

HB 288-FN - AS INTRODUCED

2023 SESSION

23-0540

02/08

HOUSE BILL **288-FN**

AN ACT relative to taxation of sole proprietorship businesses.

SPONSORS: Rep. Corcoran, Hills. 44

COMMITTEE: Ways and Means

ANALYSIS

This bill exempts sole proprietorships and single member LLCs from business enterprise and business profits taxes.

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 Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Twenty Three

AN ACT relative to taxation of sole proprietorship businesses.

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

1 1 Findings. The general court of the State of New Hampshire recognizes that sole proprietors
2 and single member LLCs are not subject to business tax at a federal level and that proprietorships
3 and single member LLCs are legally identical with their owners. Therefore, in as much individuals
4 are not liable for the business enterprise or business profits tax, neither can their proprietorships or
5 single member LLCs be liable for the business profits or business enterprise tax.

6 2 Business Profits Tax; Definitions. Amend RSA 77-A:1, I to read as follows:

7 I. " Business organization " means any enterprise, whether corporation, partnership, limited
8 liability company, ~~[proprietorship,]~~ association, business trust, real estate trust or other form of
9 organization; organized for gain or profit, carrying on any business activity within the state, except
10 such enterprises as are expressly made exempt from income taxation under the United States
11 Internal Revenue Code as defined in RSA 77-A:1, XX. Each enterprise under this definition shall be
12 subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this
13 chapter to be treated otherwise, such as, but not limited to, combined reporting. Trusts or
14 foundations treated as grantor trusts under section 671 of the United States Internal Revenue Code
15 shall be included in the return of their owners, and such owners shall be subject to the tax thereon to
16 the extent such owners would be considered a business organization hereunder notwithstanding the
17 existence of the trust or foundation. The use of consolidated returns as defined in the United States
18 Internal Revenue Code as defined in RSA 77-A:1, XX is not permitted. Notwithstanding any other
19 provision of this paragraph, an enterprise shall not be characterized as a business organization and
20 shall be excluded from taxation at the entity level if it elects to be treated as a qualified investment
21 company as defined in RSA 77-A:1, XXI or if it elects to be treated as a qualified regenerative
22 manufacturing company as defined in RSA 77-A:1, XXX. A partnership, limited liability company,
23 estate, trust, or foundation except grantor trusts pursuant to section 671 of the United States
24 Internal Revenue Code, "S" corporation, real estate investment trust, or any other such entity, other
25 than an organization electing to be treated as a qualified investment company as defined in RSA 77-
26 A:1, XXI whose net income is reportable by the true owners either directly or indirectly, or an
27 organization electing to be treated as a qualified regenerative manufacturing company as defined in
28 RSA 77-A:1, XXX, shall be subject to tax at the entity level, and no part of such earnings or loss shall
29 be included in the calculation of the gross business profits of the owners of such entity.
30 ***Notwithstanding any other provision of this paragraph, a person who does business***
31 ***activity as a proprietorship, that is, without formally creating a separate business***

organization as a legal entity, or who does business as a limited liability company in which that person is the sole member, shall not be characterized as a business organization and shall be excluded from taxation under this chapter.

3 Business Profits Tax; Deductions. Amend RSA 77-A:4, III to read as follows:

III.(a) In the case of a [~~proprietorship,~~] partnership[;] or limited liability company filing a business profits tax return as a [~~proprietorship-or~~] partnership, a deduction equal to a fair and reasonable compensation for the actual personal services of a natural person who is a [~~proprietor,~~] partner[;] or member provided to the business organization; provided, however, that the amount of such deduction shall not reduce such business organization's taxable business profits to less than zero. The purpose of this paragraph is to permit a deduction from gross business profits of such a [~~proprietorship,~~] partnership[;] or limited liability company of all amounts that are fairly attributable to the actual personal services of the [~~proprietor,~~] partner[;] or member. Such amounts shall not exceed the amount reported as earned income on the federal income tax returns of the [~~proprietor,~~] partner[;] or member, but may also include an amount not to exceed net rental income as compensation for operating rental property, and an amount not to exceed 15 percent of the gross selling price as commissions on the sale of business assets.

(b) Subject to the provisions of subparagraph (c) which establishes a record-keeping safe harbor, the method of determining the amount of the deduction available to the business organization allowed under this paragraph shall be by using the standards set forth in section 162(a)(1) of the United States Internal Revenue Code, as it may be amended from time to time, and the Treasury Regulations, administrative rulings, and judicial cases issued thereunder. The business organization shall keep such records as may be necessary to determine that the deduction is reasonable under these standards.

(c) In lieu of substantiating the value of the personal services of [~~proprietors,~~] partners[;] or members, a business organization or group of related business organizations may elect, as a record-keeping safe harbor, to deduct up to \$75,000 as total compensation for the tax year;

(d)(1) In this paragraph, "record-keeping safe harbor" means that amount of compensation for personal services claimed by a business organization which does not need to be substantiated by any evidence, records, or legal or regulatory authority, except as provided in subparagraph (e).

(2) Notwithstanding subparagraph III(d)(1), the record-keeping safe harbor shall not be relevant or admissible for any purpose in determining whether a compensation deduction claimed in an amount in excess of any such record-keeping safe harbor is fair and reasonable.

(e) A business organization or group of related business organizations may elect the record-keeping safe harbor option in subparagraph III(c) without a redetermination of the reasonableness of the deduction by the commissioner. Any such deduction claimed by the business organization or group of related business organizations shall not be subject to challenge; provided,

that upon request, the business organization or group of related business organizations shall be required to substantiate that ~~[the proprietor or]~~ at least one partner or member performed actual personal services for the business organization or group of related business organizations.

