

1 SENATE CORPORATIONS AND TRANSPORTATION COMMITTEE SUBSTITUTE FOR
2 SENATE BILL 1

3 **53RD LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2017**
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10 AN ACT

11 RELATING TO TAXATION; REQUIRING COMBINED REPORTING FOR A
12 UNITARY GROUP; ALLOWING CORPORATIONS TO FILE A CONSOLIDATED
13 RETURN; ADDING AND AMENDING DEFINITIONS IN THE CORPORATE INCOME
14 AND FRANCHISE TAX ACT; REPEALING SECTION 7-2A-8.4 NMSA 1978
15 (BEING LAWS 1983, CHAPTER 213, SECTION 13, AS AMENDED).
16

17 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

18 SECTION 1. Section 7-2A-2 NMSA 1978 (being Laws 1986,
19 Chapter 20, Section 33, as amended) is amended to read:

20 "7-2A-2. DEFINITIONS.--For the purpose of the Corporate
21 Income and Franchise Tax Act and unless the context requires
22 otherwise:

23 ~~[A. "affiliated group" means that term as it is~~
24 ~~used in the Internal Revenue Code;~~

25 ~~B.]~~ A. "bank" means any national bank, national

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underscored material = new
[bracketed material] = delete

1 banking association, state bank or bank holding company;

2 ~~[G-]~~ B. "base income" means that part of the
3 taxpayer's income defined as taxable income and upon which the
4 federal income tax is calculated in the Internal Revenue Code
5 for income tax purposes, including interest received on a state
6 or local bond, plus [for taxable years beginning on or after
7 January 1, 1991] the amount of the net operating loss deduction
8 allowed by Section 172(a) of the Internal Revenue Code, as that
9 section may be amended or renumbered, and claimed by the
10 taxpayer for that year ["base income" also includes interest
11 received on a state or local bond], subject to the following
12 adjustments for a taxpayer that files a water's edge combined
13 return, a worldwide combined return or a consolidated return:

14 (1) exclusion of one hundred percent of a
15 dividend, net of direct expense, received or considered to be
16 received from a subsidiary that is a member of a unitary group,
17 if that subsidiary is organized or incorporated outside of the
18 United States and is not included in a water's edge combined
19 return or a consolidated return; provided that:

20 (a) the return factors include a portion
21 of the foreign subsidiary's factors equal to the lesser of one
22 hundred percent or a fraction that is the amount of dividend
23 received or considered received divided by the current year
24 earnings and profits of the foreign subsidiary, as determined
25 under the Internal Revenue Code or Section 7-2A-6 NMSA 1978;

1 and

2 (b) direct expense includes the portion
3 of interest that is equal to the fraction of the total average
4 investment in dividend-paying subsidiaries divided by the total
5 investment in assets;

6 (2) for taxpayers not filing a worldwide
7 combined return, exclusion of one hundred percent of the
8 adjusted income of a foreign operating company, as determined
9 under the Internal Revenue Code or Section 7-2A-6 NMSA 1978,
10 after elimination of transactions with members of the unitary
11 or consolidated group; provided that:

12 (a) the return factors include a portion
13 of the foreign operating company's factors equal to a fraction
14 that is the amount of income not excluded by this paragraph,
15 divided by the company's adjusted income;

16 (b) income generated from intangible
17 property or from a capital gain, dividend, interest, rent,
18 royalty or other similar item that is generated from an asset
19 held for investment and not from a regular business trading
20 activity is not excluded; and

21 (c) any amount adjusted pursuant to
22 Paragraph (1) of this subsection or this paragraph is not
23 excluded from the income of a foreign operating company; and

24 (3) exclusion of any deduction, other than for
25 premiums, for amounts paid directly or indirectly to a commonly

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1 controlled entity that is exempt from corporate income tax
2 pursuant to Section 7-2A-4 NMSA 1978;

