

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003

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SENATE BILL 1304

Short Title: Reduce Franchise Taxes for Loss Corporations. (Public)

Sponsors: Senators Hoyle; Forrester, Moore, Smith, and Tillman.

Referred to: Finance.

May 25, 2004

A BILL TO BE ENTITLED

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

3 The General Assembly of North Carolina enacts:

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

5 **"§ 105-122. Franchise or privilege tax on domestic and foreign corporations.**

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

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

18 (b) Capital Stock Base. – Every such corporation taxed under this section shall
19 determine the total amount of its issued and outstanding capital stock, surplus and
20 undivided profits; no reservation or allocation from surplus or undivided profits shall be
21 allowed other than for definite and accrued legal liabilities, except as herein provided;
22 taxes accrued, dividends declared and reserves for depreciation of tangible assets as
23 permitted for income tax purposes shall be treated as deductible liabilities. There shall
24 also be treated as a deductible liability reserves for the entire cost of any air-cleaning
25 device or sewage or waste treatment plant, including waste lagoons, and pollution
26 abatement equipment purchased or constructed and installed which reduces the amount
27 of air or water pollution resulting from the emission of air contaminants or the discharge
28 of sewage and industrial wastes or other polluting materials or substances into the
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1 outdoor atmosphere or streams, lakes, or rivers, upon condition that the corporation
2 claiming such deductible liability shall furnish to the Secretary a certificate from the
3 Department of Environment and Natural Resources or from a local air pollution control
4 program for air-cleaning devices located in an area where the Environmental
5 Management Commission has certified a local air pollution control program pursuant to
6 G.S. 143-215.112 certifying that the Environmental Management Commission or local
7 air pollution control program has found as a fact that the air-cleaning device, waste
8 treatment plant or pollution abatement equipment purchased or constructed and installed
9 as above described has actually been constructed and installed and that such plant or
10 equipment complies with the requirements of the Environmental Management
11 Commission or local air pollution control program with respect to such devices, plants
12 or equipment, that such device, plant or equipment is being effectively operated in
13 accordance with the terms and conditions set forth in the permit, certificate of approval,
14 or other document of approval issued by the Environmental Management Commission
15 or local air pollution control program and that the primary purpose thereof is to reduce
16 air or water pollution resulting from the emission of air contaminants or the discharge of
17 sewage and waste and not merely incidental to other purposes and functions. The cost of
18 purchasing and installing equipment or constructing facilities for the purpose of
19 recycling or resource recovering of or from solid waste or for the purpose of reducing
20 the volume of hazardous waste generated shall be treated as deductible for the purposes
21 of this section upon condition that the corporation claiming such deductible liability
22 shall furnish to the Secretary a certificate from the Department of Environment and
23 Natural Resources certifying that the Department of Environment and Natural
24 Resources has found as a fact that the equipment or facility has actually been purchased,
25 installed or constructed, that it is in conformance with all rules and regulations of the
26 Department of Environment and Natural Resources, and the recycling or resource
27 recovering is the primary purpose of the facility or equipment. The cost of constructing
28 facilities of any private or public utility built for the purpose of providing sewer service
29 to residential and outlying areas shall be treated as deductible for the purposes of this
30 section; the deductible liability allowed by this section shall apply only with respect to
31 such pollution abatement plants or equipment constructed or installed on or after
32 January 1, 1955. Treasury stock shall not be considered in computing the capital stock,
33 surplus and undivided profits as the basis for franchise tax, but shall be excluded
34 proportionately from said capital stock, surplus and undivided profits as the case may be
35 upon the basis and to the extent of the cost thereof. In the case of an international
36 banking facility, the capital base shall be reduced by the excess of the amount as of the
37 end of the taxable year of all assets of an international banking facility which are
38 employed outside the United States over liabilities of the international banking facility
39 owed to foreign persons. For purposes of such reduction, foreign persons shall have the
40 same meaning as defined in G.S. 105-130.5(b)(13)d.

