

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2005

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HOUSE DRH10058-LY-105 (2/11)

Short Title: Reduce Franchise Tax.

(Public)

Sponsors: Representative Gibson.

Referred to:

A BILL TO BE ENTITLED

AN ACT TO REMOVE THE MINIMUM FRANCHISE TAX BASE FOR
CORPORATIONS EXPERIENCING A NET ECONOMIC LOSS.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 105-122 reads as rewritten:

"§ 105-122. **Franchise or privilege tax on domestic and foreign corporations.**

(a) Return. – Every corporation, domestic and foreign, incorporated, or, by an act, domesticated under the laws of this State or doing business in this State, except as otherwise provided in this Article, shall, on or before the fifteenth day of the third month following the end of its income year, annually make and deliver to the Secretary in the form prescribed by the Secretary a full, accurate, and complete report and statement signed by either its president, vice-president, treasurer, assistant treasurer, secretary or assistant secretary, containing the facts and information required by the Secretary as shown by the books and records of the corporation at the close of the income year. The taxes levied in this section are for the income year of the corporation in which the taxes become due.

There shall be annexed to the return required by this subsection the affirmation of the officer signing the return.

(b) Capital Stock Base. – Every such corporation taxed under this section shall determine the total amount of its issued and outstanding capital stock, surplus and undivided profits; no reservation or allocation from surplus or undivided profits shall be allowed other than for definite and accrued legal liabilities, except as herein provided; taxes accrued, dividends declared and reserves for depreciation of tangible assets as permitted for income tax purposes shall be treated as deductible liabilities. There shall also be treated as a deductible liability reserves for the entire cost of any air-cleaning device or sewage or waste treatment plant, including waste lagoons, and pollution abatement equipment purchased or constructed and installed which reduces the amount

1 of air or water pollution resulting from the emission of air contaminants or the discharge
2 of sewage and industrial wastes or other polluting materials or substances into the
3 outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation
4 claiming such deductible liability shall furnish to the Secretary a certificate from the
5 Department of Environment and Natural Resources or from a local air pollution control
6 program for air-cleaning devices located in an area where the Environmental
7 Management Commission has certified a local air pollution control program pursuant to
8 G.S. 143-215.112 certifying that the Environmental Management Commission or local
9 air pollution control program has found as a fact that the air-cleaning device, waste
10 treatment plant or pollution abatement equipment purchased or constructed and installed
11 as above described has actually been constructed and installed and that such plant or
12 equipment complies with the requirements of the Environmental Management
13 Commission or local air pollution control program with respect to such devices, plants
14 or equipment, that such device, plant or equipment is being effectively operated in
15 accordance with the terms and conditions set forth in the permit, certificate of approval,
16 or other document of approval issued by the Environmental Management Commission
17 or local air pollution control program and that the primary purpose thereof is to reduce
18 air or water pollution resulting from the emission of air contaminants or the discharge of
19 sewage and waste and not merely incidental to other purposes and functions. The cost of
20 purchasing and installing equipment or constructing facilities for the purpose of
21 recycling or resource recovering of or from solid waste or for the purpose of reducing
22 the volume of hazardous waste generated shall be treated as deductible for the purposes
23 of this section upon condition that the corporation claiming such deductible liability
24 shall furnish to the Secretary a certificate from the Department of Environment and
25 Natural Resources certifying that the Department of Environment and Natural
26 Resources has found as a fact that the equipment or facility has actually been purchased,
27 installed or constructed, that it is in conformance with all rules and regulations of the
28 Department of Environment and Natural Resources, and the recycling or resource
29 recovering is the primary purpose of the facility or equipment. The cost of constructing
30 facilities of any private or public utility built for the purpose of providing sewer service
31 to residential and outlying areas shall be treated as deductible for the purposes of this
32 section; the deductible liability allowed by this section shall apply only with respect to
33 such pollution abatement plants or equipment constructed or installed on or after
34 January 1, 1955. Treasury stock shall not be considered in computing the capital stock,
35 surplus and undivided profits as the basis for franchise tax, but shall be excluded
36 proportionately from said capital stock, surplus and undivided profits as the case may be
37 upon the basis and to the extent of the cost thereof. In the case of an international
38 banking facility, the capital base shall be reduced by the excess of the amount as of the
39 end of the taxable year of all assets of an international banking facility which are
40 employed outside the United States over liabilities of the international banking facility
41 owed to foreign persons. For purposes of such reduction, foreign persons shall have the
42 same meaning as defined in G.S. 105-130.5(b)(13)d.

