SB 435-FN - VERSION ADOPTED BY BOTH BODIES

02/16/2022 0311s

2022 SESSION

22-2990
10/05

SENATE BILL ***435-FN***

AN ACT relative to the net operating loss carryover under the business profits tax.

SPONSORS: Sen. Giuda, Dist 2; Sen. Bradley, Dist 3; Sen. Hennessey, Dist 1; Sen. Avard, Dist 12; Sen. Gannon, Dist 23; Rep. Edwards, Rock. 4; Rep. Lang, Belk. 4

COMMITTEE: Ways and Means

ANALYSIS

This bill modifies the calculation of net operating loss carryover for determining taxable business profits under 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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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 Two

AN ACT relative to the net operating loss carryover under the business profits tax.

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

1 Business Profits Tax; Definition of Taxable Business Profits; Net Operating Loss Carryovers. Amend RSA 77-A:1, IV to read as follows:

IV. "Taxable business profits" means gross business profits adjusted by the additions and deductions provided in RSA 77-A:4 ***except net operating loss carryover as defined in RSA 77-A:4, XIII,*** and then adjusted by the method of apportionment provided in RSA 77-A:3***, and then further adjusted by net operating loss carryover as defined in RSA 77-A:4, XIII***.

2 Business Profits Tax; Additions and Deductions; Net Operating Loss Carryover. Amend RSA 77-A:4, XIII to read as follows:

XIII. A deduction for the amount of the net operating loss carryover determined under section 172 of the United States Internal Revenue Code [~~in effect on December 31, 1996~~] ***apportioned in the year incurred according to RSA 77-A:3***. A net operating loss shall ***only*** be apportioned in the year incurred [~~according to RSA 77-A:3~~] ***and not in the subsequent years it adjusts gross business profits***. Net operating losses may only be carried forward for the 10 years following the loss year. For taxable periods ending:

(a) On or before June 30, 2003, the amount of net operating loss generated in a tax year that may be carried forward may not exceed $250,000.

(b) On or after July 1, 2003 and on or before June 30, 2004, the amount of net operating loss generated in a tax year that may be carried forward may not exceed $500,000.

(c) On or after July 1, 2004 and on or before June 30, 2005, the amount of net operating loss generated in a tax year that may be carried forward may not exceed $750,000.

(d) On or after July 1, 2005, the amount of net operating loss generated in a tax year that may be carried forward may not exceed $1,000,000.

(e) On or after January 1, 2013, the amount of net operating loss generated in a tax year that may be carried forward may not exceed $10,000,000.

In the case of a business organization not qualifying for treatment as a subchapter C corporation under the United States Internal Revenue Code, such deduction shall be the amount that would be determined under section 172 of the United States Internal Revenue Code [~~in effect on December 31, 1996~~] if the business organization were a subchapter C corporation and as limited by this section. A deduction for the amount of the net operating loss carryover shall be limited to losses incurred on or after July 1, 1997.

3 Applicability. This act shall apply to business organizations' tax years ending on or after December 31, 2022.

4 Effective Date. This act shall take effect July 1, 2022.

LBA
22-2990
Amended 2/23/22

SB 435-FN- FISCAL NOTE
AS AMENDED BY THE SENATE (AMENDMENT #2022-0311s)

AN ACT relative to the net operating loss carryover under the business profits tax.

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

	Estimated Increase / (Decrease)			
STATE:	**FY 2022**	**FY 2023**	**FY 2024**	**FY 2025**
Appropriation	$0	$0	$0	$0
Revenue	Indeterminable Decrease	Indeterminable Decrease	Indeterminable Decrease	Indeterminable Decrease
Expenditures	$0	$0	$0	$0
Funding Source:	[X] General	[ ] Education	[ ] Highway	[X] Other

METHODOLOGY:

This bill modifies the Net Operating Loss Deduction (NOLD) under the Business Profits Tax (BPT). It changes the NOLD from being apportioned twice ("double apportionment") to a single apportionment in the year the NOLD is generated. The bill eliminates the outdated reference of the Internal Revenue Code (IRC in effect on December 31, 1996) so the IRC aligns with the BPT statute (the BPT statute contains the IRC in effect on December 31, 2018). The change in removing the IRC date would cap the utilization of NOLDs to 80% of taxable income and as a result, it would also cap the BPT taxable income to 80%. This bill is effective July 1, 2022 and is applicable to tax years ending on or after December 31, 2022.

The Department of Revenue Administration states this bill would decrease General and Education Trust Fund revenue by an indeterminable amount starting in FY 2022. Although the fiscal impact is indeterminable, the Department was able to provide the fiscal impact for the various parts of this bill had the legislation been in place during tax year (TY) 2019.

Eliminating BPT Net Operating Loss Deduction Double Apportionment

To determine the impact of eliminating the double apportionment, the Department had to determine the revenue base using current law tax rates. To calculate FY 2022 thru FY 2024 revenues under current law, the DRA queried all TY 2019 taxpayers that utilized a NOLD and were required to apportion their income. The BPT rate for TY 2019 was 7.7%. However, the BPT rate is reduced from 7.7% to 7.6% for taxable periods ending on or after December 31, 2022. Therefore, in order to calculate an accurate base year to complete this analysis, the DRA multiplied the Adjusted Gross Business Profits of $634,174,018 for all taxpayers that utilized a

NOLD and were required to apportion their income by 7.6%, arriving at a current law base of $48,197,225.

