

**GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2003**

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SENATE BILL 418

Short Title: Update Corporate Tax Apportionment Formula. (Public)

Sponsors: Senators Clodfelter, Dalton, Hartsell, Hoyle, and Kerr.

Referred to: Finance.

March 17, 2003

1 A BILL TO BE ENTITLED
2 AN ACT TO ADJUST THE APPORTIONMENT FORMULA SALES FACTOR FOR
3 BROADCASTERS AND PUBLISHERS AND TO UPDATE THE
4 APPORTIONMENT FORMULA PROPERTY FACTOR FOR ALL
5 CORPORATIONS BY EXCLUDING OUTER-JURISDICTIONAL PROPERTY
6 FROM THAT FACTOR.

7 The General Assembly of North Carolina enacts:

8 **SECTION 1.** G.S. 105-130.4 reads as rewritten:

9 **"§ 105-130.4. Allocation and apportionment of income for corporations.**

10 (a) As used in this section, unless the context otherwise requires:

11 (1) 'Business income' means all income that is apportionable under the
12 United States Constitution.

13 (1a) Broadcasting. – Transmitting radio or television programming to
14 viewers or listeners by an electronic or other signal conducted by radio
15 waves, microwaves, wires, coaxial cables, fiber optics, satellite
16 transmissions, or any other means of communication.

17 (2) 'Commercial domicile' means the principal place from which the trade
18 or business of the taxpayer is directed or managed.

19 (3) 'Compensation' means wages, salaries, commissions and any other
20 form of remuneration paid to employees for personal services.

21 (4) 'Excluded corporation' means any corporation engaged in business as a
22 building or construction contractor, a securities dealer, or a loan
23 company or a corporation that receives more than fifty percent (50%)
24 of its ordinary gross income from intangible property.

25 (4a) General formula. – A fraction, the numerator of which is the property
26 factor plus the payroll factor plus twice the sales factor, and the
27 denominator of which is four. If the sales factor does not exist, the
28 denominator of the fraction is the number of existing factors. If the
29 sales factor exists but the payroll factor or the property factor does not

- 1 exist, the denominator of the fraction is the number of existing factors
2 plus one.
- 3 (5) 'Nonbusiness income' means all income other than business income.
- 4 (5a) Outer-jurisdictional property. – Tangible personal property that is not
5 physically located in any state. The term includes orbiting satellites
6 and undersea transmission cables.
- 7 (6) 'Public utility' means any corporation that is subject to control of one
8 of more of the following entities: the North Carolina Utilities
9 Commission, the Federal Communications Commission, the Interstate
10 Commerce Commission, the Federal Power Commission, or the
11 Federal Aviation Agency; and that owns or operates for public use any
12 plant, equipment, property, franchise, or license for the transmission of
13 communications, the transportation of goods or persons, or the
14 production, storage, transmission, sale, delivery or furnishing of
15 electricity, water, steam, oil, oil products, or gas. The term also
16 includes a motor carrier of property whose principal business activity
17 is transporting property by motor vehicle for hire over the public
18 highways of this State. The term does not include a corporation
19 engaged in the business of broadcasting radio or television
20 programming.
- 21 (6a) Radio programming. – Any performance, event, or production
22 broadcast on radio, including news, sporting events, plays, stories, and
23 other literary, commercial, educational, or artistic works, through the
24 use of an audio tape, disk, or any other format or medium. Each
25 episode of a series is considered separately.
- 26 (7) 'Sales' means all gross receipts of the corporation except for the
27 following receipts:
- 28 a. Receipts from a casual sale of property.
- 29 b. Receipts allocated under subsections (c) through (h) of this
30 section.
- 31 c. Receipts exempt from taxation.
- 32 d. The portion of receipts realized from the sale or maturity of
33 securities or other obligations that represents a return of
34 principal.
- 35 (8) 'Casual sale of property' means the sale of any property which was not
36 purchased, produced or acquired primarily for sale in the corporation's
37 regular trade or business.
- 38 (9) 'State' means any state of the United States, the District of Columbia,
39 the Commonwealth of Puerto Rico, any territory or possession of the
40 United States, and any foreign country or political subdivision thereof.
- 41 (9a) Television programming. – Any performance, event, or production
42 broadcast on television, including news, sporting events, plays, stories,
43 and other literary, commercial, educational, or artistic works, through

1 the use of video tape, disk, or any other format or medium. Each
2 episode of a series is considered separately.