43 Every corporation doing business in this State which is a parent, subsidiary, or
44 affiliate of another corporation shall add to its capital stock, surplus and undivided

1 profits all indebtedness owed to a parent, subsidiary or affiliated corporation as a part of
2 its capital used in its business and as a part of the base for franchise tax under this
3 section. The term "indebtedness" as used in this paragraph includes all loans, credits,
4 goods, supplies, or other capital of whatsoever nature furnished by a parent, subsidiary,
5 or affiliated corporation, other than indebtedness endorsed, guaranteed, or otherwise
6 supported by one of these corporations. The terms "parent," "subsidiary," and "affiliate"
7 as used in this paragraph shall have the meaning specified in G.S. 105-130.6. If any part
8 of the capital of the creditor corporation is capital borrowed from a source other than a
9 parent, subsidiary or affiliate, the debtor corporation, which is required under this
10 paragraph to include in its tax base the amount of debt by reason of being a parent,
11 subsidiary, or affiliate of the said creditor corporation, may deduct from the debt thus
12 included a proportionate part determined on the basis of the ratio of such borrowed
13 capital as above specified of the creditor corporation to the total assets of the said
14 creditor corporation. Further, in case the creditor corporation as above specified is also
15 taxable under the provisions of this section, such creditor corporation shall be allowed
16 to deduct from the total of its capital, surplus and undivided profits the amount of any
17 debt owed to it by a parent, subsidiary or affiliated corporation to the extent that such
18 debt has been included in the tax base of said parent, subsidiary or affiliated debtor
19 corporation reporting for taxation under the provisions of this section.

20 (c) Allocation and Apportionment. –

- 21 (1) After ascertaining and determining the amount of its capital stock,
22 surplus and undivided profits, as provided herein, every corporation
23 permitted to allocate and apportion its net income for income tax
24 purposes under the provisions of Article 4 of this Chapter shall
25 apportion its capital stock, surplus and undivided profits to this State
26 through use of the fraction computed for apportionment of its
27 apportionable income under that Article. A corporation that is subject
28 to franchise tax under this Article but is not subject to income tax
29 under Article 4 of this Chapter must apportion its capital stock,
30 surplus, and undivided profits to this State by using the apportionment
31 formula that would apply to the corporation if it were subject to Article
32 4.

33 Notwithstanding the foregoing, if a corporation is authorized by the
34 Tax Review Board to apportion its apportionable income by use of an
35 alternative formula or method, the corporation may not use this
36 alternative formula or method for apportioning its capital stock,
37 surplus and undivided profits unless specifically authorized to do so by
38 order of the Tax Review Board.

39 A corporation that is required to pay an income tax to this State on
40 its entire net income shall apportion its entire capital stock, surplus and
41 undivided profits to this State.

- 42 (2) If any corporation believes that the method of allocation or
43 apportionment hereinbefore described as administered by the Secretary
44 has operated or will so operate as to subject it to taxation on a greater

1 portion of its capital stock, surplus and undivided profits than is
2 reasonably attributable to business within the State, it may file with the
3 Tax Review Board a petition setting forth the facts upon which its
4 belief is based and its argument with respect to the application of the
5 allocation formula. This petition shall be filed in such form and within
6 such time as the Tax Review Board may prescribe. The Board shall
7 grant a hearing on the petition. The time limitations set in
8 G.S. 105-241.2 for the date of the hearing, notification to the taxpayer,
9 and a decision following the hearing apply to a hearing held pursuant
10 to this subdivision.

11 At least three members of the Tax Review Board shall attend any
12 hearing pursuant to such petition. In such cases the Tax Review
13 Board's membership shall be augmented by the addition of the
14 Secretary, who shall sit as a member of the Board with full power to
15 participate in its deliberations and decisions with respect to petitions
16 filed under the provisions of this section. An informal record
17 containing in substance the evidence, contentions and arguments
18 presented at the hearing shall be made. All members of the augmented
19 Tax Review Board shall consider such evidence, contentions and
20 arguments, and the decision thereon shall be made by a majority vote
21 of the augmented Board.

22 If the corporation employs in its books of account a detailed
23 allocation of receipts and expenditures which reflects more clearly
24 than the applicable allocation formula or alternative formulas
25 prescribed by this section the portion of the capital stock, surplus and
26 undivided profits attributable to the business within this State,
27 application for permission to base the return upon the taxpayer's books
28 of account shall be considered by the Tax Review Board. The Board
29 may permit such separate accounting method in lieu of applying the
30 applicable allocation formula if the Board finds that method best
31 reflects the portion of the capital stock, surplus and undivided profits
32 attributable to this State.

