



Ohio Revised Code

Section 5733.042 Computing net income of member of affiliated group.

Effective: March 27, 2020

Legislation: House Bill 197 - 133rd General Assembly

(A) As used in this section:

(1) "Affiliated group" has the same meaning as in section 1504 of the Internal Revenue Code.

(2) "Asset value" means the adjusted basis of assets as determined in accordance with Subchapter O of the Internal Revenue Code and the Treasury Regulations thereunder.

(3) "Intangible expenses and costs" include expenses, losses, and costs for, related to, or in connection directly or indirectly with the direct or indirect acquisition of, the direct or indirect use of, the direct or indirect maintenance or management of, the direct or indirect ownership of, the direct or indirect sale of, the direct or indirect exchange of, or any other direct or indirect disposition of intangible property to the extent such amounts are allowed as deductions or costs in determining taxable income before operating loss deduction and special deductions for the taxable year under the Internal Revenue Code. Such expenses and costs include, but are not limited to, losses related to or incurred in connection directly or indirectly with factoring transactions, losses related to or incurred in connection directly or indirectly with discounting transactions, royalty, patent, technical, and copyright fees, licensing fees, and other similar expenses and costs.

(4) "Interest expenses and costs" include but are not limited to amounts directly or indirectly allowed as deductions under section 163 of the Internal Revenue Code for purposes of determining taxable income under the Internal Revenue Code.

(5) "Member" has the same meaning as in U.S. Treasury Regulation section 1.1502-1.

(6) "Related member" means a person that, with respect to the taxpayer during all or any portion of the taxable year, is a "related entity" as defined in division (I)(12)(c) of section 5733.04 of the Revised Code, is a component member as defined in section 1563(b) of the Internal Revenue Code, or is a person to or from whom there is attribution of stock ownership in accordance with section



1563(e) of the Internal Revenue Code except, for purposes of determining whether a person is a related member under this division, "twenty per cent" shall be substituted for "5 per cent" wherever "5 per cent" appears in section 1563(e) of the Internal Revenue Code.

(B) This section applies to all corporations for tax years 1999 and thereafter. For tax years prior to 1999, this section applies only to a corporation that has, or is a member of an affiliated group that has, or is a member of an affiliated group with another member that has, one or more of the following:

- (1) Gross sales, including sales to other members of the affiliated group, during the taxable year of at least fifty million dollars;
- (2) Total assets whose asset value at any time during the taxable year is at least twenty-five million dollars;
- (3) Taxable income before operating loss deduction and special deductions during the taxable year of at least five hundred thousand dollars.

(C) For purposes of computing its net income under division (I) of section 5733.04 of the Revised Code, the corporation shall add interest expenses and costs and intangible expenses and costs directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, one or more of the following related members:

- (1) Any related member whose activities, in any one state, are primarily limited to the maintenance and management of intangible investments or of the intangible investments of corporations, business trusts, or other entities registered as investment companies under the "Investment Company Act of 1940," 15 U.S.C. 80a-1 et seq., as amended, and the collection and distribution of the income from such investments or from tangible property physically located outside such state. For purposes of division (C)(1) of this section, "intangible investments" includes, without limitation, investments in stocks, bonds, notes, and other debt obligations, including debt obligations of related members, interests in partnerships, patents, patent applications, trademarks, trade names, and similar types of intangible assets.



(2) Any related member that is a personal holding company as defined in section 542 of the Internal Revenue Code without regard to the stock ownership requirements set forth in section 542(a)(2) of the Internal Revenue Code;

(3) Any related member that is not a corporation and is directly, indirectly, constructively, or beneficially owned in whole or in part by a personal holding company as defined in section 542 of the Internal Revenue Code without regard to the stock ownership requirements set forth in section 542(a)(2) of the Internal Revenue Code;

(4) Any related member that is a foreign personal holding company as defined in section 552 of the Internal Revenue Code;

(5) Any related member that is not a corporation and is directly, indirectly, constructively, or beneficially owned in whole or in part by a foreign personal holding company as defined in section 552 of the Internal Revenue Code;

(6) Any related member if that related member or another related member directly or indirectly paid, accrued, or incurred to, or in connection directly or indirectly with one or more direct or indirect transactions with, another related member any interest expenses and costs or intangible expenses and costs in an amount less than, equal to, or greater than such amounts received from the corporation. Division (C)(6) of this section applies only if, within a one-hundred-twenty-month period commencing three years prior to the beginning of the tax year, a related member directly or indirectly paid, accrued, or incurred such amounts or losses with respect to one or more direct or indirect transactions with an entity described in divisions (C)(1) to (5) of this section. A rebuttable presumption exists that a related member did so pay, accrue, or incur such amounts or losses with respect to one or more direct or indirect transactions with an entity described in divisions (C)(1) to (5) of this section. A corporation can rebut this presumption only with a preponderance of the evidence to the contrary.

