

LEGISLATIVE BILL 1124

Approved by the Governor April 11, 1984

Introduced by Revenue Committee, Carsten, 2,
Chairperson; Hefner, 19; Landis, 46;
Pappas, 42; Lundy, 36; Sieck, 24;
Hannibal, 4; for the Governor

AN ACT relating to revenue and taxation; to amend sections 77-377.04, 77-2701, and 77-2733, Reissue Revised Statutes of Nebraska, 1943, and section 77-2716, Revised Statutes Supplement, 1983; to redefine an act; to provide for statutory construction; to provide a tax on corporations as prescribed; to define terms; to provide powers and duties; to harmonize provisions; to provide for severability; to provide an operative date; to repeal the original sections, and also sections 77-2735 to 77-2752, Reissue Revised Statutes of Nebraska, 1943, and section 77-2734, Revised Statutes Supplement, 1983.

Be it enacted by the people of the State of Nebraska,

Section 1. That section 77-377.04, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

77-377.04. A collection agency entering into a contract with the Tax Commissioner for the collection of delinquent taxes pursuant to sections 77-377.01 to 77-377.04 agrees that it is receiving income from sources within this state or doing business in this state for purposes of the Nebraska income tax ~~and franchise tax~~ laws pursuant to section 77-2733 or 77-2734, respectively section 5 of this act.

Sec. 2. That section 77-2701, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

77-2701. Sections 77-2701 to 77-27,135 and sections 4 to 18 of this act shall be known and may be cited as the Nebraska Revenue Act of 1967. After the operative date of this act any reference to sections 77-2701 to 77-27,135 shall be construed to include sections 4 to 18 of this act and any reference which would include sections 77-2734 to 77-2752 shall be construed to include sections 4 to 18 of this act.

Sec. 3. That section 77-2716, Revised Statutes Supplement, 1983, be amended to read as follows:

77-2716. (1) There shall be subtracted from federal taxable income interest or dividends on obligations of the United States and its territories and possessions or of any authority, commission, or

instrumentality of the United States to the extent includable in gross income for federal income tax purposes but exempt from state income taxes under the laws of the United States. The amount subtracted under the provisions of this subsection shall, except as provided in subsections (2) to (6) of this section, be reduced by any interest on indebtedness incurred to carry the obligations or securities described in this subsection; and by any expenses incurred in the production of interest or dividend income described in this subsection to the extent that such expenses, including amortizable bond premiums, are deductible in determining federal taxable income.

(2) For ~~taxpayer~~ corporations subject to the tax under ~~subsection (2) of section 77-2734~~ section 5 of this act, in lieu of the reduction for expenses contained in subsection (1) of this section, there shall be added to federal taxable income, the investment interest expense incurred by the ~~taxpayer~~ corporation to purchase and maintain exempt securities as determined under subsection (3) of this section.

(3) The investment interest expense provided in subsection (2) of this section shall be determined by (a) dividing the ~~taxpayer's~~ corporation's average investment in exempt securities by the ~~taxpayer's~~ corporation's average total assets and multiplying such ratio by the corporation's ~~taxpayer's~~ total interest expense and (b) subtracting any interest disallowed under 26 U.S.C. sections 265 and 291.

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

(a) Exempt securities shall mean the obligations that earn income exempt from taxation under subsection (1) of this section or under 26 U.S.C. section 103;

(b) Average investment in exempt securities shall mean the average of the aggregate tax basis in exempt securities at the beginning and the end of the taxable year;

(c) Average total assets shall mean the average of the aggregate tax basis in total assets at the beginning and end of the taxable year; and

(d) Total interest expense shall mean the total interest expense allowed as a deduction in computing federal taxable income plus any interest disallowed under 26 U.S.C. sections 265 and 291.

(5) Whenever it is necessary to properly reflect the ratio of investment in exempt securities to total assets, the Tax Commissioner may permit or require the computation of the average provided for in subsection (3) of this section using amounts from interim balance sheets.