33 If the corporation shows that any other method of allocation than
34 the applicable allocation formula or alternative formulas prescribed by
35 this section reflects more clearly the portion of the capital stock,
36 surplus and undivided profits attributable to the business within this
37 State, application for permission to base the return upon such other
38 method shall be considered by the Tax Review Board. The application
39 shall be accompanied by a statement setting forth in detail, with full
40 explanations, the method the taxpayer believes will more nearly reflect
41 the portion of its capital stock, surplus and undivided profits
42 attributable to the business within this State. If the Board concludes
43 that the allocation formula and the alternative formulas prescribed by
44 this section allocate to this State a greater portion of the capital stock,

1 surplus and undivided profits of the corporation than is reasonably
2 attributable to business within this State, it shall determine the
3 allocable portion by such other method as it finds best calculated to
4 assign to this State for taxation the portion reasonably attributable to
5 its business within this State.

6 There shall be a presumption that the appropriate allocation
7 formula reasonably attributes to this State the portion of the
8 corporation's capital stock, surplus and undivided profits reasonably
9 attributable to its business in this State and the burden shall rest upon
10 the corporation to show the contrary. The relief herein authorized shall
11 be granted by the Board only in cases of clear, cogent and convincing
12 proof that the petitioning taxpayer is entitled thereto. No corporation
13 shall use any alternative formula or method other than the applicable
14 allocation formula provided by statute in making a franchise tax report
15 or return to this State except upon order in writing of the Board and
16 any return in which any alternative formula or other method other than
17 the applicable allocation formula prescribed by statute is used without
18 the permission of the Board, shall not be a lawful return.

19 When the Board determines, pursuant to the provisions of this
20 Article, that an alternative formula or other method more accurately
21 reflects the portion of the capital stock, surplus and undivided profits
22 allocable to North Carolina and renders its decision with regard
23 thereto, the corporation shall allocate its capital stock, surplus and
24 undivided profits for future years in accordance with such
25 determination and decision of the Board so long as the conditions
26 constituting the basis upon which the decision was made remain
27 unchanged or until such time as the business method of operation of
28 the corporation changes. Provided, however, that the Secretary may,
29 with respect to any subsequent year, require the corporation to furnish
30 information relating to its property, operations and activities.

31 A corporation which proposes to do business in this State may file
32 a petition with the Board setting forth the facts upon which it contends
33 that the applicable allocation formula will allocate a greater portion of
34 the corporation's capital stock, surplus and undivided profits to North
35 Carolina than will be reasonably attributable to its proposed business
36 within the State. Upon a proper showing in accordance with the
37 procedure described above for determination by the Board, the Board
38 may authorize such corporation to allocate its capital stock, surplus
39 and undivided profits to North Carolina on the basis prescribed by the
40 Board under the provisions of this section for such future years as the
41 conditions constituting the basis upon which the Board's decision is
42 made remain unchanged and the business operations of the corporation
43 continue to conform to the statement of proposed methods of business
44 operations presented by the corporation to the Board.

1 When the Secretary asserts liability under the formula adjustment
2 decision of the Tax Review Board, an aggrieved taxpayer may pay the
3 tax under protest and bring a civil action for recovery under the
4 provisions of G.S. 105-241.4.

- 5 (3) The proportion of the total capital stock, surplus and undivided profits
6 of each such corporation so allocated shall be deemed to be the
7 proportion of the total capital stock, surplus and undivided profits of
8 each such corporation used in connection with its business in this State
9 and liable for annual franchise tax under the provisions of this section.

