

1 SB351  
2 128557-1  
3 By Senators Keahey, Sanders, Figures, Coleman and Fielding  
4 RFD: Commerce, Transportation, and Utilities  
5 First Read: 06-APR-11

SYNOPSIS:           This bill defines unitary business and  
requires taxpayers who are part of a unitary  
business to use a combined report to determine  
their Alabama taxable income.

A BILL  
TO BE ENTITLED  
AN ACT

To amend Section 40-18-1, Code of Alabama 1975, to  
provide for additional definitions, and Section 40-2A-17, Code  
of Alabama 1975, to require taxpayers who are part of a  
unitary business to use a combined report to determine their  
Alabama taxable income.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. Sections 40-18-1 and 40-2A-17, Code of  
Alabama 1975, are amended to read as follows:

"§40-18-1.

1           "For the purpose of this chapter, the following  
2 terms shall have the respective meanings ascribed by this  
3 section:

4           "(1) ADVANCED FOSSIL-BASED GENERATION. The  
5 production of electricity from fossil-based generation with  
6 the use of technology or efficiency improvements to control or  
7 reduce carbon emissions, including but not limited to,  
8 technologies described in 26 U.S.C. § 48A(f), as such  
9 provision existed on December 31, 2007.

10           "(2) ALTERNATIVE ENERGY RESOURCES. Coal gasification  
11 or liquefaction, nuclear, and advanced fossil-based  
12 generation.

13           "(3) BIOMASS. Animals and plants, and the waste,  
14 by-products, or derivatives of either, including, but not  
15 limited to, the materials described in 26 U.S.C. §§ 45(c)(2),  
16 45(c)(3), 45K(c)(3), or 48B(c)(4).

17           "(4) BUSINESS TRUST. Any entity which is a business  
18 trust for federal income tax purposes.

19           "(5) CAPTIVE REIT. Any REIT whose shares or  
20 certificates of beneficial interest are not regularly traded  
21 on an established securities market and are owned or  
22 controlled, at any time during the last half of the tax year,  
23 by an association taxable as a corporation that is not exempt  
24 from tax under 26 U.S.C. § 501(a), and is not any of the  
25 following: (i) a REIT; (ii) a listed Australian property trust  
26 (including any trust that a listed Australian property trust  
27 owns or controls, directly or indirectly, seventy-five percent

1 or more of the voting power or value of the beneficial  
2 interests or shares of such trust); or (iii) any qualified  
3 foreign entity. The term Captive REIT shall not include any  
4 REIT at least 50 percent of the shares of which (by vote or  
5 value) are owned or controlled, directly or indirectly, at any  
6 time during the last half of the tax year, by a financial  
7 institution, as such term is defined in Chapter 16. For  
8 purposes of this definition, own or control means to own or  
9 control directly, indirectly, beneficially, or constructively  
10 more than fifty percent (50%) of the voting power or value of  
11 an entity. The attribution rules of 26 U.S.C. § 318, as  
12 modified by 26 U.S.C. § 856(d)(5), apply in determining  
13 ownership and control.

14 "(6) CASH. Any legal tender, negotiable paper, or  
15 solvent credit.

16 "(7) COAL GASIFICATION OR LIQUEFACTION. Liquid or  
17 gaseous fuels which are produced from coal, including lignite  
18 and including but not limited to fuels described in 26 U.S.C.  
19 §§ 45(c)(7)(A)(i), 45K(c)(1)(C), 48A(c)(7), or 48B(c)(2) as to  
20 coal, as such provisions existed on December 31, 2007.

21 "(8) CORPORATION. The term includes associations,  
22 joint stock companies, and any other entity classified as an  
23 association taxable as a corporation for federal income tax  
24 purposes.

25 "(9) DISREGARDED ENTITY. Any entity which is  
26 disregarded for federal income tax purposes.

1           "(10) DOMESTIC. When applied to a corporation or  
2 subchapter K entity means created or organized under the laws  
3 of the State of Alabama.

4           "(11) FIDUCIARY. A guardian, trustee, executor,  
5 administrator, personal representative, receiver, conservator,  
6 or any person acting in any fiduciary capacity for any person.

7           "(12) FISCAL YEAR. An accounting period of 12-months  
8 ending on the last day of any month other than December.