(6) The ~~taxpayer~~ corporation may use, in lieu of the tax basis for the computation in subsection (3) of this section, the amounts from a balance sheet included with the federal return or as required to be reported to federal or

state regulatory agencies if (a) such amounts are not materially different from tax basis, (b) the amounts are prepared consistently from year to year, and (c) absent a change in circumstances, the amounts are consistently used by the taxpayer corporation from year to year. The Tax Commissioner may require a taxpayer corporation to use the alternative amounts in order to maintain consistency or may require the taxpayer corporation to show that the amounts used do not materially differ from the tax basis.

~~(7) There shall be added to or subtracted from federal taxable income, as the case may be, the taxpayer's share of the fiduciary adjustment determined under the provisions of section 77-2720.~~

(7) There shall be subtracted from federal taxable income dividends received or deemed to be received from corporations which are not subject to the Internal Revenue Code.

Sec. 4. (1) Residents of Nebraska who are shareholders of a small business corporation having an election in effect under subchapter S of the Internal Revenue Code shall include in their income, to the extent includable in federal gross income, their proportionate share of such corporation's income.

(2) Nonresidents of Nebraska who are shareholders of such corporations shall file a Nebraska income tax return and shall include in Nebraska adjusted gross income their proportionate share of the corporation's Nebraska income, as determined under the provisions of sections 8 to 18 of this act.

(3) The shareholder shall execute and forward to the corporation before the filing of the corporation's return an agreement which states he or she will file a Nebraska income tax return and pay the tax on the income derived from or connected with sources in this state, and such agreement shall be attached to the corporation's Nebraska return for such taxable year.

(4) In the absence of the nonresident shareholder's executed agreement being attached to the Nebraska small business corporate return, the corporation shall remit with the return an amount equal to fifty per cent of the rate imposed on individuals under section 77-2715 multiplied by the nonresident shareholder's share of the corporation's income which was derived from or attributable to this state.

Sec. 5. (1) A tax is hereby imposed for each taxable year on the taxable income of every corporate taxpayer that is doing business in this state at a rate equal to twenty-five per cent of the rate imposed on individuals under section 77-2715 on the first fifty thousand dollars of taxable income and at the rate of thirty-five per cent of such rate on all taxable income in excess of fifty thousand dollars.

(a) For corporate taxpayers with a fiscal year

that does not coincide with the calendar year, the individual rate used for subsection (1) of this section shall be the rate in effect on the first day, or the day deemed to be the first day, of the taxable year.

(b) For fiscal years beginning before January 1, 1968, the rate initially set shall apply for the period from January 1, 1968, to the end of that fiscal year.

(2) For a corporate taxpayer that is subject to tax in another state, its taxable income shall be the portion of the taxpayer's federal taxable income, as adjusted, that is determined to be connected with the taxpayer's operations in this state pursuant to sections 8 to 18 of this act.

(3) Each corporate taxpayer shall file only one income tax return for each taxable year.

Sec. 6. (1) Any (a) corporation subject to tax under section 44-1213, 77-908, 77-909, or 81-523, (b) electric cooperative organized under Chapter 70, article 14, or (c) credit union shall be credited, in the computation of the tax due under the provisions of the Nebraska Revenue Act of 1967, with the amount paid during the taxable year as taxes in lieu of intangible tax.

(2) There shall be allowed to corporate taxpayers a credit for nonhighway use motor vehicle fuels as provided in section 66-452.

(3) There shall be allowed to corporate taxpayers a renewable energy source systems credit or a builder's credit as provided in sections 66-1048 and 66-1050.