In order to calculate the impact of the proposed legislation, the DRA then manipulated the above taxpayer returns to eliminate the application of the taxpayer's apportionment in the year the NOLD was used in accordance with the proposed legislation. To do so, the DRA added each taxpayers NOLD back into Adjusted Gross Business Profits, applied the taxpayer's apportionment percentage, and then subtracted the taxpayer's NOLD after apportioning. This resulted in a tax base of $394,364,513, which was multiplied by 7.6% to arrive at a new total tax liability of $29,971,703 under the proposed legislation.

The Department completed an analysis to determine the split of tax year revenue to fiscal year revenue to determine the impact of this bill. The split breakdown used for FY 2022 revenue was 15% attributable to TY 2020, 63% attributable to TY 2021, and 22% attributable to TY 2022. The same split breakdown is used for FY 2023 through FY 2025. TY 2020 and TY 2021 are not impacted by this bill. See table below.

Proposed Legislation Impact Timing

Fiscal Year	Tax Year	% Applicable to Tax Year
Fiscal Year 2022	Tax Year 2020	15%
	Tax Year 2021	63%
	Tax Year 2022	22%
Fiscal Year 2023	Tax Year 2021	15%
	Tax Year 2022	63%
	Tax Year 2023	22%
Fiscal Year 2024	Tax Year 2022	15%
	Tax Year 2023	63%
	Tax Year 2024	22%
Fiscal Year 2025	Tax Year 2023	15%
	Tax Year 2024	63%
	Tax Year 2025	22%

Estimated Fiscal Impact of Eliminating BPT NOLD Double Apportionment

Business Profits Tax - Static Analysis using TY2019 Revenues			
Fiscal Year	Current Law Base with Double Apportionment	BPT Revenues with Proposed Legislation	Cumulative Fiscal Impact (Proposed Legislation Compared to Current Law)
2022	$10,603,390	$6,593,775	($4,009,615)
2023	$40,967,642	$25,475,948	($15,491,694)
2024	$48,197,225	$29,971,703	($18,225,522)

Based on this analysis and assumptions it is estimated BPT revenue will decrease by $4,009,615 in FY 2022, decrease by $15,491,694 in FY 2023 and decrease by $18,225,522 in FY 2024 and each year thereafter. If this legislation had been in effect for TY 2019, 1,487 taxpayers would have been effected.

Limiting the Net Operating Loss to 80% of Taxable Income

To determine the impact of limiting the Net Operating Loss Deduction (NOLD) to 80% of taxable income, the Department had to determine the revenue base using current law tax rates. To calculate FY 2022 thru FY 2024 revenues under current law, the Department queried all TY 2019 taxpayers that utilized a NOLD. The BPT rate for TY 2019 was 7.7%; however, the BPT rate is reduced from 7.7% to 7.6% for taxable periods ending on or after December 31, 2022. Therefore, to calculate an accurate base year to complete this analysis, the Department multiplied the Adjusted Gross Business Profits of $896,166,525 for all taxpayers that utilized a NOLD by 7.6%, arriving at a current law base of $68,108,656.

The Department then manipulated the above taxpayer returns to cap the taxpayers claimed NOLD at 80% of their federal taxable income. This resulted in a new tax base of $955,985,700, which was multiplied by 7.6% to arrive at a new total tax liability of $72,654,913 under the proposed legislation.

The result was a $4,546,257 estimated increase in BPT revenue to the General and Education Trust Funds. Based on TY 2019, this would have effected 3,092 taxpayers. Some portion of this limitation on how much NOLD could have been used in TY 2019 could be carried forward into future years. The utilization of this NOLD in future tax years is indeterminable. The estimated reductions per tax year resulting from this proposed legislation are then applied according to the tax year split breakdown chart above to calculate an estimated yearly impact. Based on this analysis BPT revenue would have increased by $1,000,177 in FY 2022, $3,864,318 in FY 2023 and $4,546,257 in FY 2024 and each year thereafter. (see table below)

Estimated Fiscal Impact of Limiting the NOL to 80% of Taxable Income

Business Profits Tax - Static Analysis using TY2019 Revenues			
Fiscal Year	Current Law Base without NOL limitation of 80%	BPT Revenues with Proposed Legislation	Cumulative Fiscal impact (Proposed Legislation Compared to Current Law)
2022	$14,983,904	$15,984,081	$1,000,177
2023	$57,892,358	$61,756,676	$3,864,318
2024	$68,108,656	$72,654,913	$4,546,257

The Department would need to update all necessary tax return forms and electronic management systems related to the changes contained in this bill; however, the Department anticipates this will not result in any additional administrative costs that cannot be absorbed in the Department's operating budget.

AGENCIES CONTACTED:

Department of Revenue Administration