3 (b) A corporation having income from business activity which is taxable both
4 within and without this State shall allocate and apportion its net income or net loss as
5 provided in this section. For purposes of allocation and apportionment, a corporation is
6 taxable in another state if (i) the corporation's business activity in that state subjects it to
7 a net income tax or a tax measured by net income, or (ii) that state has jurisdiction based
8 on the corporation's business activity in that state to subject the corporation to a tax
9 measured by net income regardless whether that state exercises its jurisdiction. For
10 purposes of this section, 'business activity' includes any activity by a corporation that
11 would establish a taxable nexus pursuant to 15 United States Code section 381.

12 (c) Rents and royalties from real or tangible personal property, gains and losses,
13 interest, dividends less the portion deductible under G.S. 105-130.7, patent and
14 copyright royalties and other kinds of income, to the extent that they constitute
15 nonbusiness income, less related expenses shall be allocated as provided in subsections
16 (d) through (h) of this section.

17 (d) (1) Net rents and royalties from real property located in this State are
18 allocable to this State.

19 (2) Net rents and royalties from tangible personal property are allocable to
20 this State:

21 a. If and to the extent that the property is utilized in this State, or

22 b. In their entirety if the corporation's commercial domicile is in
23 this State and the corporation is not organized under the laws
24 of, or is not taxable in, the state in which the property is
25 utilized.

26 (3) The extent of utilization of tangible personal property in a state is
27 determined by multiplying the rents and royalties by a fraction, the
28 numerator of which is the number of days of physical location of the
29 property in the state during the rental or royalty period in the income
30 year and the denominator of which is the number of days of physical
31 location of the property everywhere during all rental or royalty periods
32 in the income year. If the physical location of the property during the
33 rental or royalty period is unknown or unascertainable by the
34 corporation, tangible personal property is utilized in the state in which
35 the property was located at the time the rental or royalty payer
36 obtained possession.

37 (e) (1) Gains and losses from sales or other disposition of real property
38 located in this State are allocable to this State.

39 (2) Gains and losses from sales or other disposition of tangible personal
40 property are allocable to this State if

41 a. The property had a situs in this State at the time of the sale, or

42 b. The corporation's commercial domicile is in this State and the
43 corporation is not taxable in the state in which the property has
44 a situs.

1 (3) Gains and losses from sales or other disposition of intangible personal
2 property are allocable to this State if the corporation's commercial
3 domicile is in this State.

4 (f) Interest and net dividends are allocable to this State if the corporation's
5 commercial domicile is in this State. For purposes of this section, the term 'net
6 dividends' means gross dividend income received less related expenses and less that
7 portion of the dividends deductible under G.S. 105-130.7.

8 (g) (1) Royalties or similar income received from the use of patents,
9 copyrights, secret processes and other similar intangible property are
10 allocable to this State:

11 a. If and to the extent that the patent, copyright, secret process or
12 other similar intangible property is utilized in this State, or

13 b. If and to the extent that the patent, copyright, secret process or
14 other similar intangible property is utilized in a state in which
15 the taxpayer is not taxable and the taxpayer's commercial
16 domicile is in this State.

17 (2) A patent, secret process or other similar intangible property is utilized
18 in a state to the extent that it is employed in production, fabrication,
19 manufacturing, processing, or other use in the state or to the extent that
20 a patented product is produced in the state. If the basis of receipts from
21 such intangible property does not permit allocation to states or if the
22 accounting procedures do not reflect states of utilization, the intangible
23 property is utilized in the state in which the taxpayer's commercial
24 domicile is located.