Sec. 7. As used in sections 4 to 18 of this act, unless the context otherwise requires:

(1) Commercial domicile shall mean the principal place from which the trade or business of the taxpayer is directed or managed;

(2) Compensation shall mean wages, salaries, commissions, and any other form of remuneration paid to employees for personal services;

(3) Corporate taxpayer shall mean any corporation that is not a part of a unitary business or the part of a unitary business, whether it is one or more corporations, that is doing business in this state. Corporate taxpayer shall not include any corporation that has a valid election under subchapter S of the Internal Revenue Code;

(4) Corporation shall mean all corporations and all other entities that are taxed as corporations under the Internal Revenue Code;

(5) Doing business in this state shall mean the exercise of the corporation's franchise in this state or the conduct of operations in this state that exceed the limitations provided in 15 U.S.C. 381 on a state imposing an income tax;

(6) Federal taxable income shall mean the

corporate taxpayer's federal taxable income as reported to the Internal Revenue Service, or as subsequently changed or amended. Except as provided in subsection (7) of section 77-2716, no adjustment shall be allowed for a change from any election made or the method used in computing federal taxable income. An election to file a federal consolidated return shall not require the inclusion in any unitary group of a corporation that is not a part of the unitary business;

(7) Sales shall mean all gross receipts of the taxpayer;

(8) Single economic unit shall mean a business where there is a sharing or exchange of value between the parts of the unit. A sharing or exchange of value occurs when the parts of the business are linked by (a) common management or (b) common operational resources that produce material (i) economies of scale, (ii) transfers of value, or (iii) flow of goods, capital, or services between the parts of the unit;

(A) For the purposes of this subdivision common management includes, but is not limited to, (I) a centralized executive force or (II) review or approval authority over long-term operations with or without the exercise of control over the day-to-day operations; and

(B) For the purposes of this subdivision common operational resources include, but are not limited to, centralization of any of the following: Accounting, advertising, engineering, financing, insurance, legal, personnel, pension or benefit plans, purchasing, research and development, selling, or union relations;

(9) State shall mean any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof;

(10) Subject to the Internal Revenue Code shall mean a corporation that meets the requirements of Internal Revenue Code section 243 in order for its distributions to qualify for the dividends received deduction;

(11) Taxable income shall mean federal taxable income as adjusted and, if appropriate, as apportioned;

(12) Taxable year shall mean the period the corporate taxpayer used on its federal income tax return;

(13) Unitary business shall mean a business that is conducted as a single economic unit by one or more corporations with common ownership and shall include all activities in different lines of business that contribute to the single economic unit.

For the purposes of this subdivision, common ownership shall mean one or more corporations owning fifty per cent or more of another corporation; and

(14) Unitary group shall mean the group of corporations that are conducting a unitary business.

Sec. 8. (1) Any unitary business having income from business activity that is taxable both within and without this state shall determine its taxable income by multiplying its federal taxable income, as adjusted, by a fraction, which is the average of the property factor plus the payroll factor plus the sales factor.

(2) If a unitary business does not have any property, payroll, or sales anywhere, then the average in subsection (1) of this section shall be the average of the remaining factors.

(3) In the computation of the factors only the part of a unitary group that is subject to the Internal Revenue Code shall be included, except as provided in section 12 of this act.

Sec. 9. (1) The entire federal taxable income of a unitary business operating both within and without this state is presumed to be subject to apportionment. Other than for adjustments required to be made under the Nebraska Revenue Act of 1967, for any income that is claimed to be not subject to apportionment, a taxpayer needs to show by a preponderance of the evidence (a) that the income is not a part of the unitary business and (b) the taxpayer has not claimed the same income is part of the unitary business and subject to apportionment in another state with substantially the same law on apportionability of income.

(2) There shall be subtracted from federal taxable income any income that the taxpayer has shown is not subject to apportionment under subsection (1) of this section. The amount subtracted under this section shall be reduced, but not below zero, by a portion of the interest expense as determined under subsection (3) of this section and any expense incurred in the production of the income described in this section.

(3) The interest expense for the reduction required in subsection (2) of this section shall be determined by dividing the taxpayer's average investment in the activities producing the income by the taxpayer's average total assets and multiplying such ratio by the total interest deduction allowed in the computation of federal taxable income.

(4) For the purposes of this section, investment in activities producing the income described in this section shall mean the tax basis of the assets, both tangible and intangible, that are used in the activities or are the basis of the receipt of the described income.

