

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

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HOUSE BILL 619
Committee Substitute Favorable 5/26/11
Senate Finance Committee Substitute Adopted 6/8/11

Short Title: Forced Combinations.

(Public)

Sponsors:

Referred to:

April 6, 2011

1 A BILL TO BE ENTITLED
2 AN ACT TO SPECIFY THE SECRETARY OF REVENUE'S AUTHORITY TO ADJUST
3 THE NET INCOME OF A CORPORATION OR TO REQUIRE A CORPORATION TO
4 FILE A COMBINED RETURN.

5 The General Assembly of North Carolina enacts:

6 SECTION 1. G.S. 105-130.6 is repealed.

7 SECTION 2. Part 1 of Article 4 of Chapter 105 of the General Statutes is amended
8 by adding a new section to read:

9 "**§ 105-130.5A. Secretary's authority to adjust net income or require a combined return.**

10 (a) Notice. – When the Secretary has reason to believe that any corporation so conducts
11 its trade or business in such manner as to fail to accurately report its State net income properly
12 attributable to its business carried on in the State through the use of transactions that lack
13 economic substance or are not at fair market value between members of an affiliated group of
14 entities, the Secretary may, upon written notice to the corporation, require any information
15 reasonably necessary to determine whether the corporation's intercompany transactions have
16 economic substance and are at fair market value and for the accurate computation of the
17 corporation's State net income properly attributable to its business carried on in the State. The
18 corporation must provide the information requested within 90 days of the date of the notice.

19 (b) Adjust Net Income. – If upon review of the information provided, the Secretary
20 finds as a fact that the corporation's intercompany transactions lack economic substance or are
21 not at fair market value, the Secretary may redetermine the State net income of the corporation
22 properly attributable to its business carried on in the State under this section by (i) adding back,
23 eliminating, or otherwise adjusting intercompany transactions to accurately compute the
24 corporation's State net income properly attributable to its business carried on in the State, or, if
25 such adjustments are not adequate under the circumstances to redetermine State net income, (ii)
26 requiring the corporation to file a return that reflects the net income on a combined basis of all
27 members of its affiliated group that are conducting a unitary business. The Secretary shall
28 consider and be authorized to use any reasonable method proposed by the corporation for
29 redetermining its State net income attributable to its business carried on in the State. In
30 determining whether the corporation's intercompany transactions lack economic substance or
31 are not at fair market value, the Secretary shall consider each taxable year separately.

32 (c) Combined Return. – If the Secretary finds as a fact that a combined return is
33 required, the Secretary may, upon written notice to the corporation, require the corporation to
34 submit the combined return, and the corporation shall submit the combined return within 60
35 days of the date of the notice. The submission by the corporation of the combined return
36 required by the Secretary shall not be deemed to be a return or construed as an agreement by



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1 the corporation that an assessment based on the combined return is correct or that additional tax
2 is due by the Secretary's deadline for submitting the combined return. The Secretary or the
3 corporation may propose a combination of fewer than all members of the unitary group, and the
4 Secretary shall be authorized to consider whether such proposed combination is a reasonable
5 means of redetermining State net income; provided, however, the Secretary shall not require a
6 combination of fewer than all members of the unitary group without the consent of the
7 corporation.

8 (d) Written Statement of Findings. – If the Secretary makes an adjustment or requires a
9 combined return under this section, the Secretary shall provide the corporation with a written
10 statement containing detail of the facts, circumstances, and reasons for which the Secretary has
11 found as a fact that the corporation did not accurately report its State net income properly
12 attributable to its business carried on in the State and the Secretary's proposed method for
13 computation of the corporation's State net income.

14 (e) Members of Affiliated Group. – The Secretary may require a combined return under
15 this section regardless of whether the members of the affiliated group are or are not doing
16 business in this State.