25 (3) A copyright is utilized in a state to the extent that printing or other
26 publication originates in the state. If the basis of receipts from
27 copyright royalties does not permit allocation to states or if the
28 accounting procedures do not reflect states of utilization, the copyright
29 is utilized in the state in which the taxpayer's commercial domicile is
30 located.

31 (h) The income less related expenses from any other nonbusiness activities or
32 investments not otherwise specified in this section is allocable to this State if the
33 business situs of the activities or investments are located in this State.

34 (i) Most Corporations. – All business income of corporations other than public
35 utilities and excluded corporations shall be apportioned to this State by multiplying the
36 income by a fraction, the numerator of which is the property factor plus the payroll
37 factor plus twice the sales factor, and the denominator of which is four. Provided, that
38 where the sales factor does not exist, the denominator of the fraction shall be the
39 number of existing factors and where the sales factor exists but the payroll factor or the
40 property factor does not exist, the denominator of the fraction shall be the number of
41 existing factors plus one. corporations, other than those corporations that are required to
42 apportion business income under one of the special formulas provided in subsections
43 (m) through (s2) of this section, is apportioned to this State by multiplying the income
44 by the general formula.

- 1 (j) (1) The property factor is a fraction, the numerator of which is the average
2 value of the corporation's real and tangible personal property owned or
3 rented and used in this State during the income year and the
4 denominator of which is the average value of all the corporation's real
5 and tangible personal property owned or rented and used during the
6 income year. Neither the numerator nor the denominator includes
7 outer-jurisdictional property.
- 8 (2) Property owned by the corporation is valued at its original cost.
9 Property rented by the corporation is valued at eight times the net
10 annual rental rate. Net annual rental rate is the annual rental rate paid
11 by the corporation less any annual rental rate received by the
12 corporation from subrentals except that subrentals shall not be
13 deducted when they constitute business income. Any property under
14 construction and any property the income from which constitutes
15 nonbusiness income shall be excluded in the computation of the
16 property factor.
- 17 (3) The average value of property shall be determined by averaging the
18 values at the beginning and end of the income year, but in all cases the
19 Secretary of Revenue may require the averaging of monthly or other
20 periodic values during the income year if reasonably required to reflect
21 properly the average value of the corporation's property. A corporation
22 that ceases its operations in this State before the end of its income year
23 because of its intention to dissolve or to relinquish its certificate of
24 authority, or because of a merger, conversion, or consolidation, or for
25 any other reason whatsoever shall use the real estate and tangible
26 personal property values as of the first day of the income year and the
27 last day of its operations in this State in determining the average value
28 of property, but the Secretary may require averaging of monthly or
29 other periodic values during the income year if reasonably required to
30 reflect properly the average value of the corporation's property.
- 31 (k) (1) The payroll factor is a fraction, the numerator of which is the total
32 amount paid in this State during the income year by the corporation as
33 compensation, and the denominator of which is the total compensation
34 paid everywhere during the income year. All compensation paid to
35 general executive officers and all compensation paid in connection
36 with nonbusiness income shall be excluded in computing the payroll
37 factor. General executive officers shall include the chairman of the
38 board, president, vice-presidents, secretary, treasurer, comptroller, and
39 any other officers serving in similar capacities.
- 40 (2) Compensation is paid in this State if:
41 a. The individual's service is performed entirely within the State;
42 or

