

By: Representative Smith

To: Ways and Means

HOUSE BILL NO. 1690

1 AN ACT TO PROVIDE FOR THE METHOD OF APPORTIONMENT OF INCOME  
2 FOR INCOME TAX PURPOSES OF CERTAIN QUALIFIED FREIGHT FORWARDERS  
3 THAT ARE AFFILIATES OF AIRLINES; TO AMEND SECTION 27-7-23,  
4 MISSISSIPPI CODE OF 1972, IN CONFORMITY THERETO; AND FOR RELATED  
5 PURPOSES.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MISSISSIPPI:

7 **SECTION 1.** The following shall be codified as Section  
8 27-7-24.9, Mississippi Code of 1972:

9 27-7-24.9 For purposes of the income tax imposed by this  
10 chapter, a qualified freight forwarder whose business activity is  
11 taxable both within and without this state shall allocate and  
12 apportion its net business income (income which is includable in  
13 the apportionable tax base) to this state in the same manner as  
14 that for an airline as prescribed by regulations enacted by the  
15 commissioner. For the purposes of this section, the term  
16 "qualified freight forwarder" means a corporation that is an  
17 affiliate of an airline and derives more than seventy percent  
18 (70%) of its annual freight forwarding service business revenue  
19 from the airline.



20           **SECTION 2.** Section 27-7-23, Mississippi Code of 1972, is  
21 amended as follows:

22           27-7-23. (a) **Definitions.**

23                   (1) "Doing business" means the operation of any  
24 business enterprise or activity in Mississippi for financial  
25 profit or economic gain, including, but not limited to, the  
26 following:

27                           (A) The regular maintenance of an office or other  
28 place of business in Mississippi; or

29                           (B) The regular maintenance in Mississippi of an  
30 inventory of merchandise or material for sale, distribution or  
31 manufacture, regardless of whether kept on the premises of the  
32 taxpayer or otherwise; or

33                           (C) The selling or distributing of merchandise to  
34 customers in Mississippi directly from a company-owned or operated  
35 vehicle when title to the merchandise is transferred from the  
36 seller or distributor to the customer at the time of the sale or  
37 distribution (transient selling); or

38                           (D) The regular rendering of service to clients or  
39 customers in Mississippi in person or by agents or employees; or

40                           (E) The owning, renting or operating of business  
41 or income-producing property, real or personal, in Mississippi; or

42                           (F) The performing of contracts, prime or sublet  
43 work, for the construction, repair or renovation of real or  
44 personal property.



45           (2) "Business income" means income of any type or  
46 class, and from any activity that meets the relationship described  
47 in the transactional test or the functional test described in this  
48 paragraph (2). The classification of income by occasionally used  
49 labels, including, but not limited to, manufacturing income,  
50 compensation for services, sales income interest, dividends,  
51 rents, royalties, gains, operating income, and nonoperating income  
52 shall not be considered when determining whether income is  
53 business or nonbusiness income. All income of the taxpayer is  
54 business income unless clearly classifiable as nonbusiness income.  
55 A taxpayer seeking to overcome a classification of income as  
56 business income must establish by a preponderance of the evidence  
57 that the income has been incorrectly classified.

58           (A) Transactional test. Business income includes  
59 income arising from transactions and activity in the regular  
60 course of the taxpayer's trade or business.

61           (i) If the transaction or activity is in the  
62 regular course of the taxpayer's trade or business, part of which  
63 trade or business is conducted within Mississippi, the resulting  
64 income of the transaction or activity is business income for  
65 Mississippi. Income may be business income even though the actual  
66 transaction or activity that gives rise to the income does not  
67 occur in Mississippi.

68           (ii) For a transaction or activity to be in  
69 the regular course of the taxpayer's trade or business, the



70 transactions or activity need not be one that frequently occurs in  
71 the trade or business, although most frequently occurring  
72 transactions or activities shall be considered to be in the  
73 regular course of a trade or business. It is sufficient to  
74 classify a transaction or activity as being in the regular course  
75 of a trade or business if it is reasonable to conclude  
76 transactions of that type are customary in the kind of trade or  
77 business being conducted or are within the scope of what the trade  
78 or business does.

79 (B) Functional test. Business income includes  
80 income from tangible and intangible property if the acquisition,  
81 management and/or disposition of the property constitute integral  
82 parts of the taxpayer's regular trade or business operation.

