ARTICLE 64:26

BANKS AND FINANCIAL INSTITUTIONS

Chapter

CHAPTER 64:26:01

DEFINITIONS

Section

64:26:01:01. Definitions. ~~Terms~~ As used in this article ~~mean~~:

(1) "Affiliated entity" means a related corporation;

(2) "Affiliated group" means a group of two or more affiliated entities;

(3) "Department~~,~~" means the Department of Revenue ~~and Regulation~~;

~~(2) "Secretary," the secretary of revenue and regulation~~

(4) "Filing member" means the taxpayer under whose name and federal identification number a consolidated report required by SDCL 10-43-36 and Chapter 64:26:05 is filed;

~~(3) "Principal place of business," the place from which the taxpayer manages the main part of its business operations, transacts its principal affairs, or conducts its greatest volume of business operations;~~

~~(4)~~ (5) "Net federal income tax~~,~~" means that federal income tax in excess of any federal income tax refund received during the tax year for which the deduction is claimed;

~~(5) "Non-arm's length transaction," a transaction between two or more related corporations consummated at a consideration which is more or less than the amount that would have been charged in an independent transaction between unrelated corporations under similar circumstances.~~

(6) "Principal place of business" means the place from which the taxpayer manages the main part of its business operations, transacts its principal affairs, or conducts its greatest volume of business operations;

(7) “Secretary” means the secretary of revenue;

(8) “Unitary affiliate” means a member of a unitary filing group;

(9) “Unitary business” means business activities or operations conducted by two or more members of an affiliated group that are related through common ownership of greater than fifty percent and that are interdependent with one another as demonstrated by shared management, functional integration, and economies of scale; and

(10) “Unitary filing group” means two or more affiliated entities at least one of which is a financial institution that is doing business in this state during any portion of its tax year and that has income apportioned to this state pursuant to SDCL 10-43-22.1, where the entities are engaged in a unitary business and have common ownership of greater than fifty percent.

Source: SL 1975, ch 16, § 1; 4 SDR 35, effective December 22, 1977; 13 SDR 129, 13 SDR 134, effective July 1, 1987; 21 SDR 219, effective July 1, 1995; 30 SDR 58, effective November 5, 2003.

General Authority: SDCL 10-43-42.1.

Law Implemented: SDCL ~~10-43-1~~ 10-43-42.1.

CHAPTER 64:26:02

ADMINISTRATION OF PROGRAM

Section

64:26:02:07. Consolidated returns. ~~The secretary shall demand a consolidated return when it is established that a taxpayer has engaged in non-arm's length transactions which cause a material distortion in net income.~~ Repealed.

Source: 4 SDR 35, effective December 22, 1977; 13 SDR 129, 13 SDR 134, effective July 1, 1987.

~~**General Authority:** SDCL 10-43-42.1.~~

~~**Law Implemented:** SDCL 10-43-36.~~

64:26:02:12. Apportionment of bank franchise tax revenues among counties. ~~For any revenue collected for the tax year ending December 31, 1999, and thereafter, the~~ The tax remittances for the branches of depository institutions shall be distributed to each county pro rata based on the relationship the deposits at all branches in each county bear to the total deposits of the institution. The deposit information upon which this distribution ~~shall be~~ is based is the deposit information filed with the Federal Deposit Insurance Corporation on June 30 of the tax year ~~in~~ for which the tax return ~~establishing the liability of the depository institution is due~~ is being filed. The tax remittances from non-depository institutions shall be distributed pro rata based on the relationship net profits at all branches in each county bear to the total net profits of the non-depository institution.

Source: 25 SDR 167, effective July 1, 1999.

General Authority: SDCL 10-43-42.1(1)(2).

Law Implemented: SDCL 10-43-76.

CHAPTER 64:26:03

INCOME ~~-- INTERPRETIVE RULES~~

Section

64:26:03:01 Repealed.

64:26:03:02 Repealed.

64:26:03:03 Repealed.

64:26:03:04 Repealed.

64:26:03:05 Repealed.

64:26:03:06 Repealed.

64:26:03:07 Repealed.

64:26:03:08 Repealed.

64:26:03:09 Repealed.

64:26:03:10 Repealed.

64:26:03:11 Dividends received from other financial institutions.

64:26:03:12 Repealed.

64:26:03:13 ~~Filing of separate returns of financial institutions.~~ Repealed.

