

HOUSE BILL 368

56TH LEGISLATURE - STATE OF NEW MEXICO - FIRST SESSION, 2023

INTRODUCED BY

Jason C. Harper and Micaela Lara Cadena

This document may incorporate amendments proposed by a committee, but not yet adopted, as well as amendments that have been adopted during the current legislative session. The document is a tool to show amendments in context and cannot be used for the purpose of adding amendments to legislation.

AN ACT

RELATING TO TAXATION; CONVERTING A CERTAIN EXEMPTION TO A CREDIT FOR PASS-THROUGH ENTITIES THAT ELECT TO PAY AN ENTITY-LEVEL TAX; AMENDING THE DEFINITIONS OF "BASE INCOME" AND "NET INCOME" IN THE INCOME TAX ACT.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF NEW MEXICO:

SECTION 1. Section 7-2-2 NMSA 1978 (being Laws 1986, Chapter 20, Section 26, as amended) is amended to read:

.224933.2AIC February 20, 2023 (3:15pm)

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"7-2-2. DEFINITIONS.--For the purpose of the Income Tax Act and unless the context requires otherwise:

A. "adjusted gross income" means adjusted gross income as defined in Section 62 of the Internal Revenue Code, as that section may be amended or renumbered;

B. "base income":

(1) means, for estates and trusts, that part of the estate's or trust's income defined as taxable income and upon which the federal income tax is calculated in the Internal Revenue Code for income tax purposes plus:

(a) for taxable years beginning on or after January 1, 1991, the amount of the net operating loss deduction allowed by Section 172(a) of the Internal Revenue Code, as that section may be amended or renumbered, and taken by the taxpayer for that year; and

(b) for taxable years beginning on or after January 1, 2023, an amount equal to the amount of credit claimed and allowed for that year pursuant to Section 7-3A-10 NMSA 1978 with respect to the distributed net income of a pass-through entity;

(2) means, for taxpayers other than estates or trusts, that part of the taxpayer's income defined as adjusted gross income plus:

(a) for taxable years beginning on or after January 1, 1991, the amount of the net operating loss

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deduction allowed by Section 172(a) of the Internal Revenue Code, as that section may be amended or renumbered, and taken by the taxpayer for that year; and

(b) for taxable years beginning on or after January 1, 2023, an amount equal to the amount of credit claimed and allowed for that year pursuant to Section 7-3A-10 NMSA 1978 with respect to the distributed net income of a pass-through entity;

(3) includes, for all taxpayers, any other income of the taxpayer not included in adjusted gross income but upon which a federal tax is calculated pursuant to the Internal Revenue Code for income tax purposes, except amounts for which a calculation of tax is made pursuant to Section 55 of the Internal Revenue Code, as that section may be amended or renumbered; "base income" also includes interest received on a state or local bond;

(4) includes, for all taxpayers, an amount deducted pursuant to Section 7-2-32 NMSA 1978 in a prior taxable year if:

(a) such amount is transferred to another qualified tuition program, as defined in Section 529 of the Internal Revenue Code, not authorized in the Education Trust Act; or

(b) a distribution or refund is made for any reason other than: 1) to pay for qualified higher

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education expenses, as defined pursuant to Section 529 of the Internal Revenue Code; or 2) upon the beneficiary's death, disability or receipt of a scholarship; and

(5) excludes, for a taxpayer who conducts a lawful business pursuant to the laws of the state, an amount equal to any expenditure that is eligible to be claimed as a federal income tax deduction but is disallowed by Section 280E of the Internal Revenue Code, as that section may be amended or renumbered;

C. "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services;

D. "department" means the taxation and revenue department, the secretary or any employee of the department exercising authority lawfully delegated to that employee by the secretary;

E. "fiduciary" means a guardian, trustee, executor, administrator, committee, conservator, receiver, individual or corporation acting in any fiduciary capacity;

F. "filing status" means "married filing joint returns", "married filing separate returns", "head of household", "surviving spouse" and "single", as those terms are generally defined for federal tax purposes;

G. "fiscal year" means any accounting period of twelve months ending on the last day of any month other than

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December;

H. "head of household" means "head of household" as generally defined for federal income tax purposes;

I. "individual" means a natural person, an estate, a trust or a fiduciary acting for a natural person, trust or estate;

J. "Internal Revenue Code" means the United States Internal Revenue Code of 1986, as amended;

K. "lump-sum amount" means, for the purpose of determining liability for federal income tax, an amount that was not included in adjusted gross income but upon which the five-year-averaging or the ten-year-averaging method of tax computation provided in Section 402 of the Internal Revenue Code, as that section may be amended or renumbered, was applied;