17 (f) Economic Substance. – A transaction has economic substance if (i) the transaction,
18 or the series of transactions of which the transaction is a part, has one or more reasonable
19 business purposes other than the creation of State income tax benefits and (ii) the transaction,
20 or the series of transactions of which the transaction is a part, has economic effects beyond the
21 creation of State income tax benefits. In determining whether a transaction has economic
22 substance, all of the following apply:

23 (1) Reasonable business purposes and economic effects include, but are not
24 limited to, any material benefit from the transaction other than State income
25 tax benefits not allowable under subdivision (3) of this subsection.

26 (2) In determining whether to require a combined return, whether the transaction
27 has economic effects beyond the creation of State income tax benefits may
28 be satisfied by demonstrating material business activity of the entities
29 involved in the transaction.

30 (3) If State income tax benefits resulting from a transaction, or a series of
31 transactions of which the transaction is a part, are consistent with legislative
32 intent, such State income tax benefits shall be considered in determining
33 whether such transaction has business purpose and economic substance.

34 (4) Centralized cash management of an affiliated group as defined in subsection
35 (i) of this section shall not constitute evidence of an absence of economic
36 substance.

37 (5) Achieving a financial accounting benefit shall not be taken into account as a
38 reasonable business purpose for entering into a transaction if the origin of
39 such financial accounting benefit is a reduction of State income tax.

40 (g) Allocation of Income and Deductions. – In determining whether transactions
41 between members of the affiliated group of entities are not at fair market value, the Secretary
42 shall apply the standards contained in the regulations adopted under section 482 of the Code.

43 (h) Apportionment. – If the Secretary requires a combined return under this section, the
44 combined State net income of the corporation and the members of the affiliated group of
45 entities shall be apportioned to this State by use of an apportionment formula that accurately
46 reports the State net income properly attributable to the corporation's business carried on in the
47 State and which fairly reflects the apportionment formula in G.S. 105-130.4 applicable to the
48 corporation and each member of the affiliated group included in the combined return.

49 (i) Affiliated Group Defined. – For purposes of this section, an affiliated group is a
50 group of two or more corporations or noncorporate entities in which more than fifty percent
51 (50%) of the voting stock of each member corporation or ownership interest of each member

1 noncorporate entity is directly or indirectly owned or controlled by a common owner or
2 owners, either corporate or noncorporate, or by one or more of the member corporations or
3 noncorporate entities. Nothing in this subsection shall be construed to limit or negate the
4 Secretary's authority to add back, eliminate, or otherwise adjust intercompany transactions
5 involving the listed entities to accurately compute the corporation's State net income properly
6 attributable to its business carried on in the State, as provided in subsection (b) of this section.

7 The following entities shall not be included in a combined return:

8 (1) A corporation not required to file a federal income tax return.

9 (2) An insurance company, other than a captive insurance company, (i) which is
10 subject to tax under Article 8B of this Chapter, (ii) whose premiums are
11 subject to tax under Article 21 of Chapter 58 or a similar tax in another state,
12 or (iii) which is licensed as a reinsurance company. A "captive insurance
13 company" means an insurer that is part of an affiliated group where the
14 insurer receives more than fifty percent (50%) of its net written premiums or
15 other amounts received as compensation for insurance from members of the
16 affiliated group.

17 (3) A corporation exempt from taxation under section 501 of the Code.

18 (4) An S corporation.

19 (5) A foreign corporation as defined in section 7701 of the Code, other than a
20 domestic branch thereof.

21 (6) A partnership, limited liability company, or other entity not taxed as a
22 corporation.

23 (7) A corporation with at least eighty percent (80%) of its gross income from all
24 sources in the tax year being active foreign business income as defined in
25 section 861(c)(1)(B) of the Code in effect as of July 1, 2009.

26 (j) Proposed Assessment or Refund. – If the Secretary redetermines the State net
27 income of the corporation in accordance with this section by adjusting the State net income of
28 the corporation or requiring a combined return, the Secretary shall issue a proposed assessment
29 or refund upon making such redetermination. The procedures for a proposed assessment or a
30 refund in Article 9 of Chapter 105 shall be applicable to proposed assessments and refunds
31 made under this section.

32 (k) Penalties. – If a combined return required by this section is not timely submitted by
33 a corporation, then the corporation is subject to the penalties provided in G.S. 105-236(a)(3).
34 Penalties shall not be imposed on an assessment under this section except as expressly
35 authorized in this section and in G.S. 105-236(a)(5)f.