64:26:03:13. Filing of separate returns of financial institutions. ~~To determine if financial institutions sharing a common parent, such as a bank holding company, shall be required to file separate returns, the secretary shall consider the following factors:~~

~~(1) Whether there is a separate charter for each financial institution;~~

~~(2) The extent of the flow of goods and services between an institution and its parent;~~

~~(3) Whether management oversight by the parent is limited to strategic decisions affecting the operation of all subsidiaries generally, not individual institutions;~~

~~(4) Whether there would be distortion of county income through the use of loss deductions incurred by institutions not doing business in the affected county;~~

~~(5) The presence or absence of common administrative officers or procedures; or~~

~~(6) Whether each institution is conducting business in a manner consistent with separate entities.~~ Repealed.

Source: 16 SDR 76, effective November 1, 1989.

~~**General Authority:** SDCL 10-43-42.1.~~

~~**Law Implemented:** SDCL 10-43-36.~~

CHAPTER 64:26:04

EXPENSES ~~-- INTERPRETIVE RULES~~

CHAPTER 64:26:05

CONSOLIDATED REPORTS

Section

64:26:05:01. Scope of chapter. This chapter applies to financial institutions subject to the tax imposed under SDCL chapter 10-43.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:02. Consolidated reports. A taxpayer that is a member of an affiliated group, is engaged in a unitary business, and meets the presumption under 64:26:05:03 must file a consolidated report pursuant to SDCL 10-43-36 on which the aggregate South Dakota tax liability of all of the members of the unitary filing group is reported on a combined basis. The income of the unitary business is the net income of all members of the unitary filing group. Each member of the unitary business must be included in the consolidated report.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:03. When consolidated report may be required. It is presumed that a financial institution doing business in this state will file a consolidated report if:

(1) The taxpayer is part of an affiliated group engaged in a unitary business, is included in a federal consolidated income tax filing group, and a return separately filed by the taxpayer does not or would not accurately reflect the activities conducted within this state by the unitary business;

(2) The taxpayer is a limited liability corporation that is owned by one or more individuals, and is part of a unitary business comprised of at least one other limited liability corporation, partnership, or other pass-through entity; or

(3) The secretary determines that a return separately filed by the taxpayer results, or would result, in a material distortion in its apportionment factor.

The secretary may also authorize the taxpayer to file a consolidated report in response to a written request submitted by a financial institution if the secretary determines that a consolidated report adequately reflects the South Dakota net income of the taxpayer and the members of any federal consolidated filing group or unitary business of which the taxpayer is a part.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:04. Preparation of the consolidated report - General rules and requirements - Entities to be included in report. The consolidated report must be filed in the name and federal employer identification number of the parent financial institution. If the parent is not a financial institution, is not unitary with the members of the unitary filing group, or does not have nexus with this state, the members of the unitary filing group shall designate a different filing member. The filing member must have nexus with this state, and if more than one member of the unitary filing group has nexus with this state, the filing member must be the member with the largest South Dakota apportionment factor. The member selected as the filing entity must remain the same in subsequent years unless a material change in ownership or nexus occurs. A material change in ownership occurs when the parent no longer holds, directly or indirectly, more than fifty percent of the voting interest in one or more of the group members.

A consolidated report filed by a financial institution must include all affiliated entities that are a part of the financial institution's unitary business, including all members required to file a federal tax return for the purpose of reporting income to the Internal Revenue Service. Except as otherwise provided in this section, only the income of unitary affiliates that are required to file a federal income tax return, or that are required to be included in a federal consolidated filing group, must be included on the consolidated report. The consolidated report must indicate if each unitary affiliate has nexus with this state. The South Dakota net income, prior to state apportionment, of a taxpayer that is a member of an affiliated group and that is engaged in a unitary business with one or more members of an affiliated group includes its net business income, its non-business income, its income from any business activities or operations that are not derived from a unitary business, and its apportioned share of net business income from any other unitary business conducted with affiliated entities.

The unitary filing group must include any affiliated entity that is not included in the taxpayer's federal consolidated filing group if the affiliated entity is a part of the taxpayer's unitary business and meets one or more of the following conditions:

(1) The affiliated entity and the taxpayer are greater than fifty percent owned by a common parent;

(2) The affiliated entity is a pass-through entity that is required to file a separate federal return; or

(3) The affiliated entity is a financial institution that is required to file federal form 1120F.

All members of the unitary filing group are jointly and severally liable for the tax liability of the group.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:05. Unitary business - General rule - Presumptions. The secretary shall employ a substantial mutual interdependence test in determining whether a taxpayer is engaged in a unitary business with one or more affiliated entities. The substantial mutual interdependence test is applied in all cases, including when the secretary determines whether a holding company is included or excluded from a unitary business.

