

SB 167-FN-A-LOCAL – AS INTRODUCED

2011 SESSION

11-1050  
09/10

SENATE BILL            **167-FN-A-LOCAL**

AN ACT                    establishing a production jobs creation credit under the business enterprise tax and making changes affecting small business to the business profits tax, the business enterprise tax, and the meals and rooms tax.

SPONSORS:            Sen. Bradley, Dist 3; Sen. Barnes, Jr., Dist 17; Sen. Boutin, Dist 16; Sen. Carson, Dist 14; Sen. De Blois, Dist 18; Sen. Forsythe, Dist 4; Sen. Gallus, Dist 1; Sen. Lambert, Dist 13; Sen. Luther, Dist 12; Sen. Rausch, Dist 19; Sen. Stiles, Dist 24; Sen. White, Dist 9; Rep. Chandler, Carr 1; Rep. O'Brien, Hills 4; Rep. Bettencourt, Rock 4

COMMITTEE:        Ways and Means

ANALYSIS

This bill:

I. Establishes a production jobs creation tax credit under the business profits tax and the business enterprise tax.

II. Increases the filing thresholds under the business profits tax and business enterprise tax and eliminates taxation of floor plan costs under the business enterprise tax.

III. Allows small business operators to retain a greater percentage of meals and rooms taxes for a 2-year period.

IV. Establishes a deduction from the business profits tax to prevent double taxation on identical gross business profits of a parent organization and a subsidiary organization.

V. Makes certain changes in determining gain or loss on disposition of assets under the business profits tax.

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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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

AN ACT                    establishing a production jobs creation credit under the business enterprise tax and making changes affecting small business to the business profits tax, the business enterprise tax, and the meals and rooms tax.

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

1            1 Purpose. The general court finds that:

2            I. It is important to support and encourage businesses to hire New Hampshire workers to  
3 good, full-time jobs that enhance the long-term productivity of the New Hampshire economy and the  
4 economic competitiveness of New Hampshire businesses. Therefore, section 2 of this act establishes  
5 a new tax credit against the business enterprise tax for growing businesses that create new, full-  
6 time, production jobs in New Hampshire.

7            II. Good tax policy requires clear tax rules that reflect modern business and tax practices, provide  
8 taxpayers with simple and clear guidance, encourage compliance, and enhance the competitiveness of our  
9 economy.

10           III. The strength of New Hampshire’s economy is based on attracting and growing small  
11 businesses that create good jobs and growth, and the state’s tax system should provide clear rules that  
12 encourage and enhance the state’s reputation as a leading jurisdiction for the creation and growth of small  
13 businesses.

14           IV. This act will reform, simplify, and modernize important provisions of the business profits tax,  
15 the business enterprise tax, and the meals and rooms tax, that apply to small businesses and their owners,  
16 will reduce tax audits, and will restore New Hampshire’s ability to encourage small business growth and  
17 the good jobs these businesses create.

18           2 New Section; Business Enterprise Tax; Production Jobs Creation Tax Credit. Amend RSA 77-E by  
19 inserting after RSA 77-E:3-c the following new section:

20           77-E:3-d Production Jobs Creation Tax Credit.

21           I. Subject to the limitation stated in paragraph III of this section, there shall be allowed a tax credit  
22 equal to .75 percent of the amount of qualified production compensation paid or incurred by a business  
23 enterprise that is a qualifying employer with respect to the applicable tax period.

24           II. For purposes of this section, the following terms shall have the meanings indicated:

25           (a) “Eligible employee” means any individual employee of the business enterprise who is paid  
26 wages reported under RSA 282-A who, as of the last day of the applicable taxable period:

27           (1) Has been employed by such business enterprise during the applicable taxable period  
28 for services of not less than an average of 35 hours per week; and

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1 (2) Has not been an eligible employee of such business enterprise for any prior taxable  
2 period.

