HB 121-FN - AS INTRODUCED

2023 SESSION

23-0159
02/10

HOUSE BILL ***121-FN***

AN ACT relative to worldwide combined reporting for unitary businesses under the business profits tax.

SPONSORS: Rep. Schamberg, Merr. 6

COMMITTEE: Ways and Means

ANALYSIS

This bill repeals the water's edge combined group provisions of the business profits tax.

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Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

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STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Three

AN ACT relative to worldwide combined reporting for unitary businesses under the business profits tax.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Intent.

I. New Hampshire has a unique tax structure. With no general sales tax or income tax and no severance tax on natural resources, New Hampshire relies on its business profits tax (corporate income tax) more than any other state and most countries. During the legislature's 1981 session, the business profits tax law was changed to allow the department of revenue administration or taxpayers to employ the combined reporting method of taxation under the unitary business principle.

II. Before this change, large multi-form corporations were allowed to file their business profits tax returns on a separate accounting/separate entity basis as if unconnected and unrelated to its affiliated sister corporations. This separate method of taxation is inadequate to measure accurately the income of a corporation with non-New Hampshire affiliates and creates a tax disadvantage for smaller New Hampshire corporations which compete with larger multistate and multinational corporations conducting business in New Hampshire.

III. Combined reporting treats a parent corporation and its subsidiaries - both in the United States and foreign - as if a single taxpayer. The purpose of combined reporting is to counteract the profit shifting that takes place between and among a parent and its subsidiaries operating across state lines and international boundaries. The United States Supreme Court endorsed the unitary business principle in the 1980 decision in Mobil vs Commissioner of Taxes, Vermont and Exxon vs Wisconsin Department of Revenue and, in 1983, approved worldwide combined reporting in the decision in Container Corporation vs Franchise Tax Board, California. The United States Supreme Court revisited the worldwide combined reporting method in 1994 in the decisions in Barclays Bank PLC vs Franchise Tax Board, California and Colgate-Palmolive vs Franchise Tax Board, California and approved its use for both United States and foreign-based multinational corporations. The Court noted that during the intervening years Congress did not pass any laws to prohibit a state from utilizing the worldwide combined reporting method.

IV. Bowing to pressure from the Reagan Administration, multinational corporations, foreign countries, especially Great Britain, and the New Hampshire governor, the legislature in 1986 changed the business profits tax law to restrict state’s ability to employ the worldwide unitary method of taxation and, in it’s place, adopt the water’s edge unitary method which excludes the profits and operations of foreign members of a unitary group. In other words, a multinational corporation is separated into two distinct pieces: one operating in the United States and another operating outside the United States and treated as unrelated separate taxable entities. In hindsight and with reports of massive profit shifting to foreign subsidiaries in foreign tax havens over the intervening years, the 1986 change to the business profits tax was a mistake and should be reversed. In hindsight, the water's edge method defeats the purpose of unitary combined reporting. The water's edge method promotes tax havens like Bermuda and Luxembourg and encourages the shifting of profits from the United States to foreign tax havens.

V. Compounding this mistake is the unintended consequence of the water's edge method that grants a tax advantage to foreign based corporations with United States subsidiaries operating in New Hampshire. The water's edge method gives greater discretion in allocating costs. Profit shifting artificially separates income from where that income was generated through real business activity and will be taxed little or not at all. This shortchanges states like New Hampshire. Their United States subsidiaries have been allowed to file their business profits tax returns on a separate accounting/separate entity basis under the water's edge method. The federal Government Accountability Office (GAO) and a United States Senate committee on governmental affairs have reported that as high as 72 percent of foreign based corporations that do business in the United States have paid zero federal income tax. This creates a tax disadvantage for United States-based corporations big and small. It is the intent of this act to treat all corporations conducting a unitary business fairly and equally no matter how big no matter where the headquarters are located.

VI. In addition, a return to the unitary worldwide method will counteract the negative effects of the territorial taxation system that was adopted in the 2017 Federal Tax Cut and Jobs Act. The territorial system is more or less the separate accounting/separate entity method that is inadequate to measure accurately the income of a corporation with non-New Hampshire affiliates.

VII. Lloyd M. Price was the first commissioner of the department of revenue for the state of New Hampshire. In a letter dated November 30, 1983, commissioner Price submitted the following to the Worldwide Unitary Taxation Working Group and Task Force in Washington, D.C. 'The state of New Hampshire takes the following position with regard to the application of the Unitary Concept. 1. The state of New Hampshire has adopted the world-wide combined method of reporting income from business activity carried on by multi-jurisdictional corporations, both within and without New Hampshire. 2. New Hampshire law has always required the inclusion of foreign source dividend in New Hampshire tax base, since it defines taxable income as federal taxable income before net operating loss and special deductions. 3. New Hampshire takes the position that the "arms-length pricing" method is uncertain and burdensome to both the taxpayer and the state, and its enforcement will bear a hardship on the states due to the limited auditing capacity and resources of the individual states. 4. The adoption of the world-wide reporting method allows a state to prevent shifting of income to foreign jurisdictions without the necessity of reviewing numbers of intra-company transactions. 5. New Hampshire takes the position that since the United States Supreme

Court has not yet ruled on the constitutionality of subjecting a foreign-based multinational corporation doing business in the United States to world-wide combined reporting, it will not require nor accept a petition to file a combined report from a foreign-based multinational corporation." In June, 1994, the United States Supreme Court ruled that it was constitutional for a state to subject a foreign-based corporation doing business in the United States to world-wide combined reporting.