9           "(13) FOREIGN. When applied to a corporation or a  
10 subchapter K entity means created or organized under a  
11 jurisdiction other than the State of Alabama.

12           "(14) GEOTHERMAL. Any geothermal reservoir in  
13 Alabama consisting of natural heat which is stored in rocks or  
14 in an aqueous liquid or vapor, whether or not under pressure.

15           "(15) HEAD OF FAMILY. As used in this chapter, the  
16 term head of family has the same meaning as the term head of  
17 household as defined in 26 U.S.C. §2(b).

18           "(16) HYDROPOWER PRODUCTION. The hydropower  
19 production of any hydroelectric dam or pumped hydro facility  
20 in Alabama, including, but not limited to, the hydropower  
21 production described in 26 U.S.C. § 45(c)(8), as such  
22 provision existed on December 31, 2007.

23           "(17) INTANGIBLE EXPENSES AND COSTS. Any expenses,  
24 losses, and costs for, related to, or in connection directly  
25 or indirectly with the acquisition, use, maintenance,  
26 management, ownership, sale, exchange, or disposition of  
27 intangible property to the extent such amounts are allowed as

1 deductions in determining taxable income before operating loss  
2 deduction and special deductions for the taxable year  
3 including, without limitation, expenses or losses related to  
4 or incurred in connection directly or indirectly with  
5 factoring transactions or discounting transactions, royalties,  
6 patents, technical and copyright licensing fees, and other  
7 similar expenses and costs. Intangible expenses and costs paid  
8 for the use of intangible property in this state are, to the  
9 recipient, income derived from sources within Alabama.

10 "(18) INTANGIBLE PROPERTY. Patents, patent  
11 applications, trade names, trademarks, service marks,  
12 franchises, know-how, formulas, designs, patterns, processes,  
13 formats, copyrights and similar types of intangible assets,  
14 choses in action, and accounts receivable.

15 "(19) INTEREST EXPENSES AND COSTS. Amounts directly  
16 or indirectly allowed as deductions under 26 U.S.C. §163 for  
17 purposes of determining taxable income under the Internal  
18 Revenue Code. Interest expenses and costs paid to a related  
19 member by a subchapter K entity or a corporation, to the  
20 extent apportioned to Alabama by the payor, are to the  
21 recipient related member income derived from sources within  
22 Alabama.

23 "(20) MUNICIPAL SOLID WASTE. The definition given in  
24 26 U.S.C. § 45(c) (6), if located in Alabama.

25 "(21) NONRESIDENT ESTATE. An estate other than a  
26 resident estate of this state.

1           "(22) NONRESIDENT TRUST. A trust other than a  
2       resident trust of this state.

3           "(23) NUCLEAR. Any nuclear facility the reactor  
4       design for which is approved after December 31, 1993, by the  
5       Nuclear Regulatory Commission, including, but not limited to,  
6       the facilities described in 26 U.S.C. § 45J(d), as such  
7       provision existed on December 31, 2007.

8           "(24) PAID. For the purpose of deductions and  
9       credits hereinafter provided for with respect to income tax  
10      means paid or accrued or paid or incurred, and the terms paid  
11      or accrued and paid or incurred shall be construed according  
12      to the method of accounting on the basis of which the net  
13      income is computed under this chapter.

14          "(25) PERSON. Any individual, trust, estate,  
15      corporation, association, disregarded entity, or subchapter K  
16      entity.

17          "(26) QUALIFIED FOREIGN ENTITY. An entity organized  
18      outside of the U.S. that is similar in operation and form to a  
19      U.S. REIT that is not a captive REIT, and shall take into  
20      account the entity's: (i) total real estate assets; (ii) tax  
21      transparency; (iii) actual distribution or required  
22      distribution of taxable income; and (iv) concentration of  
23      ownership.

24          "(27) REIT. A Real Estate Investment Trust having  
25      the meaning ascribed to that term in 26 U.S.C. §§856 to 858,  
26      inclusive.