A taxpayer will be found by the secretary to be engaged in a unitary business within the state on behalf of its parent, an affiliated group of which the taxpayer is a part, or both, if one or more of the following applies:

(1) The taxpayer provides products or services that are substantially the same as those provided by the parent or affiliated entities, or are substantially managed or controlled by the parent or affiliated entities;

(2) The taxpayer offers products or services in this state that require the use of staff, systems or other material resources of the parent or an affiliated entity in order to provide or maintain a market in this state for products or services sold by the parent or the affiliated entity; or

(3) The taxpayer's parent or an affiliated entity provides at least one of the following to the taxpayer:

(a) Payroll services;

(b) Employee benefits;

(c) Office equipment;

(d) Operating funds or treasury functions;

(e) Logos, trademarks or copyrighted material;

(f) Computer systems, software, or hardware;

(g) Checks or other payment for expenses incurred in this state;

(h) Purchases equipment and supplies;

(i) Legal services; or

(j) Financing.

When a taxpayer acquires an affiliate or subsidiary, a presumption exists against a finding of a unitary relationship between the two entities for the purposes of the filing period in which the acquisition date falls. The secretary or either entity may rebut the presumption by proving that the entities were unitary during the period, in which case the entities are considered unitary as of the date of acquisition unless the evidence shows that unity was established as of another date.

When a corporation forms another corporation, a presumption exists in favor of finding unity between the two corporations as of the date of formation. The secretary or either corporation may rebut the presumption by proving that the corporations are not unitary or became unitary at a later date.

A limited liability corporation that is a disregarded entity for federal filing purposes shall prepare the return required pursuant to SDCL 10-43-30 based on the federal return as filed by the parent entity.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2)(5).
Law Implemented: SDCL 10-43-36.

64:26:05:06. Required schedule. The consolidated report must include a schedule that describes, both in the aggregate and for each member of the unitary filing group, the following:

(1) Federal taxable income;

(2) Additions to taxable income pursuant to SDCL 10-43-10.2;

(3) Subtractions from taxable income pursuant to SDCL 10-43-10.3;

(4) Property in this state and everywhere pursuant to SDCL 10-43-22.1 and 10-43-23.1 *et seq.*;

(5) Payroll in this state and everywhere pursuant to SDCL 10-43-22.1 and 10-43-24.1 *et seq.*;

(6) Receipts in this state and everywhere pursuant to SDCL 10-43-22.1 and 10-43-25.1 *et seq.*;

(7) Intercompany transactions and eliminations; and

(8) South Dakota net income.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2)(5).
Law Implemented: SDCL 10-43-36.

64:26:05:07. Apportionment. The South Dakota apportionment factor of a unitary filing group is the combined apportionment factor for all members of the group calculated pursuant to SDCL 10-43-22.1. To calculate the apportionment factor, the property, payroll, and receipts in this state that are attributable directly to the filing member and all members of the unitary filing group are divided by the total property, payroll, and receipts of all members of the group, net of all intercompany transactions and eliminations.

An alternative apportionment method may be required or allowed by the secretary in response to a written petition submitted by the taxpayer, pursuant to SDCL 10-43-29.1. The apportionment factor of a unitary filing group must include items of property, payroll and receipts only to the extent that they are included in South Dakota net income for the filing period.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:08. Required adjustments. The separate federal taxable income of each member of a unitary filing group, before net operating losses (26 U.S.C. § 172) and special deductions (26 U.S.C. § 241 *et seq.*), as calculated pursuant to federal consolidated filing regulations, must be adjusted as provided in this section as follows:

(1) Any eliminations, deferrals, and other adjustments based on intercompany transactions and eliminations must be made only for transactions between unitary affiliates included in the consolidated report;

(2) Any federal net operating losses or special deductions of individual members of the unitary filing group must be adjusted for eliminations, deferrals and other modifications required under federal law and regulations. Any net operating loss that is generated by a member of the unitary filing group may only be applied to the South Dakota taxable income of the member that generated the loss. If the member that generated the net operating loss leaves the filing group, the

net operating loss generated by that member is no longer available to the group after it leaves. The former member may use the loss if it files a separate return or becomes a member of another filing group, but the loss can only be used to offset the income of the member who generated the loss, not the income of the group. If there is no loss available at the federal level, no loss is available for the South Dakota return;