- 1 b. The individual's service is performed both within and without
2 the State, but the service performed without the State is
3 incidental to the individual's service within the State; or
4 c. Some of the service is performed in this State and (i) the base of
5 operations or, if there is no base of operations, the place from
6 which the service is directed or controlled is in this State, or (ii)
7 the base of operations or the place from which the service is
8 directed or controlled is not in any state in which some part of
9 the service is performed, but the individual's residence is in this
10 State.
- 11 (1) (1) The sales factor is a fraction, the numerator of which is the total sales
12 of the corporation in this State during the income year, and the
13 denominator of which is the total sales of the corporation everywhere
14 during the income year. Notwithstanding any other provision under
15 this Part, the receipts from any casual sale of property shall be
16 excluded from both the numerator and the denominator of the sales
17 factor. Where a corporation is not taxable in another state on its
18 business income but is taxable in another state only because of
19 nonbusiness income, all sales shall be treated as having been made in
20 this State.
- 21 (2) (2) Sales of tangible personal property are in this State if the property is
22 received in this State by the purchaser. In the case of delivery of goods
23 by common carrier or by other means of transportation, including
24 transportation by the purchaser, the place at which the goods are
25 ultimately received after all transportation has been completed shall be
26 considered as the place at which the goods are received by the
27 purchaser. Direct delivery into this State by the taxpayer to a person or
28 firm designated by a purchaser from within or without the State shall
29 constitute delivery to the purchaser in this State.
- 30 (3) (3) Other sales are in this State if:
- 31 a. The receipts are from real or tangible personal property located
32 in this State; or
33 b. The receipts are from intangible property and are received from
34 sources within this State; or
35 c. The receipts are from services and the income-producing
36 activities are in this State.
- 37 (m) All business income of a railroad company shall be apportioned to this State
38 by multiplying the income by a fraction, the numerator of which is the 'railway
39 operating revenue' from business done within this State and the denominator of which is
40 the "total railway operating revenue" from all business done by the company as shown
41 by its records kept in accordance with the standard classification of accounts prescribed
42 by the Interstate Commerce Commission.
- 43 'Railway operating revenue' from business done within this State shall mean 'railway
44 operating revenue' from business wholly within this State, plus the equal mileage

1 proportion within this State of each item of 'railway operating revenue' received from
2 the interstate business of the company. 'Equal mileage proportion' shall mean the
3 proportion which the distance of movement of property and passengers over lines in this
4 State bears to the total distance of movement of property and passengers over lines of
5 the company receiving such revenue. 'Interstate business' shall mean 'railway operating
6 revenue' from the interstate transportation of persons or property into, out of, or through
7 this State. If the Secretary of Revenue shall find, with respect to any particular
8 company, that its accounting records are not kept so as to reflect with exact accuracy
9 such division of revenue by State lines as to each transaction involving interstate
10 revenue, the Secretary of Revenue may adopt such regulations, based upon averages, as
11 will approximate with reasonable accuracy the proportion of interstate revenue actually
12 earned upon lines in this State. Provided, that where a railroad is being operated by a
13 partnership which is treated as a corporation for income tax purposes and pays a net
14 income tax to this State, or if located in another state would be so treated and so pay as
15 if located in this State, each partner's share of the net profits shall be considered as
16 dividends paid by a corporation for purposes of this Part and shall be so treated for
17 inclusion in gross income, deductibility, and separate allocation of dividend income.

18 (n) All business income of a telephone company shall be apportioned to this State
19 by multiplying the income by a fraction, the numerator of which is gross operating
20 revenue from local service in this State plus gross operating revenue from toll services
21 performed wholly within this State plus the proportion of revenue from interstate toll
22 services attributable to this State as shown by the records of the company plus the gross
23 operating revenue in North Carolina from other service less the uncollectible revenue in
24 this State, and the denominator of which is the total gross operating revenue from all
25 business done by the company everywhere less total uncollectible revenue. Provided,
26 that where a telephone company is required to keep its records in accordance with the
27 standard classification of accounts prescribed by the Federal Communications
28 Commission the amounts in such accounts shall be used in computing the
29 apportionment fraction as provided in this subsection.

30 (o) All business income of a motor carrier of property shall be apportioned by
31 multiplying the income by a fraction, the numerator of which is the number of vehicle
32 miles in this State and the denominator of which is the total number of vehicle miles of
33 the company everywhere. The words 'vehicle miles' shall mean miles traveled by
34 vehicles owned or operated by the company hauling property for a charge or traveling
35 on a scheduled route.

