By Senator Rich

34-01239-11 20111764__

A bill to be entitled

An act relating to corporate income taxes; amending s. 220.13, F.S.; limiting deductions of certain intangible expenses, licensing fees, and management fees paid by a taxpayer to a related entity; creating exceptions to the limitations on deductions; requiring the adjustment of the income of a related entity under certain circumstances; limiting the number of times certain items may be added or subtracted from taxable income; specifying information relating to transactions with related entities which must be contained in a corporate income tax return; providing that the failure of a taxpayer to add certain amounts to a taxpayer's income or to provide complete information in a tax return is negligence for which a penalty may be imposed; authorizing the Department of Revenue to adopt rules; specifying the applicability of the act; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 220.13, Florida Statutes, is amended to read:

220.13 "Adjusted federal income" defined; transactions with related entities.—

(1) ADJUSTMENTS TO TAXABLE INCOME.—The term "adjusted federal income" means an amount equal to the taxpayer's taxable income as defined in subsection (2), or such taxable income of more than one taxpayer as provided in s. 220.131, for the

taxable year, adjusted as follows:

(a) *Additions.*—There shall be added to such taxable income:

1. The amount of any tax upon or measured by income, excluding taxes based on gross receipts or revenues, paid or accrued as a liability to the District of Columbia or any state of the United States which is deductible from gross income in the computation of taxable income for the taxable year.

2. The amount of interest which is excluded from taxable income under s. 103(a) of the Internal Revenue Code or any other federal law, less the associated expenses disallowed in the computation of taxable income under s. 265 of the Internal Revenue Code or any other law, excluding 60 percent of any amounts included in alternative minimum taxable income, as defined in s. 55(b)(2) of the Internal Revenue Code, if the taxpayer pays tax under s. 220.11(3).

3. In the case of a regulated investment company or real estate investment trust, an amount equal to the excess of the net long-term capital gain for the taxable year over the amount of the capital gain dividends attributable to the taxable year.

4. That portion of the wages or salaries paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.181. This subparagraph shall expire on the date specified in s. 290.016 for the expiration of the Florida Enterprise Zone Act.

5. That portion of the ad valorem school taxes paid or incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year under s. 220.182. This subparagraph shall expire on the date specified in s. 290.016 for the expiration of the Florida Enterprise Zone Act.

6. The amount of emergency excise tax paid or accrued as a liability to this state under chapter 221 which tax is deductible from gross income in the computation of taxable income for the taxable year.

7. That portion of assessments to fund a guaranty association incurred for the taxable year which is equal to the amount of the credit allowable for the taxable year.

8. In the case of a nonprofit corporation that ~~which~~ holds a pari-mutuel permit and ~~which~~ is exempt from federal income tax as a farmers' cooperative, an amount equal to the excess of the gross income attributable to the pari-mutuel operations over the attributable expenses for the taxable year.

9. The amount taken as a credit for the taxable year under s. 220.1895.

10. Up to nine percent of the eligible basis of any designated project which is equal to the credit allowable for the taxable year under s. 220.185.

11. The amount taken as a credit for the taxable year under s. 220.1875. The addition in this subparagraph is intended to ensure that the same amount is not allowed for the tax purposes of this state as both a deduction from income and a credit against the tax. This addition is not intended to result in adding the same expense back to income more than once.

12. The amount taken as a credit for the taxable year under s. 220.192.

13. The amount taken as a credit for the taxable year under s. 220.193.

14. Any portion of a qualified investment, as defined in s. 288.9913, which is claimed as a deduction by the taxpayer and

taken as a credit against income tax pursuant to s. 288.9916.

15. The costs to acquire a tax credit pursuant to s. 288.1254(5) which ~~that~~ are deducted from or otherwise reduce federal taxable income for the taxable year.

(b) *Subtractions.*—

1. There shall be subtracted from such taxable income:

a. The net operating loss deduction allowable for federal income tax purposes under s. 172 of the Internal Revenue Code for the taxable year,

b. The net capital loss allowable for federal income tax purposes under s. 1212 of the Internal Revenue Code for the taxable year,

c. The excess charitable contribution deduction allowable for federal income tax purposes under s. 170(d)(2) of the Internal Revenue Code for the taxable year, and

d. The excess contributions deductions allowable for federal income tax purposes under s. 404 of the Internal Revenue Code for the taxable year.