3 C. "captive real estate investment trust" means a
4 corporation, trust or association taxed as a real estate
5 investment trust pursuant to Section 857 of the Internal
6 Revenue Code, the shares or beneficial interests of which are
7 not regularly traded on an established securities market;
8 provided that more than fifty percent of any class of
9 beneficial interests or shares of the real estate investment
10 trust are owned directly, indirectly or constructively by the
11 taxpayer during all or a part of the taxpayer's taxable year;

12 D. "common ownership" means the direct or indirect
13 control or ownership of more than fifty percent of the
14 outstanding voting stock, ownership of which shall be
15 determined pursuant to Section 1563 of the Internal Revenue
16 Code, of:

17 (1) a parent-subsidiary controlled group as
18 defined in Section 1563 of the Internal Revenue Code, except
19 that fifty percent shall be substituted for eighty percent;

20 (2) a brother-sister controlled group as
21 defined in Section 1563 of the Internal Revenue Code; or

22 (3) three or more corporations each of which
23 is a member of a group of corporations described in Paragraph
24 (1) or (2) of this subsection, and one of which is:

25 (a) a common parent corporation included

1 in a group of corporations described in Paragraph (1) of this
2 subsection; and

3 (b) included in a group of corporations
4 described in Paragraph (2) of this subsection;

5 ~~[D.]~~ E. "corporation" means corporations, joint
6 stock companies, real estate trusts organized and operated
7 under the Real Estate Trust Act, financial corporations and
8 banks, other business associations and, for corporate income
9 tax purposes, partnerships and limited liability companies
10 taxed as corporations under the Internal Revenue Code;

11 ~~[E.]~~ F. "department" means the taxation and revenue
12 department, the secretary of taxation and revenue or any
13 employee of the department exercising authority lawfully
14 delegated to that employee by the secretary;

15 ~~[F.]~~ G. "fiscal year" means any accounting period
16 of twelve months ending on the last day of any month other than
17 December;

18 H. "foreign operating company" means a corporation
19 if:

20 (1) the corporation is incorporated in the
21 United States;

22 (2) the corporation is not a corporation that
23 qualifies for the Puerto Rico and possession tax credit
24 pursuant to Section 936 of the Internal Revenue Code; and

25 (3) the corporation has eighty percent or more

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1 of its property, payroll and sales sourced to locations outside
2 the United States;

3 ~~[G.]~~ I. "Internal Revenue Code" means the United
4 States Internal Revenue Code of 1986, as amended;

5 ~~[H.]~~ J. "net income" means base income adjusted to
6 exclude:

7 (1) income from obligations of the
8 United States less expenses incurred to earn that income;

9 (2) other amounts that the state is prohibited
10 from taxing because of the laws or constitution of this state
11 or the United States;

12 (3) for taxable years that began prior to
13 January 1, 1991, an amount equal to the sum of:

14 (a) net operating loss carryback
15 deductions to that year from taxable years beginning prior to
16 January 1, 1991 claimed and allowed, as provided by the
17 Internal Revenue Code; and

18 (b) net operating loss carryover
19 deductions to that year claimed and allowed;

20 (4) for taxable years beginning on or after
21 January 1, 1991 and prior to January 1, 2013, an amount equal
22 to the sum of any net operating loss carryover deductions to
23 that year claimed and allowed; provided that the amount of any
24 net operating loss carryover from a taxable year beginning on
25 or after January 1, 1991 and prior to January 1, 2013 may be

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1 excluded only as follows:

2 (a) in the case of a timely filed
3 return, in the taxable year immediately following the taxable
4 year for which the return is filed; or

5 (b) in the case of amended returns or
6 original returns not timely filed, in the first taxable year
7 beginning after the date on which the return or amended return
8 establishing the net operating loss is filed; and

9 (c) in either case, if the net operating
10 loss carryover exceeds the amount of net income exclusive of
11 the net operating loss carryover for the taxable year to which
12 the exclusion first applies, in the next four succeeding
13 taxable years in turn until the net operating loss carryover is
14 exhausted for any net operating loss carryover from a taxable
15 year prior to January 1, 2013; in no event may a net operating
16 loss carryover from a taxable year beginning prior to January
17 1, 2013 be excluded in any taxable year after the fourth
18 taxable year beginning after the taxable year to which the
19 exclusion first applies; and