36 (p) All business income of a motor carrier of passengers shall be apportioned by
37 multiplying the income by a fraction, the numerator of which is the number of vehicle
38 miles in this State and the denominator of which is the total number of vehicle miles of
39 the company everywhere. The words 'vehicle miles' shall mean miles traveled by
40 vehicles owned or operated by the company carrying passengers for a fare or traveling
41 on a scheduled route.

42 (q) All business income of a telegraph company shall be apportioned by
43 multiplying the income by a fraction, the numerator of which is the property factor plus
44 the payroll factor plus the sales factor and the denominator of which is three.

1 The property factor shall be as defined in subsection (j) of this section, the payroll
2 factor shall be as defined in subsection (k) of this section, and the sales factor shall be as
3 defined in subsection (l) of this section.

4 (r) All business income of an excluded corporation and of all other public
5 utilities shall be apportioned by multiplying the income by the sales factor as
6 determined under subsection (l) of this section.

7 (s) All business income of an air or water transportation corporation shall be
8 apportioned by a fraction, the numerator of which is the corporation's revenue ton miles
9 in this State and the denominator of which is the corporation's revenue ton miles
10 everywhere. The term 'revenue ton mile' means one ton of passengers, freight, mail, or
11 other cargo carried one mile. In making this computation, a passenger is considered to
12 weigh two hundred pounds.

13 (s1) Broadcasters. – All business income of a corporation engaged in the
14 business of broadcasting radio or television programming is apportioned by multiplying
15 the income by the general formula, after modifying the numerator of the sales factor in
16 accordance with this section. The numerator includes all receipts from broadcasting
17 radio and television programming multiplied by an audience factor. For radio broadcasts
18 and for television broadcasts by a television station, the audience factor is the ratio of
19 the corporation's North Carolina listening or viewing audience to the corporation's total
20 listening or viewing audience. For television broadcasts by a cable television system,
21 the audience factor is the ratio of the cable television system's subscribers located in this
22 State to all the cable television system's subscribers. A corporation may use published
23 rating or subscription statistics, as appropriate, to determine its audience factor.

24 (s2) Publishers. – All business income of a corporation engaged in the business
25 of publishing, selling, licensing, or distributing newspapers, magazines, trade journals,
26 books, or other publications is apportioned by multiplying the income by the general
27 formula, after modifying the numerator of the sales factor in accordance with this
28 section. The numerator includes all the corporation's receipts from advertising and from
29 the sale, rental, or other use of its customer lists multiplied by a circulation factor. The
30 circulation factor is the ratio of the corporation's North Carolina purchasers and
31 subscribers of a publication to the corporation's total purchasers and subscribers of the
32 publication. A purchaser or subscriber of a publication is the final recipient of the
33 publication. A separate circulation factor applies to each publication. If advertising in a
34 publication is included only in copies of the publication distributed to a limited
35 geographic area, the circulation factor is determined on the basis of the circulation
36 within the limited geographic area. A corporation may use rating statistics published by
37 the Audit Bureau of Circulations or other comparable statistics to determine the
38 circulation factor for a publication.

39 (t) (1) If any corporation believes that the method of allocation or
40 apportionment as administered by the Secretary has operated or will so
41 operate as to subject it to taxation on a greater portion of its income
42 than is reasonably attributable to business or earnings within the State,
43 it may file with the Tax Review Board a petition setting forth the facts
44 upon which its belief is based and its argument with respect to the

1 application of the allocation formula. This petition shall be filed in
2 such form and within such time as the Tax Review Board may
3 prescribe. The Board shall grant a hearing on the petition. The time
4 limitations set in G.S. 105-241.2 for the date of the hearing,
5 notification to the taxpayer, and a decision following the hearing apply
6 to a hearing held pursuant to this subsection. At least three members of
7 the Tax Review Board shall attend any hearing pursuant to such
8 petition. In such cases, the Tax Review Board's membership shall be
9 augmented by the addition of the Secretary, who shall sit as a member
10 of the Board with full power to participate in its deliberations and
11 decisions with respect to petitions filed under the provisions of this
12 subsection. An informal record containing in substance the evidence,
13 contentions and arguments presented at the hearing shall be made. All
14 members of the augmented Tax Review Board shall consider such
15 evidence, contentions and arguments and the decisions thereon shall be
16 made by a majority vote of the augmented Board.