36 (l) Advice. – A corporation may request in writing from the Secretary specific advice
37 regarding whether a redetermination of the corporation's State net income or a combined return
38 would be required under this section under certain facts and circumstances. The Secretary may
39 request information from the taxpayer that is required to provide the specific advice. The
40 Secretary shall provide the specific advice within 120 days of the receipt of the requested
41 information from the taxpayer. G.S. 105-264 governs the effect of this advice.

42 (m) Extension. – The Secretary and the taxpayer may extend any time limit contained in
43 this section by mutual agreement.

44 (n) Other Tax Adjustments. – Nothing in this section shall be construed to limit or
45 negate the Secretary's authority to make tax adjustments as otherwise permitted by law.

46 (o) Appeals. – If the corporation appeals a final determination by the Department under
47 this section to the Office of Administrative Hearings in a contested tax case, the administrative
48 law judge shall review de novo (i) whether the separate income tax returns submitted by the
49 taxpayer fail to report State net income properly attributable to its business carried on in this
50 State through the use of intercompany transactions that lack economic substance or are not at
51 fair market value between members of an affiliated group of entities; (ii) whether the

1 Department's means of determining the corporation's State net income under this section is an
2 appropriate means of determining the corporation's State net income properly attributable to
3 this State; and (iii) if a combined return is required by the Department, whether adjustments
4 other than requiring the corporation to file a return on a combined basis are adequate under the
5 circumstances to redetermine State net income."

6 **SECTION 3.** G.S. 105-130.15(a) reads as rewritten:

7 "(a) The net income of a corporation shall be computed in accordance with the method
8 of accounting it regularly employs in keeping its books. The method must be consistent with
9 respect to both income and deductions. ~~If this method does not clearly reflect the income, the~~
10 ~~computation shall be made in accordance with a method that, in the Secretary's opinion, does~~
11 ~~clearly reflect the income, but~~ deductions and shall follow as nearly as practicable the federal
12 practice, unless contrary to the context and intent of this Part.

13 The Secretary may adopt the rules and regulations and any guidelines administered or
14 established by the Internal Revenue Service unless contrary to any provisions of this Part."

15 **SECTION 4.** G.S. 105-130.16 reads as rewritten:

16 "**§ 105-130.16. Returns.**

17 (a) ~~Return.~~—Every corporation doing business in this State must file with the Secretary
18 an income tax return showing specifically the items of gross income and the deductions
19 allowed by this Part and any other facts the Secretary requires to make any computation
20 required by this Part. The return of a corporation must be signed by its president,
21 vice-president, treasurer, or chief financial officer. The officer signing the return must furnish
22 an affirmation verifying the return. The affirmation must be in the form required by the
23 Secretary.

24 (b) ~~Correction of Distortions.~~—~~When the Secretary has reason to believe that any~~
25 ~~corporation so conducts its trade or business in such manner as to either directly or indirectly~~
26 ~~distort its true net income and the net income properly attributable to the State, whether by the~~
27 ~~arbitrary shifting of income, through price fixing, charges for service, or otherwise, whereby~~
28 ~~the net income is arbitrarily assigned to one or another unit in a group of taxpayers carrying on~~
29 ~~business under a substantially common control, the Secretary may require any facts the~~
30 ~~Secretary considers necessary for the proper computation of the entire net income and the net~~
31 ~~income properly attributable to the State, and in determining these computations, the Secretary~~
32 ~~must have regard to the fair profit that would normally arise from the conduct of the trade or~~
33 ~~business.~~