2 Repeals. Water's Edge Combined Reporting for Business Profits Taxation. The following are repealed:

I. RSA 77-A:1, XV, relative to the definition of water's edge combined group.

II. RSA 77-A:1, XVI, relative to the definition of water's edge method.

III. RSA 77-A:1, XVIII, relative to the definition of foreign property, payroll and sales.

IV. RSA 77-A:2-b, relative to conditions for employment of only water's edge combinations.

V. RSA 77-A:3, II(b), relative to apportionment for a combined water's edge group.

VI. RSA 77-A:6, IV, relative to returns for water's edge combined group reporting.

3 Definition; Gross Business Profits. Amend RSA 77-A:1, III(f) to read as follows:

(f) In the case of any business organization which is part of [~~a water's edge combined group~~] ***a unitary business with combined net income*** and which does not make or file a United States income tax return or schedule under subparagraphs (a)-(d), the amount of net income as would be determinable under the provisions of the United States Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for such business organizations.

4 Definition; Combined Net Income. Amend RSA 77-A:1, XIII to read as follows:

XIII. "Combined net income" means the revenues less expenses as would be determinable under the provisions of the Internal Revenue Code as defined in RSA 77-A:1, XX and applied within the concepts of RSA 77-A for all business organizations conducting a unitary business regardless of whether such business organizations are required to file a federal income tax return. ***This provision shall authorize the application of worldwide combined reporting.***

5 Definition; Foreign Dividend. Amend RSA 77-A:1, XVII to read as follows:

XVII. "Foreign dividends" as used in RSA 77-A:3, II means dividends from overseas business organizations. [~~For purposes of RSA 77-A:3, II(b), actual distributions from partnerships, limited liability companies, and "S" corporations are dividends for purposes of this definition.~~]

6 Application. The provisions of this act shall apply for taxable periods beginning after December 31, 2023.

7 Effective Date. This act shall take effect July 1, 2023.

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HB 121-FN- FISCAL NOTE
AS INTRODUCED

AN ACT relative to worldwide combined reporting for unitary businesses under the business profits tax.

FISCAL IMPACT: **[X] State** **[ ] County** **[ ] Local** **[ ] None**

	Estimated Increase / (Decrease)			
STATE:	**FY 2023**	**FY 2024**	**FY 2025**	**FY 2026**
Appropriation	$0	$0	$0	$0
Revenue	$0	Indeterminable	Indeterminable	Indeterminable
Expenditures	$0	Indeterminable Increase	Indeterminable Increase	Indeterminable Increase
Funding Source:	[X] General [ ] Education [ ] Highway [ ] Other			

METHODOLOGY:

This bill changes the water's edge method of taxation for unitary business groups under the Business Profits Tax (BPT) to worldwide combined reporting for taxable periods beginning after December 31, 2023.

A unitary business group under worldwide combined reporting, unlike a "water's edge combined group," includes foreign incorporated business organizations and so-called "80/20 companies" with 80% or more of the average of their payroll and property outside the United States. Such an overseas business organization is still subject to BPT under the water's edge method as a separate entity, provided that the business organization by itself is engaged in business activity in New Hampshire.

This change will have an indeterminable fiscal impact on General Fund and Education Trust Fund revenue. The Department cannot estimate the BPT liability for a unitary business group under worldwide combined reporting because it does not know their combined net income, the additions and deductions provided in RSA 77-A:4 for members of the group, or the group's apportionment percentage as provided in RSA 77-A:3. With a water's edge system of taxation, the BPT is still imposed on foreign dividends paid by foreign subsidiaries to United States parent companies, and for taxable periods beginning on or after January 1, 2020, on global intangible low-taxed income (GILTI). It also applies to any overseas business organization that by itself is engaged in business activity in New Hampshire, but as a separate entity. There would be "winners and losers" depending on the proposed legislation's effects on the tax base and apportionment.

Additionally, moving to worldwide combined reporting may create practical constraints for the Department including obtaining access to the books and records of foreign parent companies, converting foreign currency-denominated assets into their dollar equivalent, and determining taxable business profits without starting from federal taxable income (because under the federal Tax Cuts and Jobs Act of 2017, the United State moved to a more territorial or water's edge system of taxation).

The Department does not anticipate needing more positions but may incur additional expenditures due to the practical constraints mentioned above.

AGENCIES CONTACTED:

Department of Revenue Administration