3 (b)(1) “Full-time New Hampshire employee” means an employee who is paid wages reported  
4 under RSA 282-A for employment in this state and who is either:

5 (A) Paid wages by the employer for services of not less than an average of 35 hours per  
6 week; or

7 (B) A salaried employee who was paid compensation during the taxable period for full-  
8 time employment by the employer.

9 (2) Partners, independent contractors and household employees shall not be treated as an  
10 employee within the meaning of this definition.

11 (c) “Net increase in full-time New Hampshire employees” means the total number of full-time  
12 New Hampshire employees of the business enterprise as of the last day of the taxable period, minus the  
13 total number of full-time New Hampshire employees employed by the business enterprise on the first day of  
14 the taxable period.

15 (d) “Qualifying employer” means a business enterprise that, with respect to the taxable period:

16 (1) Is an employer within the meaning of RSA 282-A:8; and

17 (2) Has experienced a net increase in full-time New Hampshire employees with respect to  
18 the taxable period.

19 (e) “Qualified production compensation” means wages, salaries, fees, bonuses, commissions, or  
20 other payments that are, with respect to the taxable period:

21 (1) Paid to, or accrued with respect to, one or more eligible employees of the business  
22 enterprise;

23 (2) Reported as wages under RSA 282-A;

24 (3) Included in the business enterprise’s enterprise value tax base; and

25 (4) Required to be capitalized under section 263A of the United States Internal Revenue  
26 Code.

27 III. For any business enterprise, the total amount of the credit allowed under this section with  
28 respect to any taxable period shall not exceed \$50,000.

29 IV. If the credit allowed under this section exceeds the business enterprise’s tax liability under this  
30 chapter with respect to any taxable period, such excess shall not be allowed as a refund, but the unused  
31 portion of the credit may be carried forward and allowed against the tax due under this chapter for 5  
32 taxable periods from the taxable period in which the credit was earned.

33 3 Business Profits Tax; Increased Filing Threshold. Amend RSA 77-A:5, I to read as follows:

34 I. Every business organization having gross business income in excess of [~~\$50,000~~] **\$75,000**  
35 as defined by RSA 77-A:1, VI, during the taxable period, shall on or before the fifteenth day of the  
36 third month in the case of organizations required to file a United States corporation tax return, and  
37 the fifteenth day of the fourth month in the case of all other business organizations, following

1 expiration of its taxable period, make a return to the commissioner. The commissioner of revenue  
2 administration shall adopt rules, pursuant to RSA 541-A, relative to the form of such return and the  
3 data which it must contain for the correct computation of taxable business profits and gross business  
4 income attributable to this state and the tax assessed on it. All returns shall be signed by the  
5 taxpayer or by its authorized representative, subject to the pains and penalties of perjury.

6 4 Business Enterprise Tax; Increased Filing Threshold. Amend RSA 77-E:5, I to read as follows:

7 I. Every business enterprise having gross business receipts in excess of [~~\$150,000~~] **\$175,000**  
8 as defined by RSA 77-E:1, X, during the taxable period or the enterprise value tax base of which is  
9 greater than [~~\$75,000~~] **\$125,000**, shall, on or before the fifteenth day of the third month in the case  
10 of enterprises required to file a United States corporation tax return, and the fifteenth day of the  
11 fourth month in the case of all other business enterprises, following expiration of its taxable period,  
12 make a return to the commissioner. All returns shall be signed by the business enterprise or by its  
13 authorized representative, subject to the pains and penalties of perjury and the penalties provided in  
14 RSA 21-J:39.