10 (d) Minimum Tax Base; Rate. – After determining the proportion of its total
11 capital stock, surplus and undivided profits as set out in subsection (c) of this section,
12 ~~which amount so determined~~which, except as provided in subsection (d2) of this
13 section, shall in no case be less than fifty-five percent (55%) of the appraised value as
14 determined for ad valorem taxation of all the real and tangible personal property in this
15 State of each such corporation plus the total appraised value of intangible property
16 returned for taxation of intangible personal property as herein specified nor less than its
17 total actual investment in tangible property in this State, every corporation taxed under
18 this section shall annually pay to the Secretary of Revenue, at the time the report and
19 statement are due, a franchise or privilege tax, which is hereby levied at the rate of one
20 dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the total amount of
21 capital stock, surplus and undivided profits as herein provided. The tax imposed in this
22 section shall in no case be less than thirty-five dollars (\$35.00) and shall be for the
23 privilege of carrying on, doing business, and/or the continuance of articles of
24 incorporation or domestication of each such corporation in this State. Appraised value
25 of tangible property including real estate shall be the ad valorem valuation for the
26 calendar year next preceding the due date of the franchise tax return. Appraised value of
27 intangible property shall be the total gross valuation required to be reported for
28 intangible tax purposes on April 15 coincident with or next preceding the due date of
29 the franchise tax return. The term "total actual investment in tangible property" as used
30 in this section shall be construed to mean the total original purchase price or
31 consideration to the reporting taxpayer of its tangible properties, including real estate, in
32 this State plus additions and improvements thereto less reserve for depreciation as
33 permitted for income tax purposes, and also less any indebtedness incurred and existing
34 by virtue of the purchase of any real estate and any permanent improvements made
35 thereon. In computing "total actual investment in tangible personal property" there shall
36 also be deducted reserves for the entire cost of any air-cleaning device or sewage or
37 waste treatment plant, including waste lagoons, and pollution abatement equipment
38 purchased or constructed and installed which reduces the amount of air or water
39 pollution resulting from the emission of air contaminants or the discharge of sewage and
40 industrial wastes or other polluting materials or substances into the outdoor atmosphere
41 or into streams, lakes, or rivers, upon condition that the corporation claiming such
42 deduction shall furnish to the Secretary a certificate from the Department of
43 Environment and Natural Resources or from a local air pollution control program for
44 air-cleaning devices located in an area where the Environmental Management

1 Commission has certified a local air pollution control program pursuant to
2 G.S. 143-215.112 certifying that said Department or local air pollution control program
3 has found as a fact that the air-cleaning device, waste treatment plant or pollution
4 abatement equipment purchased or constructed and installed as above described has
5 actually been constructed and installed and that such device, plant or equipment
6 complies with the requirements of the Environmental Management Commission or local
7 air pollution control program with respect to such devices, plants or equipment, that
8 such device, plant or equipment is being effectively operated in accordance with the
9 terms and conditions set forth in the permit, certificate of approval, or other document
10 of approval issued by the Environmental Management Commission or local air
11 pollution control program and that the primary purpose thereof is to reduce air or water
12 pollution resulting from the emission of air contaminants or the discharge of sewage and
13 waste and not merely incidental to other purposes and functions. The cost of
14 constructing facilities of any private or public utility built for the purpose of providing
15 sewer service to residential and outlying areas shall be treated as deductible for the
16 purposes of this section; the deductible liability allowed by this section shall apply only
17 with respect to such pollution abatement plants or equipment constructed or installed on
18 or after January 1, 1955.

19 (d1) Credits. – A corporation is allowed a credit against the tax imposed by this
20 section for a taxable year equal to one-half of the amount of tax payable during the
21 taxable year under Article 5E of this Chapter. The credit allowed by this subsection may
22 not exceed the amount of tax imposed by this section for the taxable year, reduced by
23 the sum of all other credits allowed against that tax, except tax payments made by or on
24 behalf of the taxpayer.

25 (d2) Exception to Minimum Tax Base. – For the purpose of this subsection, a 'net
26 loss corporation' is a corporation that, on the current income tax return, had no State net
27 income under Article 4 of this Chapter as a result of a net economic loss in the current
28 year or a carryforward of a net economic loss from a prior year under G.S. 105-130.8. In
29 the case of a net loss corporation, the tax imposed by this section is levied on its total
30 capital stock, surplus, and undivided profits as determined under subsections (b) and (c)
31 of this section without regard to the appraised value as determined for ad valorem
32 taxation of all the real and tangible personal property in this State of the corporation
33 plus the total appraised value of intangible property returned for taxation of intangible
34 personal property or its total actual investment in tangible property in this State.

35 (e) Short Period Return. – Any corporation which changes its income year, and
36 files a "short period" income tax return pursuant to G.S. 105-130.15 shall file a
37 franchise tax return in accordance with the provisions of this section in the manner and
38 as of the date specified in subsection (a) of this section. Such corporation shall be
39 entitled to deduct from the total franchise tax computed (on an annual basis) on such
40 return the amount of franchise tax previously paid which is applicable to the period
41 subsequent to the beginning of the new income year.

42 (f) Tax Additional. – The report, statement and tax required by this section shall
43 be in addition to all other reports required or taxes levied and assessed in this State.

1 (g) Local Tax. – Counties, cities and towns shall not levy a franchise tax on
2 corporations taxed under this section.

3 (h) Repealed by Session Laws 1981 (Regular Session, 1982), c. 1211, s. 5."

4 **SECTION 2.** This act becomes effective January 1, 2006, and applies to
5 taxes due on or after that date.