

HOUSE BILL 368

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

INTRODUCED BY

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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:

"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

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1 of the estate's or trust's income defined as taxable income and
2 upon which the federal income tax is calculated in the Internal
3 Revenue Code for income tax purposes plus:

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

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

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

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

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

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1 pass-through entity;

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

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

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

17 (b) a distribution or refund is made for
18 any reason other than: 1) to pay for qualified higher
19 education expenses, as defined pursuant to Section 529 of the
20 Internal Revenue Code; or 2) upon the beneficiary's death,
21 disability or receipt of a scholarship; and

22 (5) excludes, for a taxpayer who conducts a
23 lawful business pursuant to the laws of the state, an amount
24 equal to any expenditure that is eligible to be claimed as a
25 federal income tax deduction but is disallowed by Section 280E

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1 of the Internal Revenue Code, as that section may be amended or
2 renumbered;

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

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

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

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

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

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

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

25 J. "Internal Revenue Code" means the United States

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1 Internal Revenue Code of 1986, as amended;

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

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

- 12 (1) compensation;
- 13 (2) net profit from business;
- 14 (3) gains from dealings in property;
- 15 (4) interest;
- 16 (5) net rents;
- 17 (6) royalties;
- 18 (7) dividends;
- 19 (8) alimony and separate maintenance payments;
- 20 (9) annuities;
- 21 (10) income from life insurance and endowment
22 contracts;
- 23 (11) pensions;
- 24 (12) discharge of indebtedness;
- 25 (13) distributive share of partnership income;

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- 1 (14) income in respect of a decedent;
- 2 (15) income from an interest in an estate or a
- 3 trust;
- 4 (16) social security benefits;
- 5 (17) unemployment compensation benefits;
- 6 (18) workers' compensation benefits;
- 7 (19) public assistance and welfare benefits;
- 8 (20) cost-of-living allowances; and
- 9 (21) gifts;

10 M. "modified gross income" excludes:

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

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

17 (3) payments pursuant to a federal, state or
18 local government program directly or indirectly to a third
19 party on behalf of the taxpayer when identified to a particular
20 use or invoice by the payer; or

21 (4) payments for credits and rebates pursuant
22 to the Income Tax Act and made for a credit pursuant to Section
23 7-3-9 NMSA 1978;

24 N. "net income" means, for estates and trusts, base
25 income adjusted to exclude amounts that the state is prohibited

1 from taxing because of the laws or constitution of this state
2 or the United States and means, for taxpayers other than
3 estates or trusts, base income adjusted to exclude:

4 (1) an amount equal to the standard deduction
5 allowed the taxpayer for the taxpayer's taxable year by Section
6 63 of the Internal Revenue Code, as that section may be amended
7 or renumbered;

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

15 (3) an amount equal to the product of the
16 exemption amount allowed for the taxpayer's taxable year by
17 Section 151 of the Internal Revenue Code, as that section may
18 be amended or renumbered, multiplied by the number of personal
19 exemptions allowed for federal income tax purposes;

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

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

25 ~~[(6) for taxable years that began prior to~~

1 ~~January 1, 1991, an amount equal to the sum of:~~

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

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

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

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

18 ~~(b) in the case of amended returns or~~
19 ~~original returns not timely filed, in the first taxable year~~
20 ~~beginning after the date on which the return or amended return~~
21 ~~establishing the net operating loss is filed; and~~

22 ~~(c) in either case, if the net operating~~
23 ~~loss carryover exceeds the amount of net income exclusive of~~
24 ~~the net operating loss carryover for the taxable year to which~~
25 ~~the exclusion first applies, in the next four succeeding~~

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1 ~~taxable years in turn until the net operating loss carryover is~~
2 ~~exhausted for any net operating loss carryover from a taxable~~
3 ~~year prior to January 1, 2013; in no event shall a net~~
4 ~~operating loss carryover from a taxable year beginning prior to~~
5 ~~January 1, 2013 be excluded in any taxable year after the~~
6 ~~fourth taxable year beginning after the taxable year to which~~
7 ~~the exclusion first applies;~~

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

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

16 (b) in the case of amended returns or
17 original returns not timely filed, in the first taxable year
18 beginning after the date on which the return or amended return
19 establishing the net operating loss is filed; and

20 (c) in either case, if the net operating
21 loss carryover exceeds the amount of net income exclusive of
22 the net operating loss carryover for the taxable year to which
23 the exclusion first applies, in the next nineteen succeeding
24 taxable years in turn until the net operating loss carryover is
25 exhausted for any net operating loss carryover from a taxable

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1 year beginning on or after January 1, 2013; in no event shall a
2 net operating loss carryover from a taxable year beginning: 1)
3 prior to January 1, 2013 be excluded in any taxable year after
4 the fourth taxable year beginning after the taxable year to
5 which the exclusion first applies; and 2) on or after January
6 1, 2013 be excluded in any taxable year after the nineteenth
7 taxable year beginning after the taxable year to which the
8 exclusion first applies; and