However, a net operating loss and a capital loss shall never be carried back as a deduction to a prior taxable year, but all deductions attributable to such losses shall be deemed net operating loss carryovers and capital loss carryovers, respectively, and treated in the same manner, to the same extent, and for the same time periods as are prescribed for such carryovers in ss. 172 and 1212, respectively, of the Internal Revenue Code.

2. There shall be subtracted from such taxable income any amount to the extent included therein the following:

a. Dividends treated as received from sources without the United States, as determined under s. 862 of the Internal Revenue Code.

b. All amounts included in taxable income under s. 78 or s. 951 of the Internal Revenue Code.

However, as to any amount subtracted under this subparagraph, there shall be added to such taxable income all expenses deducted on the taxpayer's return for the taxable year which are attributable, directly or indirectly, to such subtracted amount. Further, no amount shall be subtracted with respect to dividends paid or deemed paid by a Domestic International Sales Corporation.

3. In computing "adjusted federal income" for taxable years beginning after December 31, 1976, there shall be allowed as a deduction the amount of wages and salaries paid or incurred within this state for the taxable year for which no deduction is allowed pursuant to s. 280C(a) of the Internal Revenue Code (relating to credit for employment of certain new employees).

4. There shall be subtracted from such taxable income any amount of nonbusiness income included therein.

5. There shall be subtracted any amount of taxes of foreign countries allowable as credits for taxable years beginning on or after September 1, 1985, under s. 901 of the Internal Revenue Code to any corporation <u>that</u> ~~which~~ derived less than 20 percent of its gross income or loss for its taxable year ended in 1984 from sources within the United States, as described in s. 861(a)(2)(A) of the Internal Revenue Code, not including credits allowed under ss. 902 and 960 of the Internal Revenue Code,

withholding taxes on dividends within the meaning of sub-subparagraph 2.a., and withholding taxes on royalties, interest, technical service fees, and capital gains.

6. Notwithstanding any other provision of this code, except with respect to amounts subtracted pursuant to subparagraphs 1. and 3., any increment of any apportionment factor which is directly related to an increment of gross receipts or income which is deducted, subtracted, or otherwise excluded in determining adjusted federal income shall be excluded from both the numerator and denominator of such apportionment factor. Further, all valuations made for apportionment factor purposes shall be made on a basis consistent with the taxpayer's method of accounting for federal income tax purposes.

(c) *Installment sales occurring after October 19, 1980.*—

1. In the case of any disposition made after October 19, 1980, the income from an installment sale shall be taken into account for the purposes of this code in the same manner that such income is taken into account for federal income tax purposes.

2. Any taxpayer who regularly sells or otherwise disposes of personal property on the installment plan and reports the income therefrom on the installment method for federal income tax purposes under s. 453(a) of the Internal Revenue Code shall report such income in the same manner under this code.

(d) *Nonallowable deductions.*—A deduction for net operating losses, net capital losses, or excess contributions deductions under ss. 170(d)(2), 172, 1212, and 404 of the Internal Revenue Code which has been allowed in a prior taxable year for Florida tax purposes shall not be allowed for Florida tax purposes,

notwithstanding the fact that such deduction has not been fully utilized for federal tax purposes.

(e) *Adjustments related to the Federal Economic Stimulus Act of 2008 and the American Recovery and Reinvestment Act of 2009.*—Taxpayers shall be required to make the adjustments prescribed in this paragraph for Florida tax purposes in relation to certain tax benefits received pursuant to the Economic Stimulus Act of 2008 and the American Recovery and Reinvestment Act of 2009.

1. There shall be added to such taxable income an amount equal to 100 percent of any amount deducted for federal income tax purposes as bonus depreciation for the taxable year pursuant to ss. 167 and 168(k) of the Internal Revenue Code of 1986, as amended by s. 103 of Pub. L. No. 110-185 and s. 1201 of Pub. L. No. 111-5, for property placed in service after December 31, 2007, and before January 1, 2010. For the taxable year and for each of the 6 subsequent taxable years, there shall be subtracted from such taxable income an amount equal to one-seventh of the amount by which taxable income was increased pursuant to this subparagraph, notwithstanding any sale or other disposition of the property that is the subject of the adjustments and regardless of whether such property remains in service in the hands of the taxpayer.

