance or evasion of tax by the taxpayer, the department may, on a case-by-case basis, require all or any part of the income and associated apportionment factors of the corporation be included in the taxpayer's combined report.
 - (d) With respect to the inclusion of associated apportionment factors as provided in paragraph (a) of this subsection, the department may require the inclusion of any one (1) or more additional factors which will fairly represent the taxpayer's business activity in this state, or the employment of any other method to effectuate a proper reflection of the total amount of income subject to apportionment and an equitable allocation and apportionment of the

taxpayer's income.

- (e) A unitary business shall consider the combined gross receipts and combined income from all sources of all members under subsection (8) of this section, including eliminating entries for transactions among the members under subsection (8)(e) of this section.
 - (f) Notwithstanding paragraphs (a) to (e) of this subsection, a consolidated return may be filed as provided in KRS 141.201 if the taxpayer makes an election according to KRS 141.201.
- (4) The use of a combined report does not disregard the separate identities of the taxpayer members of the combined group. Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or allocated to this state, which shall include, in addition to the other types of income, the taxpayer member's share of apportionable income of the combined group, where apportionable income of the combined group is calculated as a summation of the individual net incomes of all members of the combined group. A member's net income is determined by removing all but apportionable income, expense, and loss from that member's total income as provided in subsection (5) of this section.
- (5) (a) Each taxpayer member is responsible for tax based on its taxable income or loss apportioned or allocated to this state, which shall include:
- 1. Its share of any income apportionable to this state of each of the combined groups of which it is a member, determined under subsection (6) of this section;
 - 2. Its share of any income apportionable to this state of a distinct business activity conducted within and without the state wholly by the taxpayer member, determined under KRS 141.120;
 - 3. Its income from a business conducted wholly by the taxpayer member entirely within the state;
 - 4. Its income sourced to this state from the sale or exchange of capital or assets, and from involuntary conversions, as determined under subsection (8)(g) of this section;
 - 5. Its nonapportionable income or loss allocable to this state, determined under KRS 141.120;
 - 6. Its income or loss allocated or apportioned in an earlier year, required to be taken into account as state source income during the income year, other than a net operating loss; and
 - 7. Its net operating loss carryover.
- (b) No tax credit or post-apportionment deduction earned by one (1) member of the group, but not fully used by or allowed to that member, may be used in whole or in part by another member of the group or applied in whole or in part against the total income of the combined group, except as provided in paragraph (c) of this subsection.
- (c) If the taxable income computed pursuant to KRS 141.039 results in a net loss for a taxpayer member of the combined group, that taxpayer member has a

Kentucky net operating loss, subject to the net operating loss limitations and carry forward provisions of KRS 141.011. No prior year net operating loss carryforward shall be available to entities that were not doing business in this state in the year in which the loss was incurred. A Kentucky net operating loss carryover incurred by a taxpayer member of a combined group shall be deducted from income or loss apportioned to this state pursuant to this section as follows:

1. For taxable years beginning on or after the first day of the initial taxable year for which a combined unitary tax return is required under this section, if the computation of a combined group's Kentucky net income before apportionment to this state results in a net operating loss, a taxpayer member of the group may carry over its share of the net operating loss as apportioned to this state, as calculated under this section and in accordance with KRS 141.120 or 141.121, and it shall be deductible from a taxpayer member's apportioned net income derived from the unitary business in a future tax year to the extent that the carryover and deduction is otherwise consistent with KRS 141.011;
2. Where a taxpayer member of a combined group has a Kentucky net operating loss carryover derived from a loss incurred by a combined group in a tax year beginning on or after the first day of the initial tax year for which a combined unitary tax return is required under this section, then the taxpayer member may share the net operating loss carryover with other taxpayer members of the combined group if the other taxpayer members were members of the combined group in the tax year that the loss was incurred. Any amount of net operating loss carryover that is deducted by another taxpayer member of the combined group shall reduce the amount of net operating loss carryover that may be carried over by the taxpayer member that originally incurred the loss;
3. Where a taxpayer member of a combined group has a net operating loss carryover derived from a loss incurred in a tax year prior to the initial tax year for which a combined unitary tax return is required under this section, the carryover shall remain available to be deducted by that taxpayer member and any other taxpayer members of the combined group, but in no case shall the deduction reduce any taxpayer member's Kentucky apportioned taxable income by more than fifty percent (50%) in any taxable year, other than the taxpayer member that originally incurred the net operating loss, in which case no limitation is provided except as provided by Section 172 of the Internal Revenue Code. Any net operating loss carryover that is not utilized in a particular taxable year shall be carried over by the taxpayer member that generated the loss and utilized in the future consistent with the limitations of this subparagraph; or
4. Where a taxpayer member of a combined group has a net operating loss carryover derived from a loss incurred in a tax year during which the