9 ~~[(9)]~~ (7) for taxable years beginning on or
10 after January 1, 2011, an amount equal to the amount included
11 in adjusted gross income that represents a refund of state and
12 local income and sales taxes that were deducted for federal tax
13 purposes in taxable years beginning on or after January 1,
14 2010;

15 O. "net operating loss" means any net operating
16 loss, as defined by Section 172(c) of the Internal Revenue
17 Code, as that section may be amended or renumbered, for a
18 taxable year as further increased by the income, if any, from
19 obligations of the United States for that year less related
20 expenses;

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

25 Q. "nonresident" means every individual not a

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1 resident of this state;

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

9 S. "resident" means an individual who is domiciled
10 in this state during any part of the taxable year or an
11 individual who is physically present in this state for one
12 hundred eighty-five days or more during the taxable year; but
13 any individual, other than someone who was physically present
14 in the state for one hundred eighty-five days or more during
15 the taxable year, who, on or before the last day of the taxable
16 year, changed the individual's place of abode to a place
17 without this state with the bona fide intention of continuing
18 actually to abide permanently without this state is not a
19 resident for the purposes of the Income Tax Act for periods
20 after that change of abode;

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

23 U. "state" means any state of the United States,
24 the District of Columbia, the commonwealth of Puerto Rico, any
25 territory or possession of the United States or any political

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1 subdivision of a foreign country;

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

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

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

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

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

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

21 "7-2-13. CREDIT FOR TAXES PAID OTHER STATES BY RESIDENT
22 INDIVIDUALS.--

23 A. When a resident individual is liable to another
24 state for tax upon income derived from sources outside this
25 state but also included in net income under the Income Tax Act

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1 as income allocated or apportioned to New Mexico pursuant to
2 Section 7-2-11 NMSA 1978, the individual, upon filing with the
3 secretary satisfactory evidence of the payment of the tax to
4 the other state, shall receive a credit against the tax due
5 this state in the amount of the tax paid the other state with
6 respect to income that is required to be either allocated or
7 apportioned to New Mexico. However, in no case shall the
8 credit exceed the amount of the taxpayer's New Mexico income
9 tax liability on that portion of income that is required to be
10 either allocated or apportioned to New Mexico on which the tax
11 payable to the other state was determined. The credit provided
12 by this section does not apply to or include income taxes paid
13 to any municipality, county or other political subdivision of a
14 state.

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

18 SECTION 3. Section 7-3A-10 NMSA 1978 (being Laws 2022,
19 Chapter 46, Section 3) is amended to read:

20 "7-3A-10. ELECTION OF ENTITY-LEVEL TAX--CREDIT---

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

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

10 C. The entity-level tax is imposed on the
11 distributed net income of the pass-through entity for the
12 taxable year. The rate of entity-level tax is equal to the
13 higher of the maximum tax rate imposed pursuant to Section
14 7-2-7 NMSA 1978 or the maximum tax rate imposed pursuant to
15 Section 7-2A-5 NMSA 1978 for the taxable year.

16 D. Distributed net income of a pass-through entity
17 shall equal the amount ~~[of net]~~ allocated and apportioned to
18 New Mexico pursuant to the Uniform Division of Income for Tax
19 Purposes Act from the following sum:

20 (1) the total income of the pass-through
21 entity ~~[allocated and apportioned to New Mexico pursuant to the~~
22 ~~Uniform Division of Income for Tax Purposes Act, less~~
23 ~~allocations of net income from that amount to: (1)]~~ properly
24 reported for federal income tax purposes plus, for
25 partnerships, the amount of guaranteed payments other than

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1 premiums for health insurance paid by the partnership on behalf
2 of a partner, less the net income or guaranteed payments
3 property allocated or made to:

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

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

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

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

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

19 (2) forty percent of net capital gains
20 properly allocated to owners who are subject to tax pursuant to
21 the Income Tax Act.

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

25 ~~[E.]~~ F. Pass-through entities electing to pay the

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

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

17 H. An owner of a pass-through entity electing to
18 pay the tax imposed under this section may be allowed a tax
19 credit in an amount equal to the owner's share of the tax;
20 provided that the pass-through entity paid the tax and
21 furnished sufficient information on the pass-through entity's
22 tax return to identify that owner. If the amount of the credit
23 exceeds the amount of the owner's tax liabilities pursuant to
24 the Income Tax Act, the excess shall be refunded to the owner.

25 I. As used in this section:

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

4 (2) "net capital gain" means "net capital
5 gain" as defined in Section 1222(11) of the Internal Revenue
6 Code; and

7 (3) "net operating loss" means "net operating
8 loss" as defined in Section 7-2-2 NMSA 1978."

9 SECTION 4. REPEAL.--Sections 7-2-5.12 and 7-2A-4.1 NMSA
10 1978 (being Laws 2022, Chapter 46, Sections 1 and 2) are
11 repealed.

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