L. "modified gross income" means all income of the taxpayer and, if any, the taxpayer's spouse and dependents, undiminished by losses and from whatever source, including:

- (1) compensation;
- (2) net profit from business;
- (3) gains from dealings in property;
- (4) interest;
- (5) net rents;
- (6) royalties;
- (7) dividends;

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(8) alimony and separate maintenance payments;  
(9) annuities;  
(10) income from life insurance and endowment contracts;

(11) pensions;  
(12) discharge of indebtedness;  
(13) distributive share of partnership income;  
(14) income in respect of a decedent;  
(15) income from an interest in an estate or a trust;

(16) social security benefits;  
(17) unemployment compensation benefits;  
(18) workers' compensation benefits;  
(19) public assistance and welfare benefits;  
(20) cost-of-living allowances; and  
(21) gifts;

M. "modified gross income" excludes:

(1) payments for hospital, dental, medical or drug expenses to or on behalf of the taxpayer;

(2) the value of room and board provided by federal, state or local governments or by private individuals or agencies based upon financial need and not as a form of compensation;

(3) payments pursuant to a federal, state or local government program directly or indirectly to a third

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party on behalf of the taxpayer when identified to a particular use or invoice by the payer; or

(4) payments for credits and rebates pursuant to the Income Tax Act and made for a credit pursuant to Section 7-3-9 NMSA 1978;

N. "net income" means, for estates and trusts, base income adjusted to exclude amounts that the state is prohibited from taxing because of the laws or constitution of this state or the United States and means, for taxpayers other than estates or trusts, base income adjusted to exclude:

(1) an amount equal to the standard deduction allowed the taxpayer for the taxpayer's taxable year by Section 63 of the Internal Revenue Code, as that section may be amended or renumbered;

(2) an amount equal to the itemized deductions defined in Section 63 of the Internal Revenue Code, as that section may be amended or renumbered, allowed the taxpayer for the taxpayer's taxable year less the amount excluded pursuant to Paragraph (1) of this subsection and less the amount of state and local income and sales taxes included in the taxpayer's itemized deductions;

(3) an amount equal to the product of the exemption amount allowed for the taxpayer's taxable year by Section 151 of the Internal Revenue Code, as that section may be amended or renumbered, multiplied by the number of personal

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exemptions allowed for federal income tax purposes;

(4) income from obligations of the United States of America less expenses incurred to earn that income;

(5) other amounts that the state is prohibited from taxing because of the laws or constitution of this state or the United States;

~~[(6) for taxable years that began prior to January 1, 1991, an amount equal to the sum of:~~

~~(a) net operating loss carryback deductions to that year from taxable years beginning prior to January 1, 1991 claimed and allowed, as provided by the Internal Revenue Code; and~~

~~(b) net operating loss carryover deductions to that year claimed and allowed;~~

~~(7) for taxable years beginning on or after January 1, 1991 and prior to January 1, 2013, an amount equal to the sum of any net operating loss carryover deductions to that year claimed and allowed; provided that the amount of any net operating loss carryover from a taxable year beginning on or after January 1, 1991 and prior to January 1, 2013 may be excluded only as follows:~~

~~(a) in the case of a timely filed return, in the taxable year immediately following the taxable year for which the return is filed; or~~

~~(b) in the case of amended returns or~~



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~~original returns not timely filed, in the first taxable year beginning after the date on which the return or amended return establishing the net operating loss is filed; and~~

~~(c) in either case, if the net operating loss carryover exceeds the amount of net income exclusive of the net operating loss carryover for the taxable year to which the exclusion first applies, in the next four succeeding taxable years in turn until the net operating loss carryover is exhausted for any net operating loss carryover from a taxable year prior to January 1, 2013; in no event shall a net operating loss carryover from a taxable year beginning prior to January 1, 2013 be excluded in any taxable year after the fourth taxable year beginning after the taxable year to which the exclusion first applies;~~

~~(8)]~~ (6) for taxable years beginning on or after January 1, 2013, an amount equal to the sum of any net operating loss carryover deductions to that year claimed and allowed; provided that the amount of any net operating loss carryover may be excluded only as follows:

(a) in the case of a timely filed return, in the taxable year immediately following the taxable year for which the return is filed; or

(b) in the case of amended returns or original returns not timely filed, in the first taxable year beginning after the date on which the return or amended return

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establishing the net operating loss is filed; and