34 (c) ~~Other Corrections.~~—~~When any corporation liable to taxation under this Part~~
35 ~~conducts its business in such a manner as to either directly or indirectly benefit the members or~~
36 ~~stockholders thereof or any person interested in the business by selling its products or goods or~~
37 ~~commodities in which it deals at less than the fair price which might be obtained therefor, or~~
38 ~~when a corporation, a substantial portion of whose capital stock is owned either directly or~~
39 ~~indirectly by another corporation, acquires and disposes of the products of the corporation so~~
40 ~~owning a substantial portion of its stock in such a manner as to create a loss or improper net~~
41 ~~income for either of the corporations, or when a corporation, owning directly or indirectly a~~
42 ~~substantial portion of the stock of another corporation, acquires and disposes of the products of~~
43 ~~the corporation of which it so owns a substantial portion of the stock in such manner as to~~
44 ~~create a loss or improper net income for either of the corporations, the Secretary may determine~~
45 ~~the amount of taxable income of the such corporations for the calendar or fiscal year, having~~
46 ~~due regard to the reasonable profits which, but for such arrangement or understanding, might or~~
47 ~~could have been obtained by the corporations liable to taxation under this Part from dealing in~~
48 ~~such products, goods or commodities."~~

49 **SECTION 5.** G.S. 105-236(a)(5)f. reads as rewritten:

50 "(a) Penalties. – The following civil penalties and criminal offenses apply:

51 ...

1 (5) Negligence. –

2 ...
3 f. Consolidated or combined return. – The amount of tax shown as due
4 on a consolidated or combined return filed at the request of the
5 Secretary under Part 1 of Article 4 of this Chapter is not considered a
6 deficiency and is not subject to this subdivision unless one or more of
7 the following applies:

8 1. The return is an amended consolidated or combined return
9 that includes the same corporations as the initial consolidated
10 or combined return filed at the request of the Secretary. In
11 this case the deficiency is the extent to which the amount
12 shown as due on the amended return exceeds the amount
13 shown as due on the initial return.

14 ~~2. The Secretary has adopted permanent rules in accordance~~
15 ~~with G.S. 105-262 that describe the facts and circumstances~~
16 ~~under which the Secretary will require a consolidated or~~
17 ~~combined return under G.S. 105-130.6, and the Secretary~~
18 ~~requires the taxpayer to file a consolidated or combined~~
19 ~~return under that statute because the taxpayer's facts and~~
20 ~~circumstances meet those described in the rules.~~

21 3. Pursuant to a written request from a taxpayer, the Secretary
22 has provided written advice to that taxpayer stating that the
23 Secretary will require a consolidated or combined return
24 under the facts and circumstances set out in the request, and
25 the Secretary requires a taxpayer to file a consolidated or
26 combined return under ~~G.S. 105-130.6~~ G.S. 105-130.5A
27 because the taxpayer's facts and circumstances meet those
28 described in the written advice."

29 **SECTION 6.** G.S. 105-264 is amended by adding a new subsection to read:

30 "(d) Fee. – The Secretary may charge a fee for providing specific written advice at the
31 request of a taxpayer. The fee is a receipt of the Department and must be applied to the costs of
32 providing the specific advice. The proceeds of the fee must be credited to a special account
33 within the Department and do not revert but remain in the special account until spent by the
34 Department for the costs of providing the specific advice. The Secretary may adopt a tiered fee
35 structure based on the taxpayer's income or gross receipts, the relative complexity of the advice
36 requested, or the tax schedule for which advice is requested. The fee shall not be less than one
37 hundred dollars (\$100.00) or more than five thousand dollars (\$5,000). The fee may be waived
38 by the Secretary."

39 **SECTION 7.** The date by which the Department must issue a final determination
40 under G.S. 105-241.14 for any request for review pending as of the effective date of this act
41 under G.S. 105-130.6 is extended until June 30, 2012.

42 **SECTION 8.** This act is effective when it becomes law and applies to assessments
43 and requests for refunds which have not become final by the issuance of a final decision of the
44 Department of Revenue in a contested case commenced at the Office of Administrative
45 Hearings pursuant to G.S. 105-241.15 as of the effective date of this act. This act does not
46 apply to taxes and penalties that are the subject of pending litigation in the General Court of
47 Justice as of the effective date of this act and shall not be construed to affect the interpretation
48 of any statute that is the subject of pending litigation in the General Court of Justice or an
49 appeal from a final decision by the Court of General Justice, or to affect any other aspect of
50 such pending litigation.