taxpayer member was not a taxpayer member of the combined group, the carryover shall remain available to be deducted by that taxpayer member or other taxpayer members, but in no case shall the deduction reduce any taxpayer member's Kentucky apportioned taxable income by more than fifty percent (50%) in any taxable year, other than the taxpayer member that originally incurred the net operating loss, in which case no limitation is provided except as provided by Section 172 of the Internal Revenue Code. Any net operating loss carryover that is not utilized in a particular taxable year, shall be carried over by the taxpayer member that generated the loss and utilized in the future consistent with the limitations of this subparagraph.

- (6) The taxpayer's share of the business income apportionable to this state of each combined group of which it is a member shall be the product of:
 - (a) The apportionable income of the combined group, determined under subsection (7) of this section; and
 - (b) The taxpayer member's apportionment fraction, determined under KRS 141.120, including in the sales factor numerator the taxpayer's sales associated with the combined group's unitary business in this state, and including in the denominator the sales of all members of the combined group, including the taxpayer, which sales are associated with the combined group's unitary business wherever located. The sales of a pass-through entity shall be included in the determination of the partner's apportionment percentage in proportion to a ratio, the numerator of which is the amount of the partner's distributive share of the pass-through entity's unitary income included in the income of the combined group as provided in subsection (8) of this section and the denominator of which is the amount of pass-through entity's total unitary income.
- (7) The apportionable income of a combined group is determined as follows:
 - (a) The total income of the combined group is the sum of the income of each member of the combined group determined under federal income tax laws, as adjusted for state purposes, as if the member were not consolidated for federal purposes; and
 - (b) From the total income of the combined group determined under subsection (8) of this section, subtract any income and add any expense or loss, other than the apportionable income, expense, or loss of the combined group.
- (8) To determine the total income of the combined group, taxpayer members shall take into account all or a portion of the income and apportionment factor of only the following members otherwise included in the combined group as provided in subsection (3) of this section:
 - (a) The entire income and apportionment percentage 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, that earns less than eighty percent (80%) of its income from sources outside of the United States, the District of Columbia, or any territory or possession of the United

States;

- (b) Any member that earns more than twenty percent (20%) of its income, directly or indirectly, from intangible property or service related activities that are deductible against the apportionable income of other members of the combined group, to the extent of that income and the apportionment factor related to that income. If a non-United States corporation is includible as a member in the combined group, to the extent that the non-United States corporation's income is excluded from United States taxation pursuant to the provisions of a comprehensive income tax treaty, the income or loss is not includible in the combined group's net income or loss. The member's expenses or apportionment factors attributable to income that is excluded from United States taxation pursuant to the provisions of a comprehensive income tax treaty are not to be included in the combined report;
- (c) The entire income and apportionment factor of any member that is doing business in a tax haven. 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 definition established in subsection (2)(d) of this section, the activity of the member shall be treated as not having been conducted in a tax haven;
- (d) If a unitary business includes income from a pass-through entity, the income to be included in the total income of the combined group shall be the member of the combined group's direct and indirect distributive share of the pass-through entity's unitary income;
- (e) Income from an intercompany transaction between members of the same combined group shall be deferred in a manner similar to 26 C.F.R. 1.1502-13. Upon the occurrence of any of the following events, deferred income resulting from an intercompany transaction between members of a combined group shall be restored to the income of the seller, and shall be apportionable income earned immediately before the event:
 - 1. The object of a deferred intercompany transaction is:
 - a. Resold by the buyer to an entity that is not a member of the combined group;
 - b. Resold by the buyer to an entity that is a member of the combined group for use outside the unitary business in which the buyer and seller are engaged; or
 - c. Converted by the buyer to a use outside the unitary business in which the buyer and seller are engaged; or
 - 2. The buyer and seller are no longer members of the same combined group, regardless of whether the members remain unitary;
- (f) A charitable expense incurred by a member of a combined group shall, to the extent allowable as a deduction provided by Section 170 of the Internal Revenue Code, be subtracted first from the apportionable income of the combined group, subject to the income limitations of that section applied to