(c) in either case, if the net operating loss carryover exceeds the amount of net income exclusive of the net operating loss carryover for the taxable year to which the exclusion first applies, in the next nineteen succeeding taxable years in turn until the net operating loss carryover is exhausted for any net operating loss carryover from a taxable year beginning on or after January 1, 2013; in no event shall a net operating loss carryover from a taxable year beginning: 1) prior to January 1, 2013 be excluded in any taxable year after the fourth taxable year beginning after the taxable year to which the exclusion first applies; and 2) on or after January 1, 2013 be excluded in any taxable year after the nineteenth taxable year beginning after the taxable year to which the exclusion first applies; and

~~[(9)]~~ (7) for taxable years beginning on or after January 1, 2011, an amount equal to the amount included in adjusted gross income that represents a refund of state and local income and sales taxes that were deducted for federal tax purposes in taxable years beginning on or after January 1, 2010;

0. "net operating loss" means any net operating loss, as defined by Section 172(c) of the Internal Revenue Code, as that section may be amended or renumbered, for a taxable year as further increased by the income, if any, from

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obligations of the United States for that year less related expenses;

P. "net operating loss carryover" means the amount, or any portion of the amount, of a net operating loss for any taxable year that, pursuant to Paragraph (6) [~~(7)~~ or ~~(8)~~] of Subsection N of this section, may be excluded from base income;

Q. "nonresident" means every individual not a resident of this state;

R. "person" means any individual, estate, trust, receiver, cooperative association, club, corporation, company, firm, partnership, limited liability company, joint venture, syndicate or other association; "person" also means, to the extent permitted by law, any federal, state or other governmental unit or subdivision or agency, department or instrumentality thereof;

S. "resident" means an individual who is domiciled in this state during any part of the taxable year or an individual who is physically present in this state for one hundred eighty-five days or more during the taxable year; but any individual, other than someone who was physically present in the state for one hundred eighty-five days or more during the taxable year, who, on or before the last day of the taxable year, changed the individual's place of abode to a place without this state with the bona fide intention of continuing actually to abide permanently without this state is not a

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resident for the purposes of the Income Tax Act for periods after that change of abode;

T. "secretary" means the secretary of taxation and revenue or the secretary's delegate;

U. "state" means any state of the United States, the District of Columbia, the commonwealth of Puerto Rico, any territory or possession of the United States or any political subdivision of a foreign country;

V. "state or local bond" means a bond issued by a state other than New Mexico or by a local government other than one of New Mexico's political subdivisions, the interest from which is excluded from income for federal income tax purposes under Section 103 of the Internal Revenue Code, as that section may be amended or renumbered;

W. "surviving spouse" means "surviving spouse" as generally defined for federal income tax purposes;

X. "taxable income" means net income less any lump-sum amount;

Y. "taxable year" means the calendar year or fiscal year upon the basis of which the net income is computed under the Income Tax Act and includes, in the case of the return made for a fractional part of a year under the provisions of the Income Tax Act, the period for which the return is made; and

Z. "taxpayer" means any individual subject to the tax imposed by the Income Tax Act."

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SECTION 2. Section 7-2-13 NMSA 1978 (being Laws 1965, Chapter 202, Section 11, as amended) is amended to read:

"7-2-13. CREDIT FOR TAXES PAID OTHER STATES BY RESIDENT INDIVIDUALS.--

A. When a resident individual is liable to another state for tax upon income derived from sources outside this state but also included in net income under the Income Tax Act as income allocated or apportioned to New Mexico pursuant to Section 7-2-11 NMSA 1978, the individual, upon filing with the secretary satisfactory evidence of the payment of the tax to the other state, shall receive a credit against the tax due this state in the amount of the tax paid the other state with respect to income that is required to be either allocated or apportioned to New Mexico. However, in no case shall the credit exceed the amount of the taxpayer's New Mexico income tax liability on that portion of income that is required to be either allocated or apportioned to New Mexico on which the tax payable to the other state was determined. The credit provided by this section does not apply to or include income taxes paid to any municipality, county or other political subdivision of a state.

B. The credit allowed pursuant to Subsection A of this section shall be calculated without regard to the credit allowed pursuant to Section 7-3A-10 NMSA 1978."

SECTION 3. Section 7-3A-10 NMSA 1978 (being Laws 2022,

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Chapter 46, Section 3) is amended to read:

"7-3A-10. ELECTION OF ENTITY-LEVEL TAX--CREDIT.--

A. A pass-through entity may elect on an annual basis to pay a tax at the entity level for a taxable year. The tax that may elected to be paid pursuant to this section may be referred to as the "entity-level tax".

B. A pass-through [~~entities~~] entity electing to pay the entity-level tax shall make the election by filing a complete entity-level tax return with the department in the form and manner as prescribed by the department. The election shall be binding on all owners of the electing pass-through entity. The return shall be filed no later than the original or extended due date of the entity's federal partnership or S corporation return for the taxable year. Payment of the entity-level tax shall accompany or precede the filing of the return.