15 5 Business Enterprise Tax; Elimination of Taxation of Floor Plan Costs. Amend RSA 77-E:1, XI  
16 to read as follows:

17 XI. "Interest" means all amounts paid or accrued for the use or forbearance of money or  
18 property. The term "interest" shall not include:

19 (a) Amounts paid, credited, or set aside in connection with reserves by insurers to fulfill  
20 policy and contractual responsibilities to policy holders or by voluntary employees' beneficiary  
21 associations qualified under section 501(c)(9) of the United States Internal Revenue Code to fulfill  
22 obligations to members[-]; or

23 (b) *Amounts paid, credited, or set aside by a person who regularly sells or*  
24 *otherwise disposes of tangible personal inventory property pursuant to floor plan*  
25 *arrangements that provide for advances or payments directly in connection with the*  
26 *acquisition or disposition of such inventory property.*

27 6 Meals and Rooms Tax; Temporary Assistance for Certain Operators. Amend RSA 78-A:7, III  
28 to read as follows:

29 III.(a) *Except as provided in subparagraph (b),* to compensate operators for keeping the  
30 prescribed records and the proper account and remitting of taxes by them, operators are allowed to  
31 retain 3 percent of the taxes due and to be remitted if the return and payment are timely received by  
32 the department of revenue administration, as provided in RSA 78-A:8, III.

33 (b) *For any tax period beginning after June 30, 2011 and ending before July 1,*  
34 *2013, operators having less than \$200,000 in gross receipts subject to tax under this chapter*  
35 *for the calendar year immediately preceding such tax period shall be allowed to retain 5*  
36 *percent of the taxes due and to be remitted if the return and payment are timely received by*  
37 *the department of revenue administration, as provided in RSA 78-A:8, III.*

1           7 New Paragraph; Business Profits Tax; Deduction. Amend RSA 77-A:4 by inserting after  
2 paragraph III the following new paragraph:

3           IV.(a) In the case of a business organization (the “parent organization”), a deduction equal to  
4 the “deductible amount” (as defined below) of gross business profits of the parent organization as are  
5 derived from one or more actual distributions received from another business organization (the  
6 “payor organization”), but only if each of the following conditions is satisfied:

7                   (1) During the taxable period of the parent organization in which such an actual  
8 distribution is received, the parent organization and the payor organization are not members of the  
9 same water’s edge combined group;

10                   (2) The gross business profits of the payor organization are subject to taxation under  
11 this chapter with respect to the tax period of the payor organization which includes the date on  
12 which the parent organization receives such an actual distribution; and

13                   (3) Such an actual distribution does not constitute foreign dividends as defined in  
14 RSA 77-A:1, XVII.

15           (b) The purpose of the deduction under this paragraph is to prevent double taxation on  
16 the identical gross business profits of a parent organization and a subsidiary organization when each  
17 business organization is required to file a separate return reporting taxable business profits. For  
18 purposes of this paragraph, the term “deductible amount” means the product of (i) the total amount  
19 of gross business profits as are derived from actual distributions received by the parent organization  
20 from a payor organization, multiplied by (ii) the apportionment fraction of such payor organization  
21 as determined pursuant to RSA 77-A:3, II(a) for the tax period of the payor organization that  
22 includes the date on which the actual distributions were paid.

23           8 Business Profits Tax; Addition to Gross Business Profits. RSA 77-A:4, XIV is repealed and  
24 reenacted to read as follows:

25           XIV. In the case of a business organization which realizes for federal income tax purposes,  
26 an increase in the basis of one or more of its assets as the direct result of a sale or exchange of an  
27 ownership interest in such business organization without a corresponding recognition of taxable  
28 income attributable to such increase in basis, such business organization shall determine its gross  
29 business profits without taking such increase in basis into account. Accordingly, such business  
30 organization shall report an addition to gross business profits of an amount equal to any deduction  
31 for depreciation or amortization attributable to any such increase in the basis of its assets for federal  
32 income tax purposes. Further, such business organization shall determine gain or loss at the time of  
33 any actual disposition of its assets without taking such increase in basis for federal purposes into  
34 account.

