5703-29-02 **Application of common owners and joint ventures.**

(A) Consolidated elected and combined taxpayer groups under sections 5751.011 and 5751.012 of the Revised Code are required to file as one taxpayer if persons in the group meet certain requirements. One of those requirements is that the persons have a specified portion of the value of their ownership interest owned and controlled by "common owners" included in the group. In addition to an ownership interest, the higher-tiered entity must have the ability through its voting rights to control the operations of the lower-tiered entities at each level of the vertical chain. There is a different "control test" for combined groups than for consolidated elected groups. For combined groups, the "control test" is that the higher-tiered entity must own more than fifty per cent of the lower-tiered entity at each level of the vertical chain and effectively, through its ownership, possess the voting rights to be able to control the lower-tiered entity. For consolidated elected groups, the "control test" is that the higher-tiered entity must own at least fifty per cent or at least eighty per cent of the lower-tiered entity at each level of the vertical chain and effectively, through its ownership, possess the voting rights to be able to control the lower-tiered entity. For purposes of this paragraph, "effectively" means that the entity has the ability to actually control the operations of the lower-tiered entity and is not required to be part of another combined or consolidated group.

(B)

(1) Subject to paragraphs (B)(2), (C), and (D) of this rule, if a person owns and controls, directly or constructively through related interests, more than fifty per cent of the value of the ownership interest of another person, the first person is a common owner of the second person, and those persons must be members of a combined taxpayer group unless they elect to be members of a consolidated elected taxpayer group. Consolidated elected taxpayers may choose to consolidate based on a ~~the~~ fifty percent or more ownership test or ~~the~~an eighty percent or more ownership test, and choose to either include or exclude all foreign entities. Common owners are not limited to business organizations but also include individuals, trusts, and estates. Further, "common owner" includes an entity that is not a "person" as that termed is defined in division (A) of section 5751.01 of the Revised Code. Not being a "person" will not prevent such an entity from making an election to be in a consolidated elected group~~, allowing the entity to exclude receipts between members~~. If a person ~~has~~is a common ~~ownership~~owner of persons who report as a consolidated elected taxpayer group as well as persons who are in a combined taxpayer group, the common owner is to register as part of both groups but must report its taxable gross receipts as part of the consolidated elected taxpayer group.

(2) A de minimis test applies in determining whether an individual, a trust, or an estate must be included as a common owner in a combined or consolidated

elected taxpayer group. If the individual, trust, or estate has less than four thousand five hundred dollars in taxable gross receipts for the calendar year, the individual, trust, or estate will not be required to be registered as part of a combined or consolidated elected taxpayer group for that year. However, the individual, trust, or estate is still a common owner for all purposes of the commercial activity tax.

(C) There are general rules that are to be applied when determining the common ownership of any person. These are applicable to all persons defined in division (A) of section 5751.01 of the Revised Code.

(1) The determination of whether a person owns and controls another person constructively through related interests shall be made using a vertical ownership test, based on voting rights, pursuant to paragraph (D) of this rule. Attribution rules under the Internal Revenue Code, such as attribution between a husband and wife, do not apply. The vertical chain shall continue as long as the ownership test is satisfied, separately or in the aggregate, by any one or more members of the group.

(2) In the event a person or a group of persons believes that the uniqueness of its organizational structure justifies that “common ownership” exists despite the strict application of this rule, the person may file in writing with the tax commissioner a request for a finding that common ownership exists. Such request must be made prior to the end of the reporting period for which the request is to become effective. The person making this request has the burden of proof to show that common ownership exists and must provide the commissioner with detailed probative evidence in support of its position.

(3) If the ownership test is met for any part of the calendar quarter or calendar year, as applicable, the group must include the taxable gross receipts of that person for the portion of the tax period in which the ownership test was met. A person who no longer meets the ownership test of the group shall report taxable gross receipts only through the date it qualifies as a member of that group. The person shall report all taxable gross receipts during the remaining portion of the tax period either as a separate taxpayer, as a member of a combined taxpayer, or as a member of another consolidated elected group if it satisfies the requirements with respect to such group.

(4)

(a) When an election under section 5751.011 of the Revised Code is made, the election remains in place for at least eight calendar quarters. During that time the composition of the consolidated elected taxpayer group is only changed when a person falls within or without the elected ownership threshold. At the end of the eight calendar quarters, the consolidated elected group must notify the commissioner in writing if it does not wish to renew its election. In the absence of such notification, the election to consolidate automatically renews for another eight calendar quarters.

(b) A separate taxpayer or a combined taxpayer may make an election under section 5751.011 of the Revised Code at any time after it has registered. However, once the election is made, it remains in place for at least eight calendar quarters. Such election is effective prospectively unless a retroactive application has been requested in writing by the taxpayer and approved by the tax commissioner in accordance with paragraph (C)(5) of this rule.

(5) The tax commissioner may approve a request for a retroactive election to file as a consolidated elected taxpayer group under section 5751.011 of the Revised Code if the taxpayer made a registration error or made the request through the voluntary disclosure program.