83 (i) Under the functional test, business  
84 income need not be derived from transactions or activities that  
85 are in the regular course of the taxpayer's own particular trade  
86 or business. It shall be sufficient if the property from which  
87 the income is derived is or was an integral, functional, necessary  
88 or operative component of the taxpayer's trade or business  
89 operations, part of which trade or business is or was conducted  
90 within this state.

91 (ii) Income that is derived from isolated  
92 sales, leases, assignments, licenses and other infrequently  
93 occurring dispositions, transfers or transactions involving  
94 property, including transactions made in liquidation or the



95 winding up of business is business income if the property is or  
96 was used in the taxpayer's trade or business operation. Income  
97 from the licensing of intangible assets, such as patents,  
98 copyrights, trademarks, service marks, goodwill, know-how, trade  
99 secrets and similar assets, that were developed or acquired for  
100 use by the taxpayer in his trade or business operations,  
101 constitute business income whether the licensing itself  
102 constituted the operation of a trade or business and whether the  
103 taxpayer remains in the same trade or business from or for which  
104 the intangible asset was developed or acquired.

105 (iii) Under the functional test, income from  
106 intangible property is business income when the intangible  
107 property serves an operating function, as opposed to solely an  
108 investment function. The relevant inquiry shall focus on whether  
109 the property is or was held in furtherance of the taxpayer's trade  
110 or business, that is, on the objective characteristics of the  
111 intangible property's use or acquisition and its relation to the  
112 taxpayer and the taxpayer's activities. The functional test is  
113 not satisfied where the holding of the property is limited solely  
114 to an investment function as in the case where the holding of the  
115 property is limited to mere financial betterment of the taxpayer  
116 in general.

117 (iv) If the property is or was held in  
118 furtherance of the taxpayer's trade or business beyond mere  
119 financial betterment, then income from the property may be



120 business income even though the actual transaction or activity  
121 involving the property that gives rise to the income does not  
122 occur in Mississippi.

123 (v) If, with respect to an item of property,  
124 a taxpayer takes a deduction from business income that is  
125 apportioned to Mississippi, or includes that item of property in  
126 the property factor, it is presumed that the item of property is  
127 or was integral to the taxpayer's trade or business operations.  
128 No presumption arises from the absence of any of this action.

129 (vi) Application of the functional test is  
130 generally unaffected by the form of the property. Income arising  
131 from intangible property is business income when the intangible  
132 property itself or the underlying value of the intangible property  
133 is or was an integral, functional, necessary or operative  
134 component to the taxpayer's trade or business operation.  
135 Therefore, while treatment of income derived from transactions  
136 involving intangible property as business income may be supported  
137 by a finding that the issuer of the intangible property and the  
138 taxpayer are engaged in the same trade or business, establishment  
139 of such a relationship is not the exclusive basis for concluding  
140 that the income constitutes business income. It is sufficient to  
141 support a finding of business income if the holding of the  
142 intangible property served an operational rather than an  
143 investment function.



144           (3) "Nonbusiness income" means all income that does not  
145 meet the definition of business income.

146           (4) "Commercial domicile" means the principal place  
147 from which the trade or business of the taxpayer is directed or  
148 managed.

149           (5) "State" means any state of the United States, the  
150 District of Columbia, the Commonwealth of Puerto Rico, any  
151 territory or possession of the United States, and any foreign  
152 country or political subdivision thereof.

153           (b) **Nonresident individuals, partnerships, trusts and**  
154 **estates.**

155           (1) The tax imposed by this article shall apply to the  
156 entire net income of a taxable nonresident derived from  
157 employment, trade, business, professional, personal service or  
158 other activity for financial gain or profit, performed or carried  
159 on within Mississippi, including the rental of real or personal  
160 property located within this state or for use herein and including  
161 the sale or exchange or other disposition of tangible or  
162 intangible property having a situs in Mississippi.

163           (2) Income derived from trade, business or other  
164 commercial activity shall be taxed to the extent that it is  
165 derived from such activity within this state. Mississippi net  
166 income shall be determined in the manner prescribed by the  
167 commissioner for the allocation and/or apportionment of income of



168 foreign corporations having income from sources both within and  
169 without the state.