20 (5) for taxable years beginning on or after
21 January 1, 2013, an amount equal to the sum of any net
22 operating loss carryover deductions to that year claimed and
23 allowed; provided that the amount of any net operating loss
24 carryover may be excluded only as follows:

25 (a) in the case of a timely filed

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1 return, in the taxable year immediately following the taxable
2 year for which the return is filed; or

3 (b) in the case of amended returns or
4 original returns not timely filed, in the first taxable year
5 beginning after the date on which the return or amended return
6 establishing the net operating loss is filed; and

7 (c) in either case, if the net operating
8 loss carryover exceeds the amount of net income exclusive of
9 the net operating loss carryover for the taxable year to which
10 the exclusion first applies, in the next nineteen succeeding
11 taxable years in turn until the net operating loss carryover is
12 exhausted for any net operating loss carryover from a taxable
13 year beginning on or after January 1, 2013; in no event shall a
14 net operating loss carryover from a taxable year beginning: 1)
15 prior to January 1, 2013 be excluded in any taxable year after
16 the fourth taxable year beginning after the taxable year to
17 which the exclusion first applies; and 2) on or after
18 January 1, 2013 be excluded in any taxable year after the
19 nineteenth taxable year beginning after the taxable year to
20 which the exclusion first applies;

21 [~~I.~~] K. "net operating loss" means any net
22 operating loss, as defined by Section 172(c) of the Internal
23 Revenue Code, as that section may be amended or renumbered, for
24 a taxable year as further increased by the income, if any, from
25 obligations of the United States for that year less related

1 expenses;

2 ~~[J.]~~ L. "net operating loss carryover" means the
3 amount, or any portion of the amount, of a net operating loss
4 for any taxable year that, pursuant to Paragraph (3), (4) or
5 (5) of Subsection ~~[H]~~ J of this section, may be excluded from
6 base income;

7 ~~[K.]~~ M. "person" means any individual, estate,
8 trust, receiver, cooperative association, club, corporation,
9 company, firm, partnership, limited liability company, joint
10 venture, syndicate or other association; "person" also means,
11 to the extent permitted by law, any federal, state or other
12 governmental unit or subdivision or agency, department or
13 instrumentality thereof;

14 N. "real estate investment trust" has the meaning
15 ascribed to the term in Section 856 of the Internal Revenue
16 Code, as that section may be amended or renumbered;

17 O. "return" means any tax or information return,
18 including a water's edge or worldwide combined return, a
19 consolidated return, a declaration of estimated tax or a claim
20 for refund, including any amendments or supplements to the
21 return, required or permitted pursuant to a law subject to
22 administration and enforcement pursuant to the Tax
23 Administration Act and filed with the secretary or the
24 secretary's delegate by or on behalf of any person;

25 ~~[L.]~~ P. "secretary" means the secretary of taxation

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1 and revenue or the secretary's delegate;

2 [M.] Q. "state" means any state of the United
3 States, the District of Columbia, the commonwealth of Puerto
4 Rico, any territory or possession of the United States or
5 political subdivision thereof or any political subdivision of a
6 foreign country;

7 [N.] R. "state or local bond" means a bond issued
8 by a state other than New Mexico or by a local government other
9 than one of New Mexico's political subdivisions, the interest
10 from which is excluded from income for federal income tax
11 purposes under Section 103 of the Internal Revenue Code, as
12 that section may be amended or renumbered;

13 [O.] S. "taxable year" means the calendar year or
14 fiscal year upon the basis of which the net income is computed
15 under the Corporate Income and Franchise Tax Act and includes,
16 in the case of the return made for a fractional part of a year
17 under the provisions of that act, the period for which the
18 return is made;