(a) Registration Error. With respect to the tax periods affected by the election, the taxpayer's original commercial activity tax returns reflect that the taxpayer filed as a consolidated elected taxpayer group and reported the taxable gross receipts of all members required to be included in the group in accordance with section 5751.011 of the Revised Code, but the taxpayer failed to make a proper election on a form prescribed by the commissioner for the purpose of making the election. The taxpayer’s commercial activity tax returns as originally filed, from the date the taxpayer requests the election be effective up to and including the most recent tax period for which a return is due, must demonstrate that the taxpayer excluded intermember receipts and filed as a consolidated elected taxpayer group such that the application of a retroactive election will have no impact on the taxpayer’s tax liability as shown on its originally filed returns. To the extent the taxpayer included on its initial registration any entities that were not incorporated or formed under the laws of a state or of the United States and, subject to the same limitations as described in this paragraph, the taxpayer may include additional similar entities. A request for a retroactive election to file as a consolidated elected taxpayer group will be denied for a taxpayer that was not registered for the commercial activity tax prior to contact from the department of taxation through a commercial activity tax audit, compliance, or criminal investigation program.

(b) Voluntary Disclosure Program. The taxpayer requests retroactive consolidation through the commercial activity tax voluntary disclosure program and qualifies for the program. A taxpayer qualifies for the commercial activity tax voluntary disclosure program if the taxpayer enters into and executes the commercial activity tax voluntary disclosure agreement prior to any contact from the department of taxation through any commercial activity tax audit, compliance, or criminal investigation program.

(D)

(1) In the case of a corporation, the valuation is calculated with respect to only those classes of stock having voting rights. Interests held in a corporation are attributable to any shareholder in the corporation based on the percentage of total value of the voting equity interests in the corporation owned and controlled by that shareholder.

(2) In the cases of partnerships and entities with membership interests (e.g., a limited liability company) or beneficial interests (e.g., business trusts, or other unincorporated business interests), the value is calculated with respect to the fair market value of the voting interest in those entities.

(3) In the case of a limited partnership, only the value of general partnership interests will be considered.

(4)

(a) In the case of a trust to which section 677 of the Internal Revenue Code applies, commonly referred to as a “grantor trust,” the grantor is the common owner of the trust described in that section.

(b) In the case of a trust to which section 678 of the Internal Revenue Code applies, the person, other than the trust, described in section 678 of the Internal Revenue Code is the common owner of the trust.

(c) In the case of a trust treated as a corporation for federal income tax purposes, including but not limited to real estate investment trusts and business trusts, the beneficiaries are treated as shareholders and the common ownership rules for corporations apply.

(d) In the case of any other trust, there is no common owner unless paragraph (C)(2) of this rule applies.

(5) In the case of two or more persons having an interest in an unincorporated business, including but not limited to rental property, where there is no formal partnership agreement between the persons, an implied partnership is deemed to exist. One implied partnership exists for all such commonly owned and controlled interests of the unincorporated business. The implied partnership is a separate entity for purposes of the commercial activity tax and the ownership interests are determined as follows:

(a) In the case where the owners file a federal income tax form 1065, paragraphs (D)(5)(b) and (D)(5)(c) do not apply and the ownership and control is based on the capital account contribution as reported at the end of the tax filing occurring in the previous calendar year.

(b) If, for some reason, the owners are not required to file a federal income tax form 1065, in the case of rental property, the common ownership is based on the deed to the property. If two persons are listed on the deed, the property is considered to be owned and controlled fifty per cent by each of those persons. The burden is on those persons to prove an alternate ownership structure.

(c) If paragraph (D)(5)(b) of this rule does not apply, the common ownership of the implied partnership is based on the number of persons in the group. The burden is on those persons to prove an alternate ownership structure.

(E) If, pursuant to paragraph (A) of this rule, a person elects to consolidate with all others in which it has at least ~~a~~ fifty per cent common ownership and control ~~interest~~, that person must include all taxable gross receipts of a joint venture so owned and controlled unless there is another fifty per cent owner of the joint venture that makes the fifty per cent election to consolidate. ~~In other words~~For example, if ~~one~~a fifty per cent owner of a joint venture, A, makes an eighty per cent election to consolidate with others or decides to be part of a combined taxpayer group or be a single taxpayer, and the other fifty per cent owner, B, makes the fifty per cent election, ~~that other owner~~B is required to include all the taxable gross receipts of the joint venture except for any receipts the joint venture has from ~~that other owner~~B. If both ~~fifty per cent owners~~A and B make the fifty per cent election, the taxable gross receipts of the joint venture, after subtracting any receipts ~~between~~the joint venture received from its ~~the~~ owners ~~and the joint venture~~, are split evenly between the two consolidated elected taxpayer groups. However, ~~Each~~each of the joint venture owners making ~~the~~a fifty per cent election are only ~~allowed~~able to exclude those receipts each received from the joint venture entity ~~has from that owner~~ and should refrain from dividing or apportioning such receipts from the joint venture with the other owner. In addition, each owner cannot exclude receipts the joint venture has from the other owner since the other owner is not in the same consolidated elected taxpayer group.

(F) For purposes of a combined taxpayer ~~groups~~group, ~~persons~~a person who does not have nexus with the state of Ohio may nevertheless be a “common ~~owners~~owner,” but ~~are~~is not required to ~~register~~include its taxable gross receipts on the group's return for purposes of calculating the group's commercial activity tax. Such combined taxpayer groups only need to include persons with substantial nexus with the state of Ohio, as defined in divisions (H) and (I) of section 5751.01 of the Revised Code and those persons' taxable gross receipts.

(G) The commissioner ~~shall~~may publish and make available on the department of taxation’s website, examples of the application of this rule.