

1 HB548
2 156459-1
3 By Representative Scott
4 RFD: Ways and Means Education
5 First Read: 26-FEB-14

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8 SYNOPSIS: Under existing law, the term nexus is used
9 to describe the amount and degree of business
10 activity that must be present before a state can
11 tax an entity's income. Multi-state taxpayers and
12 the Department of Revenue must make nexus
13 determinations regarding the taxpayer's corporate
14 income tax filing requirements.

15 Currently, there is nothing codified that
16 provides a "bright line" test when determining
17 nexus.

18 This bill would establish a factor presence
19 nexus standard for business activity for purposes
20 of income tax.

21 This bill would provide for the adoption of
22 the Multi-State Tax Commission standard for
23 determination of nexus.

24
25 A BILL
26 TO BE ENTITLED
27 AN ACT

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To add a new Section 40-18-31.2 to the Code of Alabama 1975, to establish a factor presence nexus standard for business activity for purposes of income tax.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Section 40-18-31.2 is added to the Code of Alabama 1975, to read as follows:

§40-18-31.2.

(a) (1) Individuals who are residents or domiciliaries of this state and business entities that are organized or commercially domiciled in this state have substantial nexus with this state.

(2) Nonresident individuals and business entities organized outside of the state that are doing business in this state have substantial nexus and are subject to the taxes provided for in Chapters 14A, 18, and 16 of this title, when in any tax period the property, payroll, or sales of the individual or business in the state, as they are defined in subsection (d), exceeds the thresholds set forth in subsection (b).

(b) Substantial nexus is established if any of the following thresholds are exceeded during the tax period:

(1) A dollar amount of fifty thousand dollars (\$50,000) of property.

(2) A dollar amount of fifty thousand dollars (\$50,000) of payroll.

1 (3) A dollar amount of five hundred thousand dollars
2 (\$500,000) of sales.

3 (4) Twenty-five percent of total property, total
4 payroll, or total sales.

5 (c) At the end of each year, the commissioner shall
6 review the cumulative percentage change in the consumer price
7 index. The commissioner shall adjust the thresholds set forth
8 in subsection (b) if the consumer price index has changed by
9 any of the following:

10 (1) Five percent or more since January 1, 2014, or
11 since the date that the thresholds were last adjusted under
12 this subsection. The thresholds shall be adjusted under this
13 subsection. The thresholds shall be adjusted to reflect that
14 cumulative percentage change in the consumer price index. The
15 adjusted thresholds shall be rounded to the nearest one
16 thousand dollars (\$1,000). As used in this subsection,
17 "consumer price index" means the Consumer Price Index for All
18 Urban Consumers (CPI-U) available from the Bureau of Labor
19 Statistics of the United States Department of Labor.

20 (2) Any adjustment shall apply to tax periods that
21 begin after the adjustment is made.

22 (d) Property, payroll, and sales are defined as
23 follows:

24 (1) Property counting toward the threshold is the
25 average value of the taxpayer's real property and tangible
26 personal property owned or rented and used in this state
27 during the tax period. Property owned by the taxpayer is

1 valued at its original cost basis. Property rented by the
2 taxpayer is valued at eight times the net annual rental rate.
3 Net annual rental rate is the annual rental rate paid by the
4 taxpayer less any annual rental rate received by the taxpayer
5 from sub-rentals. The average value of property shall be
6 determined by averaging the values at the beginning and ending
7 of the tax period; but the tax administrator may require the
8 averaging of monthly values during the tax period if
9 reasonably required to reflect properly the average value of
10 the taxpayer's property.

11 (2) Payroll counting toward the threshold is the
12 total amount paid by the taxpayer for compensation in this
13 state during the tax period. Compensation means wages,
14 salaries, commissions, and any other form of remuneration paid
15 to employees and defined as gross income under the Internal
16 Revenue Code §61. Compensation is paid in this state if:

17 a. The individual's service is performed entirely
18 within the state.

19 b. The individual's service is performed both within
20 and without the state, but the service performed without the
21 state is incidental to the individual's service within the
22 state.

23 c. Some of the service is performed in the state.

24 1. The base of operations or, if there is no base of
25 operations, the place from which the service is directed or
26 controlled is in the state.

1 2. The base of operations or the place from which
2 the service is directed or controlled is not in any state in
3 which some part of the service is performed, but the
4 individual's residence is in this state.

5 (3) Sales counting toward the threshold include the
6 total dollar value of the taxpayer's gross receipts, including
7 receipts from entities that are part of a commonly owned
8 enterprise as defined in subdivision (2) of subsection (e) of
9 which the taxpayer is a member, from:

10 a. The sale, lease, or license of real property
11 located in this state.

12 b. The lease or license of tangible personal
13 property located in this state.

14 c. The sale of tangible personal property received
15 in this state as indicated by receipt at a business location
16 of the seller in this state or by instructions, known to the
17 seller, for delivery or shipment to a purchaser, or to another
18 at the direction of the purchaser, in this state.