(3) A credit generated by any member of the unitary filing group may only be applied against the income of the member that generates the credit. If the member generating a credit leaves the filing group, the credit is no longer available to the group after it leaves;

(4) If the unitary filing group includes taxpayers that are not part of the federal consolidated filing group, the income, net operating losses, and special deductions of those taxpayers must be included in the supporting schedules filed with the consolidated report. All adjustments for taxable income, net operating losses, special deductions, and net operating losses of the unitary filing group must be net of intercompany transactions;

(5) The income, expenses, and all associated federal adjustments of any members of the federal consolidated filing group that are not included in the unitary filing group must be eliminated from the work papers used to prepare the consolidated report;

(6) For the purpose of preparing the consolidated report, income must be adjusted to account for intercompany transactions that produce gains or losses between two or more financial institutions that are part of the unitary filing group. Adjustments made include:

(a) Dividends paid by one unitary affiliate to another unitary affiliate;

(b) Deferrals of gains or losses from intercompany sales or lending; and

(c) Deferrals of gains or losses from intercompany sales of fixed assets.

Intercompany transactions as described in this subdivision, are deferred or eliminated in order to properly reflect the income of the unitary business as a separate economic unit. Intercompany transactions must be treated in a manner consistent with federal law and regulations. For the purposes of this subdivision, "consistent with federal law or regulations" means the methods a unitary group employs in calculating income, net operating losses and special deductions are performed in a manner consistent with federal law and regulations in effect during the filing period. Any decision about the availability, amount, or timing of a loss or deduction must be based on whether it is included on the federal return filed for the period in question by the members of the unitary filing group; and

(7) If the taxpayer is a member of a federal consolidated filing group, the federal income tax paid by the group must be allocated to each member based on the percentage of taxable income each member contributes to the group.

The federal taxable income computed in accordance with subdivision 6 must be combined with the special deductions computed in accordance with subdivisions 2 and 4. If the result of this computation is positive, any available net operating loss deductions for members of the unitary filing group may be applied against the income of the unitary business. If the result of the computation is negative, it constitutes a net operating loss for the unitary business and is treated as the basis for a net operating loss deduction that is carried forward pursuant to SDCL 10-43-10.5.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

64:26:05:09. Period for filing and year-end dates. The calendar or fiscal year end date of the filing member determines the calendar year or fiscal year filing date for all members of the unitary filing group and all members of the group must prepare financial statements and work papers on that basis. If any member of the unitary filing group has a filing period that is different than the group, it must be converted to the filing period of the group. The formula for doing this must be based on an allocation of the non-conforming members filing period to conform to the group by dividing the financial statements by 12 and multiplying the results by the number of months needed to conform to the filing period of the group.

If a member of the South Dakota group has a different fiscal period than the group and the correct income can be calculated by reference to the books and records of the member, those amounts may be used. If the correct figures cannot be obtained from the books and records of the non-conforming member, the fiscal period is calculated by allocating the items of income and expense on the basis of the number of months that comprise the relative fiscal period of the non-conforming member. The method used to calculate the income for the fiscal period of the non-conforming member must remain the same in subsequent periods.

The apportionment factor must be computed on the basis of the same taxable year and must include receipts to the same extent they are included in income.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2).
Law Implemented: SDCL 10-43-36.

Example: If the group files on the basis of a calendar year and the nonconforming member files on the basis of a fiscal year ending April 30th, then for the calendar year period ending December 31, 2018, the financial statements of the fiscal year filer for the period ending April 30, 2018, is divided by 12 and multiplied by 4, and the financial statements for the fiscal year ending April 30, 2019, are divided by 12 and multiplied by 8 and added to the 2018 amounts.

64:26:05:10. Consistency between different filing periods. A taxpayer shall provide with every original return and amended return filed pursuant to chapter 10-43 the nature and extent of any inconsistency between the return and any return filed by the taxpayer in previous tax periods. Inconsistencies that must be disclosed include:

(1) The identity of the filing member;

(2) Any changes to the composition of the unitary filing group;

(3) Changes in the classification of income, employees or assets;

(4) The calculation of the modifications to net income made for purposes of complying with SDCL 10-43-10.2 and 10-43-10.3;

(5) The methods used to calculate any net operating losses and special deductions;

(6) The calculation of income that is exempt from taxation pursuant to the United States Constitution; and

(7) The methods used to prepare the apportionment schedules submitted with the return.

General Authority: SDCL 10-43-36, 10-43-42.1(1)(2)(5).
Law Implemented: SDCL 10-43-36.