(7) Any related member that, with respect to indebtedness directly or indirectly owed by the corporation to the related member, directly or indirectly charged or imposed on the corporation an excess interest rate. If the related member has charged or imposed on the corporation an excess interest rate, the adjustment required by division (C)(7) of this section with respect to such interest



expenses and costs directly or indirectly paid, accrued, or incurred to the related member in connection with such indebtedness does not include so much of such interest expenses and costs that the corporation would have directly or indirectly paid, accrued, or incurred if the related member had charged or imposed the highest possible interest rate that would not have been an excess interest rate. For purposes of division (C)(7) of this section, an excess interest rate is an annual rate that exceeds by more than three per cent the greater of the rate per annum prescribed by section 5703.47 of the Revised Code in effect at the time of the origination of the indebtedness, or the rate per annum prescribed by section 5703.47 of the Revised Code in effect at the time the corporation paid, accrued, or incurred the interest expense or cost to the related member.

(D)(1) In making the adjustment required by division (C) of this section, the corporation shall make the adjustment required by section 5733.057 of the Revised Code. The adjustments required by division (C) of this section are not required if either of the following applies:

(a) The corporation establishes by clear and convincing evidence that the adjustments are unreasonable.

(b) The corporation and the tax commissioner agree in writing to the application or use of alternative adjustments and computations to more properly reflect the base required to be determined in accordance with division (B) of section 5733.05 of the Revised Code. Nothing in division (D)(1)(b) of this section shall be construed to limit or negate the tax commissioner's authority to otherwise enter into agreements and compromises otherwise allowed by law.

(2) The adjustments required by divisions (C)(1) to (5) of this section do not apply to such portion of interest expenses and costs and intangible expenses and costs that the corporation can establish by the preponderance of the evidence meets both of the following:

(a) The related member during the same taxable year directly or indirectly paid, accrued, or incurred such portion to a person who is not a related member.

(b) The transaction giving rise to the interest expenses and costs or the intangible expenses and costs between the corporation and the related member did not have as a principal purpose the avoidance of any portion of the tax due under this chapter.



(3) The adjustments required by division (C)(6) of this section do not apply to such portion of interest expenses and costs and intangible expenses and costs that the corporation can establish by the preponderance of the evidence meets both of the following:

(a) The entity described in any of divisions (C)(1) to (6) of this section to whom the related member directly or indirectly paid, accrued, or incurred such portion, in turn during the same taxable year directly or indirectly paid, accrued or incurred such portion to a person who is not a related member, and

(b) The transaction or transactions giving rise to the interest expenses and costs or the intangible expenses and costs between the corporation, the related member, and the entity described in any of divisions (C)(1) to (5) of this section did not have as a principal purpose the avoidance of any portion of the tax due under this chapter.

(4) The adjustments required by division (C) of this section apply except to the extent that the increased tax, if any, attributable to such adjustments would have been avoided if both the corporation and the related member had been eligible to make and had timely made the election to combine in accordance with division (B) of section 5733.052 of the Revised Code.

(E) Except as otherwise provided in division (F) of this section, if, on the day that is one year after the day the corporation files its report, the corporation has not made the adjustment required by this section or has not fully paid the tax and interest, if any, imposed by this chapter and attributable to such adjustment, the corporation is subject to a penalty equal to twice the interest charged under division (A) of section 5733.26 of the Revised Code for the delinquent payment of such tax and interest. For the purpose of the computation of the penalty imposed by this division, such penalty shall be deemed to be part of the tax due on the dates prescribed by this chapter without regard to the one-year period set forth in this division. The penalty imposed by this division is not in lieu of but is in addition to all other penalties, other similar charges, and interest imposed by this chapter. The tax commissioner may waive, abate, modify, or refund, with interest, all or any portion of the penalty imposed by this division only if the corporation establishes beyond a reasonable doubt that both the failure to fully comply with this section and the failure to fully pay such tax and interest within one year after the date the corporation files its report were not in any part attributable to the avoidance of



any portion of the tax imposed by section 5733.06 of the Revised Code.

(F)(1) For purposes of this division, "tax differential" means the difference between the tax that is imposed by section 5733.06 of the Revised Code and that is attributable to the adjustment required by this section and the amount paid that is so attributable, prior to the day that is one year after the day the corporation files its report.

(2) The penalty imposed by division (E) of this section does not apply if the tax differential meets both of the following requirements:

(a) The tax differential is less than ten per cent of the tax imposed by section 5733.06 of the Revised Code; and

(b) The difference is less than fifty thousand dollars.

(3) Nothing in division (F) of this section shall be construed to waive, abate, or modify any other penalties, other similar charges, or interest imposed by other sections of this chapter.

(G) Nothing in this section shall require a corporation to add to its net income more than once any amount of interest expenses and costs or intangible expenses and costs that the corporation pays, accrues, or incurs to a related member described in division (C) of this section.