17 (2) If the corporation employs in its books of account a detailed allocation
18 of receipts and expenditures which reflects more clearly than the
19 applicable allocation formula prescribed by this section the income
20 attributable to the business within this State, application for permission
21 to base the return upon the taxpayer's books of account shall be
22 considered by the Tax Review Board. The Board may permit such
23 separate accounting method in lieu of applying the applicable
24 allocation formula if the Board finds that method best reflects the
25 income and earnings attributable to this State.

26 (3) If the corporation shows that any other method of allocation than the
27 applicable allocation formula prescribed by this section reflects more
28 clearly the income attributable to the business within this State,
29 application for permission to base the return upon such other method
30 shall be considered by the Tax Review Board. The application shall be
31 accompanied by a statement setting forth in detail, with full
32 explanations, the method the corporation believes will more nearly
33 reflect its income from business within this State. If the Board
34 concludes that the allocation formula prescribed by this section
35 allocates to this State a greater portion of the net income of the
36 corporation than is reasonably attributable to business or earnings
37 within this State, it shall determine the allocable net income by such
38 other method as it finds best calculated to assign to this State for
39 taxation the portion of the corporation's net income reasonably
40 attributable to its business or earnings within this State.

41 (4) There shall be a presumption that the appropriate allocation formula
42 reasonably attributes to this State the portion of the corporation's
43 income earned in this State, and the burden shall rest upon the
44 corporation to show the contrary. The relief herein authorized shall be

1 granted by the Board only in cases of clear, cogent and convincing
2 proof that the petitioning corporation is entitled thereto. No
3 corporation shall use any alternative formula or method other than the
4 applicable allocation formula provided by statute in making a report or
5 return of its income to this State except upon order in writing of the
6 Board, and any return in which any alternative formula or other
7 method, other than the applicable allocation formula prescribed by
8 statute, is used without permission of the Board shall not be a lawful
9 return.

10 When the Board determines, pursuant to the provisions of this
11 subsection, that an alternative formula or other method more
12 accurately reflects the income allocable to North Carolina and renders
13 its decision with regard thereto, the corporation shall allocate its net
14 income for future years in accordance with such determination and
15 decision of the Board so long as the conditions constituting the basis
16 upon which the decision was made remain unchanged or until such
17 time as the business method of operation of the corporation changes.
18 Provided, however, that the Secretary may, with respect to any
19 subsequent year, require the corporation to furnish information relating
20 to its property, operations, and activities.

21 (5) A corporation which proposes to do business in this State may file a
22 petition with the Board setting forth the facts upon which it contends
23 that the applicable allocation formula will allocate a greater portion of
24 the corporation's future income to North Carolina than will be
25 reasonably attributable to its proposed business or contemplated
26 earnings within the State. Upon a proper showing in accordance with
27 the procedure described above for determinations by the Board, the
28 Board may authorize such corporation to allocate income from its
29 future business to North Carolina on the basis prescribed by the Board
30 under the provisions of this section for such future years if the
31 conditions constituting the basis upon which the Board's decision is
32 made remain unchanged and the business operations of the corporation
33 continue to conform to the statement of proposed methods of business
34 operation presented by the corporation to the Board.

35 (6) When the Secretary asserts liability under the formula adjustment
36 decision of the Tax Review Board, an aggrieved corporation may pay
37 the tax and bring a civil action for recovery under the provisions of
38 Article 9."

39 **SECTION 2.** This act is effective for taxable years beginning on or after
40 January 1, 2003.