41 Every corporation doing business in this State which is a parent, subsidiary, or
42 affiliate of another corporation shall add to its capital stock, surplus and undivided
43 profits all indebtedness owed to a parent, subsidiary or affiliated corporation as a part of
44 its capital used in its business and as a part of the base for franchise tax under this

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

18 (c) Allocation and Apportionment. –

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

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

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

- 40 (2) If any corporation believes that the method of allocation or
41 apportionment hereinbefore described as administered by the Secretary
42 has operated or will so operate as to subject it to taxation on a greater
43 portion of its capital stock, surplus and undivided profits than is
44 reasonably attributable to business within the State, it may file with the

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

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

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

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

1 allocable portion by such other method as it finds best calculated to
2 assign to this State for taxation the portion reasonably attributable to
3 its business within this State.

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

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

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

43 When the Secretary asserts liability under the formula adjustment
44 decision of the Tax Review Board, an aggrieved taxpayer may pay the

1 tax under protest and bring a civil action for recovery under the
2 provisions of G.S. 105-241.4.

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

8 (d) Minimum Tax Base; Rate. – After determining the proportion of its total
9 capital stock, surplus and undivided profits as set out in subsection (c) of this section,
10 ~~which amount so determined~~ which, except as provided in subsection (d2) of this
11 section, shall in no case be less than fifty-five percent (55%) of the appraised value as
12 determined for ad valorem taxation of all the real and tangible personal property in this
13 State of each such corporation plus the total appraised value of intangible property
14 returned for taxation of intangible personal property as herein specified nor less than its
15 total actual investment in tangible property in this State, every corporation taxed under
16 this section shall annually pay to the Secretary of Revenue, at the time the report and
17 statement are due, a franchise or privilege tax, which is hereby levied at the rate of one
18 dollar and fifty cents (\$1.50) per one thousand dollars (\$1,000) of the total amount of
19 capital stock, surplus and undivided profits as herein provided. The tax imposed in this
20 section shall in no case be less than thirty-five dollars (\$35.00) and shall be for the
21 privilege of carrying on, doing business, and/or the continuance of articles of
22 incorporation or domestication of each such corporation in this State. Appraised value
23 of tangible property including real estate shall be the ad valorem valuation for the
24 calendar year next preceding the due date of the franchise tax return. Appraised value of
25 intangible property shall be the total gross valuation required to be reported for
26 intangible tax purposes on April 15 coincident with or next preceding the due date of
27 the franchise tax return. The term "total actual investment in tangible property" as used
28 in this section shall be construed to mean the total original purchase price or
29 consideration to the reporting taxpayer of its tangible properties, including real estate, in
30 this State plus additions and improvements thereto less reserve for depreciation as
31 permitted for income tax purposes, and also less any indebtedness incurred and existing
32 by virtue of the purchase of any real estate and any permanent improvements made
33 thereon. In computing "total actual investment in tangible personal property" there shall
34 also be deducted reserves for the entire cost of any air-cleaning device or sewage or
35 waste treatment plant, including waste lagoons, and pollution abatement equipment
36 purchased or constructed and installed which reduces the amount of air or water
37 pollution resulting from the emission of air contaminants or the discharge of sewage and
38 industrial wastes or other polluting materials or substances into the outdoor atmosphere
39 or into streams, lakes, or rivers, upon condition that the corporation claiming such
40 deduction shall furnish to the Secretary a certificate from the Department of
41 Environment and Natural Resources or from a local air pollution control program for
42 air-cleaning devices located in an area where the Environmental Management
43 Commission has certified a local air pollution control program pursuant to
44 G.S. 143-215.112 certifying that said Department or local air pollution control program

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

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

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

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

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

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

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

1 **SECTION 2.** This act becomes effective January 1, 2005, and applies to
2 taxes due on or after that date.