C. The entity-level tax is imposed on the distributed net income of the pass-through entity for the taxable year. The rate of entity-level tax is equal to the higher of the maximum tax rate imposed pursuant to Section 7-2-7 NMSA 1978 or the maximum tax rate imposed pursuant to Section 7-2A-5 NMSA 1978 for the taxable year.

D. Distributed net income of a pass-through entity shall equal the amount [~~of net~~] allocated and apportioned to New Mexico pursuant to the Uniform Division of Income for Tax

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Purposes Act from the following HTRC → sum ← HTRC :

(1) the total income of the pass-through entity [allocated and apportioned to New Mexico pursuant to the Uniform Division of Income for Tax Purposes Act, less allocations of net income from that amount to: (1)] properly reported for federal income tax purposes plus, for partnerships, the amount of guaranteed payments other than premiums for health insurance paid by the partnership on behalf of a partner, less the net income or guaranteed payments Hf11 → property ← Hf11 Hf11 → properly ← Hf11 allocated or made to:

(a) the United States, this state or a political subdivision of either;

[(-2)] (b) a federally recognized Indian nation, tribe or pueblo located wholly or partially in New Mexico, or any political subdivision thereof;

[(-3)] (c) an organization that has been granted exemption from the federal income tax by the United States commissioner of internal revenue as an organization described in Section 501(c)(3) of the Internal Revenue Code;  
[or]

[(-4)] (d) a corporate partner that would properly include the income in the partner's New Mexico tax return as part of the partner's unitary business income; or

(e) a pass-through entity that is an owner of the electing pass-through entity; and

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(2) HTRC ~~forty percent~~ HTRC ~~HTRC~~ ~~less the amount~~ HTRC of net capital gains HTRC ~~that may be deducted pursuant to Section 7-2-34 NMSA 1978 and is~~ HTRC properly allocated to owners who are subject to tax pursuant to the Income Tax Act.

E. A net operating loss shall not be included in the distributed net income calculated pursuant to Subsection D of this section but may be carried forward until exhausted.

~~[E.]~~ F. Pass-through entities electing to pay the entity-level tax shall make estimated payments of the tax ~~[at the same time and in the same amounts as the withholding required by Subsection B of Section 7-3A-3 NMSA 1978]~~ on forms and in the manner as determined by the department. Amounts remitted pursuant to Subsection B of Section 7-3A-3 NMSA 1978 by entities electing to pay the entity-level tax shall be deemed payments of estimated entity-level tax.

~~[F.]~~ G. If, for a taxable year, the sum of the estimated payments of tax made by a pass-through entity pursuant to Subsection ~~[E]~~ F of this section exceeds the amount of entity-level tax owed, the pass-through entity may apply for a refund of the difference. If, for a taxable year, the entity-level tax owed by a pass-through entity exceeds the sum of the estimated payments made by the pass-through entity, the pass-through entity shall remit the difference on or before the date the pass-through entity's entity-level tax is due.



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H. An owner of a pass-through entity electing to pay the tax imposed under this section may be allowed a tax credit in an amount equal to the owner's share of the tax; provided that the pass-through entity paid the tax and furnished sufficient information on the pass-through entity's tax return to identify that owner. If the amount of the credit exceeds the amount of the owner's tax liabilities pursuant to the Income Tax Act HTRC→or the Corporate Income and Franchise Tax Act←HTRC , the excess shall be refunded to the owner.

I. As used in this section:

(1) "guaranteed payments" means the guaranteed payments described in Section 707(c) of the Internal Revenue Code, as that section may be amended or renumbered;

(2) "net capital gain" means "net capital gain" as defined in Section 1222(11) of the Internal Revenue Code; Hf11→HTRC→and←HTRC←Hf11 Hf11→Hf11→and←Hf11←Hf11

(3) "net operating loss" means "net operating loss" as defined in Section 7-2-2 NMSA 1978 Hf11→HTRC→; and

~~(4) "pass-through entity" means a partnership or corporation that elects to pass income, losses, deductions and credits through to the entity's shareholders for federal tax purposes←HTRC←Hf11 Hf11→; and~~

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(4) "pass-through entity" means a partnership or corporation that elects to pass income, losses, deductions and credits through to the entity's owners for federal tax purposes←Hf11 ."

SECTION 4. REPEAL.--Sections 7-2-5.12 and 7-2A-4.1 NMSA 1978 (being Laws 2022, Chapter 46, Sections 1 and 2) are repealed.

SECTION 5. APPLICABILITY.--The provisions of this act apply to taxable years beginning on or after January 1, 2023.

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