AN ALERT FROM THE BDO STATE AND LOCAL TAX PRACTICE

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SUBJECT

MICHIGAN CORPORATE INCOME TAX: NEW LAW ALLOWS A TAXPAYER TO ELECT TO INCLUDE NON-UNITARY, CONTROLLED ENTITIES IN A COMBINED GROUP

SUMMARY

On January 2, 2014, Michigan Gov. Rick Snyder signed into law Senate Bill 367,[1] which allows a corporate taxpayer to make an irrevocable election to include all more-than-50-percent owned, non-unitary corporations, financial institutions, and insurance companies in a Corporate Income Tax combined return.

DETAILS

Prior to the enactment of this legislation, the members of a combined return were limited to more than 50-percent-owned corporations, financial institutions, and insurance companies with a unitary relationship, *i.e.*, those entities among which business activities or operations resulted in a flow of value or entities with business activities or operations that were integrated or were dependent upon or contributed to each other.[2] Thus, the new law essentially eliminates the unitary relationship requirement for those taxpayers that make an election.

The new law applies to taxable years beginning after December 31, 2012, and the election must be made with a timely-filed return. However, once made, the combined group waives any objection to treatment as a unitary combined group and the election is binding for the current and nine succeeding taxable years. In addition, the election continues even if the federal consolidated group to which

[1] S.B. 367, 97th Leg., Reg. Sess. (Mich. 2013).
[2] *See* Mich. Comp. Laws §§ 206.611(6) and 206.623(3).

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the Michigan filing group belongs discontinues or if the common parent changes due to an acquisition by a related person. In the event that the election is not timely renewed after the expiration of the ten-year election period, a new election is not permitted in any of the immediately following three taxable years.

BDO INSIGHTS

The new law could provide an opportunity to a Michigan taxpayer to include the losses of companies that were previously prohibited from participating in a combined return. Moreover, inclusion of previously prohibited combined return participants may result in apportionment factor dilution and a corresponding reduction in tax. Due to the ten-year commitment, however, care should be exercised to confirm that any anticipated losses or factor dilution would continue for a period of time so as to justify making the election.

Another consideration to keep in mind is that, by making the election, a taxpayer is voluntarily relinquishing its right to argue that the activities of the Michigan filing group are non-unitary under the United States Constitution. Accordingly, it is unclear whether the Michigan Department of Treasury could use the election to prevent the taxpayer from making a non-unitary assertion related to an item of income received by a member of the Michigan filing group. In addition, the election continues even if the federal consolidated group discontinues, which could occur in the case of an acquisition by an unrelated corporation. While also unclear, this provision would seem to indicate that such an acquirer would be bound by the election that a “target” corporation made prior to the acquisition.