(f) Related business organizations electing not to substantiate the extent of the actual personal services of their ~~[proprietors,]~~ partners~~;~~ and members, shall be limited to the record-keeping safe harbor deduction, less any owners' compensation taken on the federal tax returns of corporate members of the group, allocated among the related business organizations. For the purposes of RSA 77-A:4, III, " related business organizations " are unitary business organizations and business organizations that would qualify as unitary but for the fact that they conduct business only within the state.

(g) A business organization claiming a deduction under this paragraph shall bear the burden of proving that all ~~[proprietors,]~~ partners~~;~~ or members for whom a deduction is being claimed provided actual personal services to the business organization at any time during the taxable period. Once a business organization has satisfied this burden of proof, the amount claimed as a deduction shall be presumed to be reasonable, unless the commissioner proves by a preponderance of the evidence that the deduction claimed by the business organization is clearly unreasonable.

4 Business Profits Tax; Definitions. 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 and which does not make or file a United States income tax return or schedule under subparagraphs (a)-~~(d)~~**(c)**, 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.

5 Business Enterprise Tax; Definitions. Amend RSA 77-E:1, III to read as follows:

III. "Business enterprise" means any profit or nonprofit enterprise or organization, whether corporation, partnership, limited liability company, ~~[proprietorship,]~~ association, trust, foundation, business trust, real estate trust or other form of organization engaged in or carrying on any business activity within this state, except such enterprises as are expressly made exempt from income taxation under section 501(c)(3) of the United States Internal Revenue Code to the extent such enterprise does not engage in any business activity constituting unrelated business activity as defined by section 513 of the United States Internal Revenue Code. Each business enterprise under this definition shall be subject to the tax imposed under RSA 77-E as a separate entity except that trusts and foundations treated as grantor trusts under section 671 of the United States Internal Revenue Code shall be included in the return of their owners, and such owners shall be subject to the tax thereon to the extent any such owners would be considered a business enterprise hereunder notwithstanding the existence of the trust or foundation. The use of consolidated returns as defined in the United States Internal Revenue Code or of combined reporting is not permitted.

1 Notwithstanding any other provision of this paragraph, an enterprise shall not be characterized as a
2 business enterprise and shall be excluded from taxation at the entity level if it is a qualified
3 investment company as defined in RSA 77-E:1, XIV or if it is a qualified regenerative manufacturing
4 company as defined in RSA 77-E:1, XIV-a. ***Notwithstanding any other provision of this***
5 ***paragraph, a person who does business activity as a proprietorship, that is, without***
6 ***formally creating a separate business organization as a legal entity, or who does business***
7 ***as a limited liability company in which that person is the sole member, shall not be***
8 ***characterized as a business organization and shall be excluded from taxation under this***
9 ***chapter.***

10 6 Repeal. RSA 77-A:1, III(d), relative to the determination of gross business profits for a
11 proprietorship, is repealed.

12 7 Effective Date. This act shall take effect July 1, 2024.

**HB 288-FN- FISCAL NOTE
AS INTRODUCED**

AN ACT relative to taxation of sole proprietorship businesses.

FISCAL IMPACT: ☒ State ☐ County ☐ Local ☐ None

STATE:	Estimated Increase / (Decrease)			
	FY 2023	FY 2024	FY 2025	FY 2026
Appropriation	\$0	\$0	\$0	\$0
Revenue	\$0	Indeterminable Decrease	Indeterminable Decrease	Indeterminable Decrease
Expenditures	\$0	\$0	\$0	\$0
Funding Source:	<input checked="" type="checkbox"/> General	<input checked="" type="checkbox"/> Education	<input type="checkbox"/> Highway	<input type="checkbox"/> Other

METHODOLOGY:

This bill exempts sole proprietorships and single member limited liability companies from the Business Enterprise Tax (BET) and the Business Profits Tax (BPT). The Department of Revenue Administration states the fiscal impact is indeterminable as the Department does not currently collect information that identifies SMLLC filers. The Department does require a NH-1040 return for individual members of a SMLLC, NH-1065 from partners of an SMLLC, and a NH-1120 from corporate members of an SMLLC. The Department used data from the NH-1040 return only to provide a potential fiscal impact for this bill.

Additionally, the Department used the following information/assumptions to estimate a possible fiscal impact:

- BET tax base of \$2,647,628,833 and BPT tax base of \$294,033,753 using Tax Year 2020.
- based on a tax year revenue analysis of prior fiscal years, it was determined fiscal year tax revenue is comprised of 15 percent from the tax year 2 years ago, 63 percent is from the tax year 1 year ago and 22 percent from the current tax year (See table 1 below)
- assume the changes contained in this bill is applicable to taxable periods ending on or after December 31, 2024.

The first table below provides the tax year to fiscal year percentages. The second table provides an estimated fiscal impact on General Fund and Education Trust Fund revenue.

Table 1. Proposed Legislation Rates and Splits

Fiscal Year	Tax Year	% Applicable to Tax Year
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%
Fiscal Year 2026	Tax Year 2024	15%
	Tax Year 2025	63%
	Tax Year 2026	22%

Table 2. Business Tax Revenue Reduction - Static Analysis Using TY 2020 Revenues

Fiscal Year	Estimated BET Revenue Reduction	Estimated BPT Revenue Reduction	Estimated Total Revenue Reduction
2024	(\$3,200,000)	(\$4,900,000)	(\$8,100,000)
2025	(\$12,400,000)	(\$18,800,000)	(\$31,200,000)
2026 and forward	(\$14,600,000)	(\$22,100,000)	(\$36,700,000)

The fiscal impact as depicted in the above table may be overstated or understated for future years depending on whether actual revenue is more or less than the data used for this static analysis.

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

AGENCIES CONTACTED:

Department of Revenue Administration