1           "(28) RELATED ENTITY. A stockholder who is an  
2 individual, or a member of the stockholder's family enumerated  
3 in 26 U.S.C. §318, if the stockholder and the members of the  
4 stockholder's family own, directly, indirectly, beneficially,  
5 or constructively, in the aggregate, at least 50 percent of  
6 the value of the taxpayer's outstanding stock; a stockholder,  
7 or a stockholder's partnership, limited liability company,  
8 estate, trust or corporation, if the stockholder and the  
9 stockholder's partnerships, limited liability companies,  
10 estates, trusts, and corporations own directly, indirectly,  
11 beneficially, or constructively, in the aggregate, at least 50  
12 percent of the value of the taxpayer's outstanding stock; or a  
13 corporation, or a party related to the corporation in a manner  
14 that would require an attribution of stock from the  
15 corporation to the party or from the party to the corporation  
16 under the attribution rules of 26 U.S.C. §318, if the taxpayer  
17 owns, directly, indirectly, beneficially, or constructively,  
18 at least 50 percent of the value of the corporation's  
19 outstanding stock. The attribution rules of 26 U.S.C. §318  
20 shall apply for purposes of determining whether the ownership  
21 requirements of this subdivision have been met.

22           "(29) RELATED MEMBER. A person that, with respect to  
23 the taxpayer any time during the taxable year, is a related  
24 entity as defined in this section, a component member as  
25 defined in 26 U.S.C. §1563(b) of a controlled group of which  
26 the taxpayer is also a component, or is a person to or from



1       whom there is attribution of stock ownership in accordance  
2       with 26 U.S.C. §1563(e).

3               "(30) RENEWABLE ENERGY RESOURCES. Wind, biomass,  
4       black liquor, tidal or ocean current, geothermal, solar  
5       energy, small irrigation, municipal solid waste, and  
6       hydropower production, and such term also includes hydrogen  
7       when derived or produced from some other renewable energy  
8       resource.

9               "(31) REPORT FROM SOURCE. All individuals,  
10       corporations, associations, and partnerships, in whatever  
11       capacity acting, including lessees or mortgagors of real or  
12       personal property, fiduciaries, employers, and all other  
13       officers and employees of the state or of any municipal  
14       corporation or political subdivision of the state having  
15       control, receipt, custody, or payment of interest, rent,  
16       salaries, wages, premiums, annuities, compensation,  
17       remunerations, emoluments, barter income, or other fixed or  
18       determinable annual or periodical gains, profits, and income  
19       taxable under this chapter.

20               "(32) RESIDENT ESTATE. The estate of any person who  
21       was a resident of Alabama at the time of his or her death.

22               "(33) RESIDENT TRUST. A trust is a resident trust  
23       for a taxable year if it is a trust which meets both a. and  
24       b.:

25               "a. The trust is created by the will of a decedent  
26       who was an Alabama resident at death or by a person who was an

1 Alabama resident at the time such trust became irrevocable;  
2 and

3 "b. For more than seven months during such taxable  
4 year, a person, as defined in this section, who either resides  
5 in or is domiciled in Alabama is either a fiduciary of the  
6 trust or a beneficiary of the trust to whom distributions  
7 currently may be made.

8 "(34) SMALL IRRIGATION. An irrigation system canal  
9 or ditch in Alabama which does not include a dam or  
10 impoundment of water, including, but not limited to,  
11 facilities in Alabama described in 26 U.S.C. § 45(c)(5).

12 "(35) SUBCHAPTER K ENTITY. A partnership, including  
13 a limited partnership or limited liability partnership,  
14 limited liability company, or any other entity subject to  
15 subchapter K of the Internal Revenue Code, 26 U.S.C. §§701 to  
16 761, for federal income tax purposes, not including a single  
17 member limited liability company.

18 "(36) TAXABLE YEAR. The calendar year or the fiscal  
19 year ending during the calendar year upon the basis of which  
20 net income is computed, or a period of less than 12 months  
21 resulting from a change in accounting period as provided in  
22 Section 40-18-30.

23 "(37) TAXPAYER. Any person subject to a tax imposed  
24 by this chapter, or whose income is, in whole or in part,  
25 subject to a tax imposed by this chapter.

26 "(38) TRUST. Any entity which is a trust for federal  
27 income tax purposes.