2. There shall be added to such taxable income an amount equal to 100 percent of any amount in excess of $128,000 deducted for federal income tax purposes for the taxable year pursuant to s. 179 of the Internal Revenue Code of 1986, as amended by s. 102 of Pub. L. No. 110-185 and s. 1202 of Pub. L. No. 111-5, for taxable years beginning after December 31, 2007,

and before January 1, 2010. For the taxable year and for each of the 6 subsequent taxable years, there shall be subtracted from such taxable income one-seventh of the amount by which taxable income was increased pursuant to this subparagraph, notwithstanding any sale or other disposition of the property that is the subject of the adjustments and regardless of whether such property remains in service in the hands of the taxpayer.

3. There shall be added to such taxable income an amount equal to the amount of deferred income not included in such taxable income pursuant to s. 108(i)(1) of the Internal Revenue Code of 1986, as amended by s. 1231 of Pub. L. No. 111-5. There shall be subtracted from such taxable income an amount equal to the amount of deferred income included in such taxable income pursuant to s. 108(i)(1) of the Internal Revenue Code of 1986, as amended by s. 1231 of Pub. L. No. 111-5.

4. Subtractions available under this paragraph may be transferred to the surviving or acquiring entity following a merger or acquisition and used in the same manner and with the same limitations as specified by this paragraph.

5. The additions and subtractions specified in this paragraph are intended to adjust taxable income for Florida tax purposes, and, notwithstanding any other provision of this code, such additions and subtractions shall be permitted to change a taxpayer's net operating loss for Florida tax purposes.

(2) DEFINITIONS.—For purposes of this section, a taxpayer's taxable income for the taxable year means taxable income as defined in s. 63 of the Internal Revenue Code and properly reportable for federal income tax purposes for the taxable year, but subject to the limitations set forth in paragraph (1)(b)

with respect to the deductions provided by ss. 172 (relating to net operating losses), 170(d)(2) (relating to excess charitable contributions), 404(a)(1)(D) (relating to excess pension trust contributions), 404(a)(3)(A) and (B) (to the extent relating to excess stock bonus and profit-sharing trust contributions), and 1212 (relating to capital losses) of the Internal Revenue Code, except that, subject to the same limitations, the term:

(a) "Taxable income," in the case of a life insurance company subject to the tax imposed by s. 801 of the Internal Revenue Code, means life insurance company taxable income; however, for purposes of this code, the total of any amounts subject to tax under s. 815(a)(2) of the Internal Revenue Code pursuant to s. 801(c) of the Internal Revenue Code shall not exceed, cumulatively, the total of any amounts determined under s. 815(c)(2) of the Internal Revenue Code of 1954, as amended, from January 1, 1972, to December 31, 1983;

(b) "Taxable income," in the case of an insurance company subject to the tax imposed by s. 831(b) of the Internal Revenue Code, means taxable investment income;

(c) "Taxable income," in the case of an insurance company subject to the tax imposed by s. 831(a) of the Internal Revenue Code, means insurance company taxable income;

(d) "Taxable income," in the case of a regulated investment company subject to the tax imposed by s. 852 of the Internal Revenue Code, means investment company taxable income;

(e) "Taxable income," in the case of a real estate investment trust subject to the tax imposed by s. 857 of the Internal Revenue Code, means the income subject to tax, computed as provided in s. 857 of the Internal Revenue Code;

(f) "Taxable income," in the case of a corporation that ~~which~~ is a member of an affiliated group of corporations filing a consolidated income tax return for the taxable year for federal income tax purposes, means taxable income of such corporation for federal income tax purposes as if such corporation had filed a separate federal income tax return for the taxable year and each preceding taxable year for which it was a member of an affiliated group, unless a consolidated return for the taxpayer and others is required or elected under s. 220.131;

(g) "Taxable income," in the case of a cooperative corporation or association, means the taxable income of such organization determined in accordance with the provisions of ss. 1381-1388 of the Internal Revenue Code;

(h) "Taxable income," in the case of an organization that ~~which~~ is exempt from the federal income tax by reason of s. 501(a) of the Internal Revenue Code, means its unrelated business taxable income as determined under s. 512 of the Internal Revenue Code;

(i) "Taxable income," in the case of a corporation for which there is in effect for the taxable year an election under s. 1362(a) of the Internal Revenue Code, means the amounts subject to tax under s. 1374 or s. 1375 of the Internal Revenue Code for each taxable year;