(5) The computation in this section is subject to the same modifications as contained in subsections (5) and (6) of section 77-2716.

Sec. 10. (1) There shall be added to federal taxable income the amount of any federal deduction because of a carryforward of a net operating loss or any capital loss.

(2) There shall be allowed a deduction for a

carryforward of a net operating loss or capital loss that is connected with operations in Nebraska.

(3) There shall be allowed a carryback of a net operating loss or a capital loss that is connected with operations in Nebraska.

(4) The amounts in subsections (2) and (3) of this section shall be computed pursuant to rules and regulations adopted and promulgated by the Tax Commissioner. Such regulations shall be in accord with the laws of the United States regarding carryforwards and carrybacks.

Sec. 11. (1) When the corporate taxpayer is a group of corporations that does not file a consolidated federal return, the sum of each corporation's federal taxable income shall be used to determine taxable income.

(2) The sum of the federal taxable income of the group of corporations shall be adjusted to eliminate intercompany transactions.

(3) If the group of corporations includes a domestic international sales corporation or other entity accorded similar treatment under the Internal Revenue Code, the income of the group shall include only that portion of the domestic international sales corporation's income that is considered to be a dividend to the parent.

(a) The sales to the domestic international sales corporation shall be eliminated.

(b) The domestic international sales corporation's property, payroll, and sales shall be included in the factors to the extent of the ownership of the rest of the group.

(c) There shall be no adjustment to the factors when the deferred income is realized by the parent.

Sec. 12. Any member of a unitary group that is required or permitted to use an apportionment formula other than one based on property, payroll, and sales shall be included in a return only with other corporations using the same apportionment formula. The income and the factors of such corporation shall not be used in computing the taxable income of the rest of the unitary group that does not use such special formula. A corporation using a formula required by a regulation issued pursuant to subsection (3) of section 18 of this act is using a formula based on property, payroll, and sales.

Sec. 13. The factors computed pursuant to sections 8 to 18 of this act shall be adjusted in the following situations:

(1) The sales factor shall include the income from intangibles such as interest, royalties, or dividends and the net income from gains on the sale of intangibles;

(2) Except as provided in subdivision (1) of this section, the factors shall not include in the denominator any amount that cannot be assigned to a numerator because of the inability to reasonably identify

the location of an income-producing activity;

(3) The factors shall not include any amount that was eliminated as an intercompany transaction; and

(4) The factors shall not include any property, payroll, or sales that are a part of the production of income that is not subject to apportionment.

Sec. 14. (1) A corporate taxpayer is taxable in another state if that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not do so.

(2) The failure to provide upon request of the Tax Commissioner a copy of the return filed and proof of payment of a net income tax imposed by another state creates a rebuttable presumption that the taxpayer is not subject to tax in the other state.

Sec. 15. (1) The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

(2) Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(3) The average value of property shall be determined by averaging the values at the beginning and end of the tax period, but the Tax Commissioner may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

Sec. 16. (1) The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

(2) Compensation is paid in this state if:

(a) The individual's service is performed entirely within the state;

(b) The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) Some of the service is performed in the state and (i) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in

this state.

Sec. 17. (1) The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

(2) Sales of tangible personal property are in this state if:

(a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (i) the purchaser is the United States government or (ii) the taxpayer is not taxable in the state of the purchaser.

(3) Sales, other than sales of tangible personal property, are in this state, if:

(a) The income-producing activity is performed in this state; or

(b) The income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

Sec. 18. (1) If the apportionment provisions contained in sections 4 to 17 of this act do not fairly represent the taxable income that is reasonably attributable to the business operations conducted within this state, the taxpayer may petition for or the Tax Commissioner may require, in respect to all or any part of the taxpayer's federal taxable income, if reasonable:

(a) The inclusion of one or more additional factors which will fairly represent the taxpayer's taxable income in this state;

(b) The exclusion of any one or more factors;

(c) Separate accounting; or

(d) The employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

(2) Subsection (1) of this section is intended to apply only in unique and nonrecurring factual situations which would otherwise produce incongruous results under the normal apportionment formula.