19 d. The sale, lease, or license of services,
20 intangibles, and digital products for primary use by a
21 purchaser known to the seller to be in this state. If the
22 seller knows that a service, intangible, or digital product
23 will be used in multiple states because of separate charges
24 levied for, or measured by, the use at different locations,
25 because of other contractual provisions measuring use, or
26 because of other information provided to the seller, the

1 seller shall apportion the receipts according to usage in each
2 state.

3 e. If the seller does not know where a service,
4 intangible, or digital product will be used or where a
5 tangible will be received, the receipts shall count toward the
6 threshold of the state indicated by an address for the
7 purchaser that is available from the business records of the
8 seller maintained in the ordinary course of business when such
9 use does not constitute bad faith. If that is not known, then
10 the receipts shall count toward the threshold of the state
11 indicated by an address for the purchaser that is obtained
12 during the consummation of the sale, including the address of
13 the purchaser's payment instrument, if no other address is
14 available, when the use of this address does not constitute
15 bad faith.

16 (4) Notwithstanding the other provisions of this
17 subsection, for a taxpayer subject to special apportionment
18 methods, the property, payroll, and sales for measuring
19 against the nexus thresholds shall be defined as they are for
20 apportionment purposes under those special apportionment
21 methods or regulations associated with that special
22 apportionment method. Financial institutions subject to an
23 apportioned income tax shall determine property, payroll, and
24 sales for nexus threshold purposes the same as for
25 apportionment purposes under Chapter 16 of this title.
26 Pass-through entities, including, but not limited to,
27 partnerships, limited liability companies, S corporations, and

1 trusts shall determine threshold amounts at the entity level.
2 If property, payroll, or sales of an entity in this state
3 exceeds the nexus threshold, members, partners, owners,
4 shareholders, or beneficiaries of that pass-through entity are
5 subject to tax on the portion of income earned in this state
6 and passed through to them.

7 (e) (1) Entities that are part of a commonly owned
8 enterprise shall determine whether they meet the threshold for
9 nexus as follows:

10 a. Commonly owned enterprises shall first aggregate
11 the property, payroll, and sales of their entities that have a
12 minimum presence in this state of five thousand dollars
13 (\$5,000) of combined property, payroll, and sales, including
14 those entities that independently exceed a threshold and
15 separately have nexus. The aggregate number shall be reduced
16 based on detailed disclosure of any intercompany transactions
17 where inclusion would result in one state double counting
18 assets or revenue. If that aggregation of property, payroll,
19 and sales meets any threshold in subsection (b), the
20 enterprise shall file a joint information return as specified
21 by the department separately listing the property, payroll,
22 and sales in this state of each entity.

23 b. Those entities of the commonly owned enterprise
24 that are listed in the joint information return and that are
25 also part of a unitary business grouping conducting business
26 in this state shall then aggregate the property, payroll, and
27 sales of each such unitary business grouping on the joint

1 information return. The aggregate number shall be reduced
2 based on detailed disclosure of any intercompany transactions
3 where inclusion would result in one state double counting
4 assets or revenue. The entities shall base the unitary
5 business groupings on the unitary combined report filed in
6 this state. If no unitary combined report is required in this
7 state, then the taxpayer shall use the unitary business
8 groupings the taxpayer most commonly reports in states that
9 require combined returns.

10 c. If the aggregate property, payroll, or sales in
11 this state of the entities of any unitary business of the
12 enterprise meets a threshold in subsection (b), then each
13 entity that is part of that unitary business is deemed to have
14 nexus and shall file and pay income tax as required by law.

15 (2) "Commonly owned enterprise" means a group of
16 entities under common control either through a common parent
17 that owns, or constructively owns, more than 50 percent of the
18 voting power of the outstanding stock or ownership interests
19 or through five or fewer individuals (individuals, estates, or
20 trusts) that own, or constructively own, more than 50 percent
21 of the voting power of the outstanding stock or ownership
22 interests taking into account the ownership interest of each
23 such person only to the extent such ownership is identical
24 with respect to each such entity.

25 (f) A state without jurisdiction to impose tax on or
26 measured by net income on a particular taxpayer because that
27 taxpayer comes within the protection of Public Law 86-272, 1

1 U.S.C. §381, does not gain jurisdiction to impose such a tax
2 even if the taxpayer's property, payroll, or sales in the
3 state exceeds a threshold in subsection (b). Public Law 86-272
4 preempts the state's authority to tax and will therefore cause
5 sales of each protected taxpayer to customers in the state to
6 be thrown back to those sending states that require throwback.
7 If Congress repeals the application of Public Law 86-272 to
8 this state, an out-of-state business shall not have
9 substantial nexus in this state unless its property, payroll,
10 or sales exceeds a threshold in this act.

11 Section 2. All laws or parts of laws which conflict
12 with this act are repealed.

13 Section 3. The provisions of this act are severable.
14 If any part of this act is declared invalid or
15 unconstitutional, that declaration shall not affect the part
16 which remains.

17 Section 4. This act shall become effective on the
18 first day of the third month following its passage and
19 approval by the Governor, or its otherwise becoming law.