19 [P.] T. "taxpayer" means any corporation subject to
20 the taxes imposed by the Corporate Income and Franchise Tax Act
21 or a group of corporations filing a return pursuant to Section
22 7-2A-8.3 NMSA 1978; [and

23 Q.] U. "unitary [~~corporations~~] group" means [~~two or~~
24 ~~more integrated corporations, other than any foreign~~
25 ~~corporation incorporated in a foreign country and not engaged~~

1 ~~in trade or business in the United States during the taxable~~
2 ~~year, that are owned in the amount of more than fifty percent~~
3 ~~and controlled by the same person and for which at least one of~~
4 ~~the following conditions exists:~~

5 ~~(1) there is a unity of operations evidenced~~
6 ~~by central purchasing, advertising, accounting or other~~
7 ~~centralized services;~~

8 ~~(2) there is a centralized management or~~
9 ~~executive force and centralized system of operation; or~~

10 ~~(3) the operations of the corporations are~~
11 ~~dependent upon or contribute property or services to one~~
12 ~~another individually or as] a group of corporations, including~~
13 ~~a captive real estate investment trust, but not including an S~~
14 ~~corporation, an insurance company subject to the provisions of~~
15 ~~the New Mexico Insurance Code, an insurance company that would~~
16 ~~be subject to the New Mexico Insurance Code if the insurance~~
17 ~~company engaged in business in this state or a real estate~~
18 ~~investment trust that is not a captive real estate investment~~
19 ~~trust, that:~~

20 ~~(1) are related through common ownership; and~~

21 ~~(2) by a preponderance of the evidence as~~
22 ~~determined by a court of competent jurisdiction or the~~
23 ~~department, are economically interdependent with one another as~~
24 ~~demonstrated by the following factors:~~

25 ~~(a) centralized management;~~

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1 (b) functional integration; and

2 (c) economies of scale;

3 V. "water's edge combined return" means a return
4 combining the income and activities of all members of a unitary
5 group, except members that are exempt from corporate income tax
6 pursuant to Section 7-2A-4 NMSA 1978, that are:

7 (1) corporations organized or incorporated in
8 the United States, including those corporations qualifying for
9 the Puerto Rico and possession tax credit pursuant to Section
10 936 of the Internal Revenue Code; and

11 (2) corporations organized or incorporated
12 outside of the United States if more than twenty percent of the
13 corporations' property, payroll and sales are sourced to
14 locations within the United States; and

15 W. "worldwide combined return" means a return
16 combining the income and activities of all members of a unitary
17 group, except members that are exempt from corporate income tax
18 pursuant to Section 7-2A-4 NMSA 1978, irrespective of the
19 country in which the corporations are incorporated or conduct
20 business activity."

21 SECTION 2. Section 7-2A-8.3 NMSA 1978 (being Laws 1983,
22 Chapter 213, Section 12, as amended) is amended to read:

23 "7-2A-8.3. COMBINED AND CONSOLIDATED RETURNS.--

24 A. A unitary [~~corporation~~] group that is subject to
25 taxation under the Corporate Income and Franchise Tax Act [~~and~~

1 ~~that has not previously filed a combined return pursuant to~~
2 ~~this section or a consolidated return pursuant to Section~~
3 ~~7-2A-8.4 NMSA 1978 may elect to file a combined return with~~
4 ~~other unitary corporations as though the entire combined net~~
5 ~~income were that of one corporation; provided, however, that~~
6 ~~for taxable years beginning on or after January 1, 2014, a~~
7 ~~unitary corporation that provides retail sales of goods in a~~
8 ~~facility of more than thirty thousand square feet under one~~
9 ~~roof in New Mexico shall file a combined return with other~~
10 ~~unitary corporations as though the entire combined net income~~
11 ~~were that of one corporation. The return filed under this~~
12 ~~method of reporting shall include the net income of all the~~
13 ~~unitary corporations. Transactions among the unitary~~
14 ~~corporations may be eliminated by applying the appropriate~~
15 ~~rules for reporting income for a consolidated federal income~~
16 ~~tax return. Any corporation that has filed an income tax~~
17 ~~return with New Mexico pursuant to Section 7-2A-8.4 NMSA 1978~~
18 ~~shall not file pursuant to this section unless the secretary~~
19 ~~gives prior permission to file on a combined return basis.~~