170 (3) A taxable nonresident shall be allowed to deduct  
171 expenses, interest, taxes, losses, bad debts, depreciation and  
172 similar business expenses only to the extent that they are  
173 allowable under this article and are attributable to the  
174 production of income allocable to and taxable by the State of  
175 Mississippi. As to allowable deductions essentially personal in  
176 nature, such as contributions to charitable organizations, medical  
177 expenses, taxes, interest and the optional standard deduction,  
178 such taxable nonresident shall be allowed deductions therefor in  
179 the ratio that the net income from sources within Mississippi  
180 bears to the total net income from all sources of such taxable  
181 nonresident, computed as if such taxable nonresident was a  
182 resident of Mississippi.

183 (c) **Foreign corporations, associations, organizations and**  
184 **other entities.**

185 (1) Corporations and organizations required to file.  
186 All foreign corporations and other organizations which have  
187 obtained a certificate of authority from the Secretary of State to  
188 do business in Mississippi, or corporations or organizations which  
189 are in fact doing business in Mississippi, are subject to the  
190 income tax levy and are required to file annual income tax returns  
191 unless the corporation or organization is specifically exempt from  
192 tax by this article.





193 (2) Allocation and apportionment of income.

194 (A) Except as provided in Sections 27-7-24,  
195 27-7-24.1, 27-7-24.3, 27-7-24.5, 27-7-24.7 \* \* \*, 27-7-24.8 and  
196 27-7-24.9, Mississippi Code of 1972, any corporation or  
197 organization having business income from business activity which  
198 is taxable both within and without this state shall allocate and  
199 apportion its net business income as prescribed by regulations  
200 enacted by the commissioner. If the business income of the  
201 corporation is derived solely from property owned or business done  
202 in this state and the corporation is not taxable in another state,  
203 the entire business income shall be allocated to this state. A  
204 corporation is taxable in another state if, in that state the  
205 corporation is subject to a net income tax, or a franchise tax  
206 measured by net income, or if that state has jurisdiction to  
207 subject the corporation to a net income tax regardless of whether  
208 the state does or does not subject the corporation to a net income  
209 tax.

210 (B) If the allocation and apportionment provisions  
211 of this section or regulations enacted by the commissioner do not  
212 fairly represent the extent of the taxpayer's business activity in  
213 this state, the taxpayer may petition for, or the commissioner may  
214 require, in respect to all or any part of the taxpayer's business  
215 activity, if reasonable:

216 (i) Separate accounting;



217 (ii) The exclusion of any one or more of the  
218 factors;

219 (iii) The inclusion of one or more additional  
220 factors which will fairly represent the taxpayer's business  
221 activity in this state; or

222 (iv) The employment of any other method to  
223 effectuate an equitable allocation and apportionment of the  
224 taxpayer's income.

225 (C) In any instance in which a taxpayer requests  
226 or the commissioner requires the use of any of the alternative  
227 apportionment methods in subparagraph (B) of this paragraph, the  
228 party requesting or requiring the method shall bear the burden of  
229 proving by preponderance of the evidence in any administrative or  
230 judicial proceeding that the methods set forth in this section or  
231 the commissioner's regulations do not fairly represent the extent  
232 of the taxpayer's business activity in this state and that the  
233 proposed method more fairly represents that activity than any  
234 other reasonable method available. The alternative apportionment  
235 authority specified in this subparagraph (D) is intended to be  
236 invoked only in limited and unique, nonrecurring circumstances  
237 where the standard apportionment provisions contained in the  
238 statutes and regulations produce unanticipated results that do not  
239 fairly represent the extent of the taxpayer's business activity in  
240 this state.



241 (D) The commissioner shall be prohibited from  
242 assessing any penalties related to a deficiency arising from  
243 requiring the use of an alternative apportionment method under  
244 subparagraph (B) of this paragraph unless the commissioner shall  
245 establish by preponderance of the evidence that the taxpayer's  
246 method was without reasonable basis or was not in accordance with  
247 existing statutes or regulations.

248 (3) Nonbusiness income. Rents and royalties from real  
249 or tangible personal property, capital gains, interest, dividends,  
250 or patent or copyright royalties, to the extent that they  
251 constitute nonbusiness income, shall be allocated as follows:

252 (A) Net rents and royalties from real property are  
253 allocable to the state in which the property is located.