(j) "Taxable income," in the case of a limited liability company, other than a limited liability company classified as a partnership for federal income tax purposes, as defined in and organized pursuant to chapter 608 or qualified to do business in this state as a foreign limited liability company or other than

a similar limited liability company classified as a partnership for federal income tax purposes and created as an artificial entity pursuant to the statutes of the United States or any other state, territory, possession, or jurisdiction, if such limited liability company or similar entity is taxable as a corporation for federal income tax purposes, means taxable income determined as if such limited liability company were required to file or had filed a federal corporate income tax return under the Internal Revenue Code;

(k) "Taxable income," in the case of a taxpayer liable for the alternative minimum tax as defined in s. 55 of the Internal Revenue Code, means the alternative minimum taxable income as defined in s. 55(b)(2) of the Internal Revenue Code, less the exemption amount computed under s. 55(d) of the Internal Revenue Code. A taxpayer is not liable for the alternative minimum tax unless the taxpayer's federal tax return, or related federal consolidated tax return, if included in a consolidated return for federal tax purposes, reflect a liability on the return filed for the alternative minimum tax as defined in s. 55(b)(2) of the Internal Revenue Code;

(l) "Taxable income," in the case of a taxpayer whose taxable income is not otherwise defined in this subsection, means the sum of amounts to which a tax rate specified in s. 11 of the Internal Revenue Code plus the amount to which a tax rate specified in s. 1201(a)(2) of the Internal Revenue Code are applied for federal income tax purposes.

(3) LIMITATIONS ON DEDUCTIONS OF INTANGIBLE EXPENSES AND FEES WITH A RELATED ENTITY.—

(a) *Definitions.*—As used in this subsection, the term:

1. "Intangible expenses" means the following amounts to the extent that these amounts are allowed as deductions in determining federal taxable income under the Internal Revenue Code before the application of any net operating loss deduction and special deductions for the taxable year:

a. Expenses, losses, and costs directly or indirectly for, related to, or in association with the acquisition, use, maintenance, management, ownership, sale, exchange, or other disposition of intangible property;

b. Royalty, patent, technical, trademark, and copyright fees;

c. Licensing fees; or

d. Other substantially similar expenses and costs, including, but not limited to, interest and losses from factoring transactions.

2. "Intangible property" means patents, patent applications, trade names, trademarks, service marks, copyrights, trade secrets, and substantially similar types of intangible assets.

3. "Interest expenses" means amounts that are allowed as deductions under s. 163 of the Internal Revenue Code in determining federal taxable income before the application of any net operating loss deductions and special deductions for the taxable year.

4. "Management fees" means expenses and costs paid for services, including, but not limited to, management overhead, management supervision, accounts receivable and payable, employee benefit plans, insurance, legal, payroll, data processing, purchasing, tax, financial and securities, billing,

accounting, reporting and compliance, or similar services, only to the extent that the amounts are allowed as a deduction, cost, or expense in determining taxable net income under the Internal Revenue Code before the application of any net operating loss deduction and special deductions for the taxable year.

5. "Recipient" means a related entity that is paid an item of income that corresponds to an intangible expense, interest expense, or management fee.

6. "Related entity" means an artificial entity that would be a member of the taxpayer's affiliated group under s. 1504 of the Internal Revenue Code during all or any portion of the taxable year using an ownership percentage of 50 percent instead of 80 percent. The term includes any entity, other than a natural person, which would be included in the affiliated group based upon a 50 percent ownership percentage if the entity was organized as a corporation.

(b) *Additions.*—Except as provided in paragraph (c), in determining its adjusted federal income under this section and s. 220.131, a corporation subject to tax shall add to its taxable income:

1. Intangible expenses;

2. Interest expenses; and

3. Management fees,

paid, accrued, or incurred directly or indirectly with a related entity. For income received from a pass-through entity or a disregarded entity, the corporation is deemed to have received its share of the income and the expenses of the pass-through entity or disregarded entity for purposes of this subsection.

(c) *Special exceptions.*—Except as provided in paragraph (d), the addition of intangible expenses, interest expenses, or management fees otherwise required in a taxable year under this subsection for a specific transaction with a related entity is not required if one of the following apply:

1. The taxpayer and the recipient are included in the same Florida consolidated tax return filed under s. 220.131 for the taxable year.

2. The taxpayer and the executive director or his or her designee agree in writing to alternative computations or adjustments. The executive director or his or her designee may enter into such an agreement only if the taxpayer has clearly established to the satisfaction of the executive director or his or her designee that the addition is unreasonable and that the proposed alternative method of determining the measure of the tax accurately reflects the activity, business, income, and capital of the taxpayers within this state. The agreement must be signed by the executive director or his or her designee. The term of the agreement may not exceed 4 years.