the entire apportionable income of the group, and any remaining amount shall then be treated as a nonapportionable expense allocable to the member that incurred the expense, subject to the income limitations of that section applied to the nonapportionable income of that specific member. Any charitable deduction disallowed under this paragraph, but allowed as a carryover deduction in a subsequent year, shall be treated as originally incurred in the subsequent year by the same member, and this paragraph shall apply in the subsequent year in determining the allowable deduction in that year;

- (g) Gain or loss from the sale or exchange of capital assets, property described by Section 1231(a)(3) of the Internal Revenue Code, and property subject to an involuntary conversion shall be removed from the total separate net income of each member of a combined group and shall be apportioned and allocated as follows:
 - 1. For each class of gain or loss, including short-term capital, long-term capital, Internal Revenue Code Section 1231, and involuntary conversions, all members' gain and loss for the class shall be combined, without netting between the classes, and each class of net gain or loss separately apportioned to each member using the member's apportionment percentage determined under subsection (6) of this section;
 - 2. Each taxpayer member shall then net its apportioned business gain or loss for all classes, including any apportioned gain and loss from other combined groups, against the taxpayer member's nonapportionable gain and loss for all classes allocated to this state, using the rules of Sections 1231 and 1222 of the Internal Revenue Code, without regard to any of the taxpayer member's gains or losses from the sale or exchange of capital assets, Internal Revenue Code Section 1231 property, and involuntary conversions which are nonapportionable items allocated to another state;
 - 3. Any resulting state source income or loss, if the loss is not subject to the limitations of Section 1211 of the Internal Revenue Code, of a taxpayer member produced by the application of subparagraphs 1. and 2. of this paragraph shall then be applied to all other state source income or loss of that member; and
 - 4. Any resulting state source loss of a member that is subject to the limitations of Section 1211 of the Internal Revenue Code shall be carried forward by that member, and shall be treated as state source short-term capital loss incurred by that member for the year for which the carryover applies; and
 - (h) Any expense of one (1) member of the unitary group which is directly or indirectly attributable to the nonapportionable or exempt income of another member of the unitary group shall be allocated to that other member as corresponding nonapportionable or exempt expense, as appropriate.
- (9) (a) As a filing convenience, and without changing the respective liability of the

group members, members of a combined reporting group shall annually designate one (1) taxpayer member of the combined group to file a single return in the form and manner prescribed by the department, in lieu of filing their own respective returns.

- (b) The taxpayer member designated to file the single return shall consent to act as surety with respect to the tax liability of all other taxpayers properly included in the combined report, and shall agree to act as agent on behalf of those taxpayers for the taxable year for matters relating to the combined report. If for any reason the surety is unwilling or unable to perform its responsibilities, tax liability may be assessed against the taxpayer members.

Effective: April 15, 2020

History: Amended 2020 Ky. Acts ch. 91, sec. 12, effective April 15, 2020. -- Amended 2019 Ky. Acts ch. 196, sec. 5, effective June 27, 2019. -- Created 2018 Ky. Acts ch. 207, sec. 120, effective April 27, 2018.

Legislative Research Commission Note (4/15/2020). 2020 Ky. Acts ch. 91, sec. 76 provides that the changes made to this statute in Section 12 of that Act apply to taxable years beginning on or after January 1, 2019.

Legislative Research Commission Note (6/27/2019). This statute was amended in 2019 Ky. Acts ch. 151, sec. 48 (HB 354) and ch. 196, sec. 5 (HB 458). Although HB 354 was enacted, 2019 Ky. Acts ch. 196, sec. 16 (HB 458) repealed certain sections of that prior Act, including Section 48, and directed the Reviser of Statutes to not codify them. Therefore, the amendment to this statute in 2019 Ky. Acts ch. 151, sec. 48, was not codified.

Legislative Research Commission Note (4/27/2018). Pursuant to 2018 Ky. Acts ch. 207, sec. 154, the provisions created for this statute in that Act apply to taxable years beginning on or after January 1, 2019.