35           9 Business Profits Tax; Definition of Business Organization. Amend RSA 77-A:1, I to read as  
36 follows:

1 I. “Business organization” means any enterprise, whether corporation, partnership, limited  
2 liability company, proprietorship, association, business trust, real estate trust or other form of  
3 organization; organized for gain or profit, carrying on any business activity within the state, except  
4 such enterprises as are expressly made exempt from income taxation under the United States  
5 Internal Revenue Code as defined in RSA 77-A: 1, XX. Each enterprise under this definition shall be  
6 subject to taxation under RSA 77-A:2 as a separate entity, unless specifically authorized by this  
7 chapter to be treated otherwise, such as, but not limited to, combined reporting. Trusts treated as  
8 grantor trusts under section 671 of the United States Internal Revenue Code shall be included in the  
9 return of their owners, and such owners shall be subject to the tax thereon to the extent such owners  
10 would be considered a business organization hereunder notwithstanding the existence of the trust.  
11 ***A business organization that is disregarded as entity separate from its single owner***  
12 ***pursuant to federal regulations issued under section 7701 of the United States Internal***  
13 ***Revenue Code shall be included in the return of its owner, and such owner shall be subject***  
14 ***to the tax thereon with respect to all of the income, gains, losses, deductions and other***  
15 ***attributes of such business organization to the extent such owner would be considered a***  
16 ***business organization hereunder notwithstanding the existence of the business***  
17 ***organization.*** The use of consolidated returns as defined in the United States Internal Revenue  
18 Code as defined in RSA 77-A:1, XX is not permitted. Notwithstanding any other provision of this  
19 paragraph, an enterprise shall not be characterized as a business organization and shall be excluded  
20 from taxation at the entity level if it elects to be treated as a qualified investment company as  
21 defined in RSA 77-A:1, XXI. A partnership, limited liability company, estate, trust except grantor  
22 trusts pursuant to section 671 of the United States Internal Revenue Code, “S” corporation, real  
23 estate investment trust, or any other such entity, other than an organization electing to be treated as  
24 a qualified investment company as defined in RSA 77-A:1, XXI whose net income is reportable by the  
25 true owners either directly or indirectly shall be subject to tax at the entity level, and no part of such  
26 earnings or loss shall be included in the calculation of the gross business profits of the owners of such  
27 entity.

28 10 Applicability.

29 I. Sections 3-5, 7, and 9 of this act shall apply for tax periods ending on or after December  
30 31, 2011.

31 II. Section 8 of this act shall apply to any taxable period that began on or after January 1,  
32 2005.

33 11 Effective Date. This act shall take effect upon its passage.

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**SB 167-FN-A-LOCAL - FISCAL NOTE**

AN ACT establishing a production jobs creation credit under the business enterprise tax and making changes affecting small business to the business profits tax, the business enterprise tax, and the meals and rooms tax.

**FISCAL IMPACT:**

The Department of Revenue Administration states this bill will decrease state revenue and increase state expenditures by an indeterminable amount in FY 2011 and each year thereafter. This bill will have no fiscal impact on county and local revenue or expenditures.

**METHODOLOGY:**

The Department of Revenue Administration states this bill contains eight different sections proposing changes.

Section 2 - This section establishes a production jobs creation tax credit under the business profits tax (BPT) and the business enterprise tax (BET). The Department states they could administer this law with additional cost to audit and verify the validity of the credit, as well as additional cost to draft rules, revise computer systems, and create the necessary forms in order to implement the credit. The Department states the proposed RSA 77-E:3-d, II, (e)(4) requiring that “qualified production compensation” be capitalized under Section 263A of the United States Internal Revenue Code would restrict who could be eligible for this credit to only large business organizations since Section 263A applies to taxpayers with average annual gross receipts of \$10 Million for the three preceding tax years. The Department states even though the credit is limited to \$50,000 per year per taxpayer, the Department cannot estimate the loss of BET revenue from this provision as they do not have any data about taxpayers who are required to capitalize qualified production compensation or the dollar value of said compensation. As there does not appear to be any restriction against it, taxpayers could avail themselves of this credit and be eligible for the Economic Revitalization Zone Tax Credit as well based upon the same wages and employees.