(3) The Tax Commissioner may adopt and promulgate rules and regulations for appropriate procedures for the computation of the property, payroll, and sales factors of the apportionment formula for certain industries when necessary to retain uniformity with the taxation methods of other states or when the characteristics of the industry are such that the normal computation methods are not appropriate. Such industries shall include, but are not limited to, transportation,

broadcast communications, and insurance.

(4) If the Tax Commissioner fails to mail a notice of final action on any petition under the provisions of this section within thirty days after the filing of such petition, the taxpayer may, prior to notice of action on the petition, consider the petition denied.

Sec. 19. That section 77-2733, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

77-2733. (1) The taxable income of a nonresident derived from sources within this state shall be the sum of the following:

(a) The net amount of items of income, gain, loss, and deduction entering into his or her federal taxable income which are derived from or connected with sources in this state including (i) his or her distributive share of partnership income and deductions determined under the provisions of section 77-2729; (ii) his or her share of small business corporation ~~taxable~~ taxable income determined under the provisions of section ~~77-2734~~ 77-2734 4 of this act; and (iii) his or her share of estate or trust income and deductions determined under the provisions of section 77-2725;

(b) The portion of the modifications described in subsection (1) of section 77-2716 which relates to income derived from sources in this state, including any modifications attributable to him or her as a partner; and

(c) The amount of the standard deduction or itemized deductions and the personal exemptions allowable for a nonresident shall be limited by the percentage which his or her adjusted gross income from sources within this state is to his or her entire adjusted gross income.

(2) Items of income, gain, loss, and deduction derived from or connected with sources within this state are those items attributable to:

(a) The ownership or disposition of any interest in real or tangible personal property in this state; and

(b) A business, trade, profession, or occupation carried on in this state.

(3) Income from intangible personal property including annuities, dividends, interest, and gains from the disposition of intangible personal property, shall constitute income derived from sources within this state only to the extent that such income is from property employed in a business, trade, profession, or occupation carried on in this state.

(4) Deductions with respect to capital losses, net long-term capital gains, and net operating losses shall be based solely on income, gains, losses, and deductions derived from or connected with sources in this state, under regulations to be prescribed by the Tax Commissioner, but otherwise shall be determined in the same manner as the corresponding federal deductions.

(5) If a business, trade, profession, or

occupation is carried on partly within and partly without this state, the items of income and deduction derived from or connected with sources within this state shall be determined by apportionment and allocation under regulations to be prescribed by the Tax Commissioner.

(6) Compensation paid by the United States for service in the armed forces of the United States performed by a nonresident shall not constitute income derived from sources within this state.

(7) Compensation paid by a resident estate or trust for services by a nonresident fiduciary shall constitute income derived from sources within this state.

(8) Compensation paid by a business, trade, or profession shall constitute income derived from sources within this state if:

(a) The individual's service is performed entirely within this state;

(b) The individual's service is performed both within and without this state, but the service performed without this state is incidental to the individual's service within this state;

(c) The individual's service is performed without this state, but the service performed without this state is related to the transactions and activity of the business, trade, or profession carried on within this state; or

(d) Some of the service is performed in this state and (i) the base of operations, or, if there is no base of operations, the place from which the service is directed or controlled is in this state; or (ii) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

Sec. 20. If any section in this act or any part of any section shall be declared invalid or unconstitutional, such declaration shall not affect the validity or constitutionality of the remaining portions thereof.

Sec. 21. This act shall become operative for all taxable years commencing, or deemed to commence, on or after January 1, 1984.

Sec. 22. That original sections 77-377.04, 77-2701, and 77-2733, Reissue Revised Statutes of Nebraska, 1943, and section 77-2716, Revised Statutes Supplement, 1983, and also sections 77-2735 to 77-2752, Reissue Revised Statutes of Nebraska, 1943, and section 77-2734, Revised Statutes Supplement, 1983, are repealed.