20 ~~B. Once corporations have reported net income~~
21 ~~through a combined return for any taxable year, they shall file~~
22 ~~combined returns for subsequent taxable years, so long as they~~
23 ~~remain unitary corporations, unless the corporations elect to~~
24 ~~file pursuant to Section 7-2A-8.4 NMSA 1978 or unless the~~
25 ~~secretary grants prior permission for one or more of the~~

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1 ~~corporations to file individually.~~

2 ~~C. For taxable years beginning on or after January~~
3 ~~1, 1993, no unitary corporation once included in a combined~~
4 ~~return may elect, or be granted permission by the secretary,~~
5 ~~for any subsequent taxable year to separately account pursuant~~
6 ~~to Paragraph (4) of Subsection A of Section 7-2A-8 NMSA 1978.~~

7 ~~D. Notwithstanding Subsection A of this section, a~~
8 ~~unitary corporation shall not be required to file a combined~~
9 ~~return pursuant to this section if that unitary corporation:~~

10 ~~(1) has operations in New Mexico at facilities~~
11 ~~that do not provide retail sales of goods; and~~

12 ~~(2) employs at least seven hundred fifty~~
13 ~~employees in New Mexico at such facilities] shall file a~~
14 ~~water's edge combined return, except if a unitary group elects~~
15 ~~to file a worldwide combined return.~~

16 B. If a unitary group files a worldwide combined
17 return, each corporation in the unitary group shall not elect
18 to file a return under any other method without prior
19 permission of the secretary.

20 C. A corporation that is subject to taxation under
21 the Corporate Income and Franchise Tax Act and that reports to
22 the internal revenue service for federal income tax purposes
23 its net income consolidated with the net income of one or more
24 other corporations may elect to report to New Mexico on the
25 same basis; provided that all other corporations that were

1 included in the report to the internal revenue service on a
2 consolidated basis consent to report to New Mexico on the same
3 basis.

4 D. Once a corporation has been included in a
5 consolidated return to New Mexico, the corporation shall not
6 elect to file a New Mexico return under any other method
7 without prior permission of the secretary, unless the change in
8 reporting method is required or allowed under the Internal
9 Revenue Code.

10 E. A group of corporations filing a water's edge or
11 worldwide combined return or a consolidated return shall
12 calculate the base income of the combined group by:

13 (1) computing base income on a separate return
14 basis;

15 (2) combining income or loss of the members
16 included in the return; and

17 (3) making appropriate eliminations and
18 adjustments between members included in the return.

19 F. If an entity does not calculate federal taxable
20 income, the base income shall be calculated based on the
21 applicable federal tax laws or Section 7-2A-6 NMSA 1978.

22 G. For purposes of apportionment under the Uniform
23 Division of Income for Tax Purposes Act:

24 (1) corporations filing a water's edge or
25 worldwide combined return or a consolidated return shall not

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1 include intercompany sales or other intercompany transactions
2 between the corporations included in the return in determining
3 the sales factor;

4 (2) corporations filing a water's edge or
5 worldwide combined return or a consolidated return shall not
6 include intercompany rents or other intercompany transactions
7 between the corporations included in the return in determining
8 the property factor; and

9 (3) the amounts of the numerators in this
10 state of the property, payroll and sales factors of an
11 out-of-state business, as defined in Section 7-1-83 NMSA 1978,
12 that are directly related to disaster- or emergency-related
13 work during a disaster period shall not be included in the
14 apportionment fraction of the group."

15 SECTION 3. REPEAL.--Section 7-2A-8.4 NMSA 1978 (being
16 Laws 1983, Chapter 213, Section 13, as amended) is repealed.

17 SECTION 4. APPLICABILITY.--The provisions of this act
18 apply to taxable years beginning on or after January 1, 2018.