Section 3 – This section seeks to increase the filing threshold under the BPT from in excess of \$50,000 to in excess of \$75,000. The amount of gross receipts of each taxpayer is not captured on any New Hampshire tax form and a coupling of NH taxpayers with their respective federal tax information would be time consuming with the computer systems currently in place, and

the results would be less than 100% matches due to the disparity in federal and NH filing practices. The Department cannot estimate the potential loss of revenue, but states it should not be significant.

Section 4 – This section increases the filing thresholds under the BET from in excess of \$150,000 to in excess of \$175,000 gross business receipts, and increases the enterprise value tax base of which is greater than \$75,000 to \$125,000. The amount of gross receipts of each taxpayer is not captured on any New Hampshire tax form and a coupling of NH taxpayers with their respective federal tax information would be time consuming with the computer systems currently in place, and the results would be less than 100% matches due to the disparity in federal and NH filing practices. Based upon those taxpayers who filed business tax returns in FY 2010 whose value base was less than \$125,000, the Department estimates the maximum possible loss of BET revenue at approximately \$8,851,525.

Section 5 – This section would classify interest which would not be taxable under BET to include “Amounts paid, credited, or set aside by a person who regularly sells or otherwise disposes of tangible personal inventory property pursuant to floor plan arrangements that provide for advances or payments directly in connection with the acquisition or disposition of such inventory property.” The Department does not have any data upon which to make an estimate of the impact.

Section 6 – This section would allow operators to take a 5% commission of the meals and rooms (M&R) taxes collected instead of a 3% commission of taxes collected, if their prior calendar had less than \$200,000 in taxable gross receipts. The Department estimates this would decrease M&R revenue in the amount of \$405,876 annually assuming calendar year 2010 data. The Department states it appears this disparate treatment of operations may be unconstitutional. The Department states the operators collect the tax on behalf of the state, the taxes are not paid by them nor are they for their personal use. The Department states, in essence, this bill would give operators more commission for collecting less tax.

Section 7 – This section would allow parent organizations to take a deduction equal to the “deductible amount” of gross business profits derived from distributions from another organization if certain conditions are met. The Department is unable to determine the revenue loss as a result of this section. The Department states this law would be in conflict with the Commerce Clause of the United States Constitution and would overturn the NH Supreme Court case of General Electric Co. v Commissioner, 154 NH 457, 914 A2d 246 (2006). It would appear that this disparate treatment of taxpayers (in-state versus out of state) may be



unconstitutional. The Department states amendments to the apportionment methodologies under the BPT law have rendered these provisions obsolete. The harm they are intended to protect against, the threat of double taxation in certain specific circumstances, is addressed through federal constitutional law, state case law, and the appropriate application of RSA 77-A, through inter-company eliminations and separate entity adjustments.

Section 8 – This section would allow business organizations to make an addition to gross business profits of depreciation or amortization attributable to any such increase in the basis of its assets, but shall determine gain or loss without taking into account the increase in basis. The Department assumes in excess of \$5 million would have to be refunded based upon the retroactive application of this law as it would become effective for taxable periods that began on or after January 1, 2005. In addition, there would be an indeterminable decrease in future revenues. The exact fiscal impact cannot be determined at this time.

Section 9 – This section would change the definition of “business organization” for BPT purposes. The Department states this could lead to the demise of the BPT. NH taxes business organizations as separate entities in order to treat all business organizations on an equitable basis. Should this law pass, NH would no longer be able to provide equitable treatment and thus the BPT would be susceptible to challenges to its constitutionality. The Department is unable to estimate the exact decrease in revenue as a result of this section, but states the worst case scenario could be the loss of all FY 2012 BPT revenues. FY 2011 BPT revenues are estimated to total approximately \$313 million.