1           "(39) UNITARY BUSINESS. A single economic enterprise  
2           that is made up either of separate parts of a single business  
3           entity or of a commonly controlled group of business entities  
4           that are sufficiently interdependent, integrated, and  
5           interrelated through their activities so as to provide a  
6           synergy and mutual benefit that produces a sharing or exchange  
7           of value among them and a significant flow of value to the  
8           separate parts. For Alabama income tax purposes, the term  
9           unitary business shall be interpreted broadly, limited only by  
10          the boundaries imposed by the U.S. Constitution.

11           "\$40-2A-17.

12           "For purposes of the tax imposed in Chapter 18 of  
13          this title, the following rules shall apply:

14           "(a) In any case of two or more organizations,  
15          trades, or businesses (whether or not affiliated within the  
16          meaning of 26 U.S.C. § 1504) owned or controlled directly or  
17          indirectly by the same interests, the Commissioner of the  
18          Alabama Department of Revenue may distribute, apportion, or  
19          allocate gross income, deductions, credits, or allowances, if  
20          the commissioner determines that such distribution,  
21          apportionment, or allocation is necessary in order to prevent  
22          evasion of Alabama income taxes or to clearly reflect the  
23          income of any such organization, trade, or business.

24           "(b) (1) When an Alabama taxpayer is part of a  
25          unitary business consisting of multiple business entities, the  
26          Commissioner of the Department of Revenue shall require the

1 taxpayer to use a combined report to determine its Alabama  
2 taxable income.

3 "(2) The combined report shall include all members  
4 of the unitary business doing business in the United States or  
5 commercially domiciled in a non-U.S. jurisdiction designated a  
6 tax haven by the Organization for Economic Cooperation and  
7 Development (OECD). Together these members shall be recognized  
8 as the taxpayer's combined group. In the combined report, the  
9 taxpayer shall calculate its Alabama taxable income by  
10 apportioning the combined group's income to Alabama using a  
11 formula that measures the taxpayer's Alabama source  
12 apportionment data relative to the combined group's  
13 apportionment data from all sources.

14 "(3) The commissioner shall promulgate regulations  
15 as necessary to provide details of the combined report  
16 calculations required by this subsection and as needed to  
17 further enforce these provisions.

18 "~~(b)~~ (c) Any transaction based upon tax planning  
19 advice, tax return preparation advice, or tax return  
20 preparation services with respect to which an improper  
21 contingent fee is directly or indirectly paid by the taxpayer  
22 shall be evidence of the evasion of Alabama income taxes.

23 "~~(c)~~ (d) Any paid tax return preparer or tax planner  
24 who provides to a taxpayer tax planning advice, tax return  
25 preparation advice, or tax return preparation services in  
26 consideration for an improper contingent fee shall be subject  
27 to a penalty as if such paid tax return preparer or tax

1 planner was subject to the penalties imposed by 26 U.S.C. §  
2 6701.

3 "~~(d)~~ (e) "Improper contingent fee" shall mean  
4 compensation received by a person or entity that is subject to  
5 the Code of Professional Conduct of the American Institute of  
6 Certified Public Accountants (or the applicable state version  
7 of such code) for tax planning advice or tax return advice or  
8 preparation that would be improper under the terms of the code  
9 rendered after December 31, 2001. With respect to any person  
10 or entity that renders tax planning advice, tax return advice,  
11 or tax return preparations, but is not a certified public  
12 accountant, an improper contingent fee shall be defined in  
13 regulations prescribed by the Alabama Department of Revenue on  
14 a basis consistent with the Code of Professional Conduct of  
15 the American Institute of Certified Public Accountants.

16 "~~(e)~~ (f) Subsections ~~(b)~~ (c), ~~(c)~~ (d), and ~~(d)~~ (e)  
17 shall not apply to any contingent fee contract executed prior  
18 to January 1, 2002.

19 "~~(f)~~ (g) The Commissioner of the Alabama Department  
20 of Revenue shall exercise such authority in a manner  
21 consistent with Act 2001-1088 and, to the extent applicable,  
22 26 U.S.C. § 482 and the rulings and regulations issued  
23 thereunder. The commissioner is authorized and directed to  
24 promulgate such additional regulations as are necessary to  
25 enforce the provisions of Act 2001-1088."

1                   Section 2. This act shall become effective on the  
2   first day of the third month following its passage and  
3   approval by the Governor, or its otherwise becoming law.