

HB 438-FN-A - AS INTRODUCED

2015 SESSION

15-0213
10/09

HOUSE BILL ***438-FN-A***

AN ACT exempting proprietorships from taxation under the business profits tax.

SPONSORS: Rep. Itse, Rock 10; Rep. Hoell, Merr 23; Rep. Ingretson, Graf 15; Rep. Tucker,
Rock 23; Rep. W. O'Brien, Hills 5; Rep. Abramson, Rock 20; Sen. Reagan, Dist 17;
Sen. Cataldo, Dist 6

COMMITTEE: Ways and Means

ANALYSIS

This bill exempts the business activities of persons doing business as a proprietorship from taxation 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Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.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 Fifteen

AN ACT exempting proprietorships from taxation under the business profits tax.

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 proprietorships
2 are legally identical with their owners. Therefore, in as much individuals are not liable for the
3 business profits tax, neither can their proprietorships be liable for the business profits tax.

4 2 Business Profits Tax; Exemption for Proprietorships. Amend RSA 77-A:1, I to read as follows:

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

29 3 Business Profits Tax; Deductions; References Removed. Amend RSA 77-A:4, III to read as
30 follows:

31 III.(a) In the case of a [~~proprietorship,~~] partnership[~~s~~] or limited liability company filing a

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

12 (b) Subject to the provisions of subparagraph (c) which establishes a record-keeping safe
13 harbor, the method of determining the amount of the deduction available to the business
14 organization allowed under this paragraph shall be by using the standards set forth in section
15 162(a)(1) of the United States Internal Revenue Code, as it may be amended from time to time, and
16 the Treasury Regulations, administrative rulings, and judicial cases issued thereunder. The
17 business organization shall keep such records as may be necessary to determine that the deduction is
18 reasonable under these standards.

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

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

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

29 (e) A business organization or group of related business organizations may elect the
30 record-keeping safe harbor option in subparagraph III(c) without a redetermination of the
31 reasonableness of the deduction by the commissioner. Any such deduction claimed by the business
32 organization or group of related business organizations shall not be subject to challenge; provided,
33 that upon request, the business organization or group of related business organizations shall be
34 required to substantiate that ~~[the proprietor or]~~ at least one partner or member performed actual
35 personal services for the business organization or group of related business organizations.

36 (f) Related business organizations electing not to substantiate the extent of the actual
37 personal services of their ~~[proprietors,~~ partners~~]~~ and members, shall be limited to the record-

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1 keeping safe harbor deduction, less any owners' compensation taken on the federal tax returns of
2 corporate members of the group, allocated among the related business organizations. For the
3 purposes of RSA 77-A:4, III, "related business organizations" are unitary business organizations and
4 business organizations that would qualify as unitary but for the fact that they conduct business only
5 within the state.

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

13 4 Repeal. RSA 77-A:1, III(d), relative to the determination of gross business profits for a
14 proprietorship, is repealed.

15 5 Reference Removed. Amend RSA 77-A:1, III(f) to read as follows:

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

21 6 Effective Date. This act shall take effect July 1, 2015.

LBAO
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12/19/14

HB 438-FN-A - FISCAL NOTE

AN ACT exempting proprietorships from taxation under the business profits tax.

FISCAL IMPACT:

The Department of Revenue Administration states this bill, **as introduced**, will decrease state general and education trust fund revenue by \$17,025,000 in FY 2016, and by an indeterminable amount in FY 2017 and each year thereafter. There will be no fiscal impact on state, county, and local expenditures, or county and local revenue.

METHODOLOGY:

The Department of Revenue Administration states this bill would exempt proprietorships from the business profits tax (BPT). The Department states BPT revenue for FY 2015 is estimated at \$340,500,000. On average proprietorships paid approximately 5.0% of total BPT revenue. Assuming FY 2015 revenue as the base, the Department estimates this bill would decrease BPT revenue by approximately \$17,025,000 in FY 2016. The Department is unable to determine the fiscal impact in FY 2017 and beyond, but states it would be reasonable to assume that a similar revenue decrease would occur.