3. The taxpayer makes a disclosure on its return and establishes all of the following by clear and convincing evidence:

a. The recipient was subject to an income tax or franchise tax measured in whole or part by net income in its state or country of commercial domicile, or in the state of commercial domicile in which an intangible is required by contract to be held, and

(I) The tax base for the income or franchise tax included the intangible expense, management fee, or interest expense

paid, accrued, or incurred by the taxpayer;

(II) The aggregate effective tax rate applied was at least 5.5 percent;

(III) If the recipient is a foreign corporation, the foreign nation has a comprehensive income tax treaty with the United States; and

(IV) The recipient did not receive a credit, exemption, or exclusion for the net income from its intangible income, management fee income, or interest income, or the credit, exemption, or exclusion received was 75 percent or less of the net income.

b. The transaction did not have Florida tax avoidance as a principle purpose.

c. The recipient regularly engages in the same types of transactions with third parties.

d. The transaction was made at a commercially reasonable rate and at arms-length terms similar to those with third parties.

4. The taxpayer makes a disclosure on its return and establishes all of the following by clear and convincing evidence:

a. The related entity, during the same taxable year, directly or indirectly incurred and paid the amount of the intangible expense, interest expense, and management fee to a person or entity that is not a related entity.

b. The transaction was done for a valid business purpose.

c. The payments were limited to reimbursement of the amounts paid to a person or entity that is not a related entity.

d. The unrelated person or entity regularly engages in the

same types of transactions with third parties on a substantial basis.

(d) *Limitation on special exceptions.*—The exceptions described in subparagraphs (c)3. and (c)4. do not apply to:

1. Interest paid by a taxpayer in connection with a debt incurred to acquire the taxpayer's or a related entity's assets or stock in a transaction referenced in s. 368 of the Internal Revenue Code. For purposes of this subparagraph, acquisition interest paid by a taxpayer to a person or entity that is not a related entity is deemed to be made to a related entity.

2. Intangible property acquired directly or indirectly from the taxpayer or from a related entity.

3. Those instances in which the related entity is primarily engaged in managing, acquiring, or maintaining intangible property or related-party financing and a primary purpose of the transaction was the avoidance of Florida tax.

4. Those instances in which the taxpayer files with the related entity or the related entity files with another related entity an income tax return or report and the return or report is due because of the imposition of a tax on or measured by income or the income tax return or report results in the elimination of the tax effects from transactions directly or indirectly between the taxpayer and the related member.

(e) *Adjustment to the taxable income of a related entity.*—To the extent that a taxpayer is required to make an adjustment under paragraph (b) or paragraph (c) for a specific related entity transaction, the corresponding related entity must make a corresponding subtraction to its taxable income if the income of the related entity is subject to tax in this state.

(f) *Adjustment of net operating loss carryover.*—The amount of a taxpayer's net operating loss carryover from tax years ending before December 31, 2011, to a tax year ending on or after December 31, 2011, must be adjusted to account for the addition of intangible expenses, interest expenses, and management fees under this subsection. However, this calculation may not increase the amount of a net operating loss carryover.

(g) *Limitation on additions to income.*—This subsection does not require a taxpayer to add to its Florida taxable income more than once any amount of interest expenses, intangible expenses, or management fees that the taxpayer pays, accrues, or incurs to a related entity.

(h) *Limitations on subtractions to income.*—This subsection does not allow any item to be subtracted from adjusted federal income more than once a subtraction for any item that is excluded from income, or any item to be included in the adjusted federal income of more than one taxpayer.

(i) *Authority to make adjustments.*—This subsection does not limit or negate the authority of the executive director to make adjustments under s. 220.131(2), s. 220.44, or s. 220.152.

(j) *Required information for a return.*—Each taxpayer shall provide the following information to the department along with its tax return regarding each related entity transaction:

1. The name of the recipient;

2. The state or country of domicile of the recipient;

3. The amount paid to the recipient; and

4. A complete description of the payment made to the recipient.

(k) *Negligence.*—The failure of a taxpayer to add to its

income an amount paid directly or indirectly to a related party or to provide complete information along with the tax return is evidence of negligence within the meaning of s. 220.803(1).

(l) *Rulemaking.*—The department may adopt rules and forms necessary to administer this subsection, including, but not limited to, forms and rules for reporting transactions with related entities.

Section 2. This act shall take effect upon becoming a law, and applies to tax years ending on or after December 31, 2011.