254 (B) Net rents and royalties from tangible personal  
255 property are allocable to the state in which the property is used,  
256 or to this state in their entirety if the corporation's commercial  
257 domicile is in this state and the corporation is not organized  
258 under the laws of or taxable in the state in which the property is  
259 utilized.

260 (C) Capital gains and losses from sales of real  
261 property are allocable to the state in which the property is  
262 located.

263 (D) Capital gains and losses from sales of  
264 tangible personal property are allocable to the state in which the  
265 property is located, or to this state if the corporation's



266 commercial domicile is in this state and the corporation is not  
267 taxable in the state in which the property had a situs.

268 (E) Capital gains and losses from sales of  
269 intangible personal property are allocable to the state of the  
270 corporation's commercial domicile.

271 (F) Interest and dividends are allocable to the  
272 state of the corporation's commercial domicile.

273 (G) Patent and copyright royalties are allocable  
274 to the state in which the patent or copyright is utilized by the  
275 payer, or to this state if and to the extent that the patent or  
276 copyright is utilized by the payer in a state in which the  
277 corporation is not taxable and the corporation's commercial  
278 domicile is in this state.

279 (H) Any other nonbusiness income shall be  
280 allocated as prescribed by the commissioner.

281 (I) All expenses connected with earning  
282 nonbusiness income, such as interest, taxes, general and  
283 administrative expenses and such other expenses relating to the  
284 production of nonbusiness income, shall be deducted from gross  
285 nonbusiness income. Nonbusiness interest expense shall be  
286 computed by using the ratio of nonbusiness assets to total assets  
287 applied to total interest expense.

288 (d) **Foreign lenders.**

289 (1) In the case of any foreign lender, (corporation,  
290 association, organization, individual, partnership, trusts or



291 estates), other than: (A) a foreign insurance company subject to  
292 certification by the Commissioner of Insurance, as provided by  
293 Section 83-21-1 et seq.; or (B) a foreign lender qualified under  
294 the general laws of this state to do business herein; or (C) a  
295 foreign lender which maintains an office or place of business  
296 within this state; or (D) lenders that sold properties in this  
297 state and financed such sale and reported on the installment  
298 method, interest income received or accrued on or after January 1,  
299 1977, from loans secured by real estate or from lending on the  
300 security of real estate located within this state shall be  
301 excluded from Mississippi gross income and exempt from the  
302 Mississippi income tax levy and the reporting requirements.

303 (2) In the case of any foreign lender exempted in  
304 paragraph (1) of this subsection, interest income received on any  
305 loan finalized or consummated after January 1, 1977, shall be  
306 excluded from Mississippi gross income and the net profits derived  
307 therefrom shall be exempt from the Mississippi income tax levy for  
308 the life of such loan.

309 (e) **Insurance companies.** Insurance companies, other than  
310 life insurance companies, deriving premium income from within and  
311 without the state, may determine their Mississippi net income from  
312 underwriting by apportioning to this state a part of their total  
313 net underwriting income by such processes or formulas of general  
314 apportionment as are prescribed by the commissioner; provided that  
315 a company adopting this method of reporting for any year must



316 adhere to said method of reporting for subsequent years, unless  
317 permission is granted by the commissioner to change to a different  
318 method of reporting; and provided that all affiliated companies of  
319 the same group shall use the same method of reporting.

320 (f) **Bond requirements.** Any individual or corporation  
321 subject to the tax imposed by this article, engaged in the  
322 business of performing contracts which may require the payment of  
323 net income taxes, may be required by the commissioner, before  
324 entering into the performance of any contract or contracts the  
325 consideration of which is more than Ten Thousand Dollars  
326 (\$10,000.00), to execute and file a good and valid bond with a  
327 surety company authorized to do business in this state, or with  
328 sufficient sureties to be approved by the commissioner,  
329 conditioned that all taxes which may accrue to the State of  
330 Mississippi will be paid when due. Provided, however, that such  
331 bond shall not exceed five percent (5%) of the total contracts  
332 entered into during the taxable period, and, provided further,  
333 that any taxpayer, in lieu of furnishing such bond, may pay the  
334 maximum sum required herein as advance payment of taxes due on the  
335 net income realized from any contract or contracts performed or  
336 completed in this state.

337 **SECTION 3.** This act shall take effect and be in force from  
338 and after January 1, 2019.

