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SENATE BILL 228

**53RD LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2018**

INTRODUCED BY

Gerald Ortiz y Pino

AN ACT

RELATING TO TAXATION; DECOUPLING FROM A SECTION OF THE INTERNAL REVENUE CODE OF 1986 TO ALLOW TAXPAYERS THAT CONDUCT LAWFUL BUSINESSES PURSUANT TO STATE LAW TO DEDUCT CERTAIN BUSINESS EXPENSES FOR TAX PURPOSES.

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

8 (2) means, for taxpayers other than estates or  
9 trusts, that part of the taxpayer's income defined as adjusted  
10 gross income plus, for taxable years beginning on or after  
11 January 1, 1991, the amount of the net operating loss deduction  
12 allowed by Section 172(a) of the Internal Revenue Code, as that  
13 section may be amended or renumbered, and taken by the taxpayer  
14 for that year;

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

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

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

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

10 (5) excludes, for taxpayers that conduct  
11 lawful businesses pursuant to the laws of this state, an amount  
12 equal to any expenditure that is eligible to be claimed as a  
13 federal income tax deduction but is disallowed by Section 280E  
14 of the Internal Revenue Code, as that section may be amended or  
15 renumbered;

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

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

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

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

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

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

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

13          J. "Internal Revenue Code" means the United States  
14 Internal Revenue Code of 1986, as that code may be amended;

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

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

25                 (1) compensation;

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- 1 (2) net profit from business;
- 2 (3) gains from dealings in property;
- 3 (4) interest;
- 4 (5) net rents;
- 5 (6) royalties;
- 6 (7) dividends;
- 7 (8) alimony and separate maintenance payments;
- 8 (9) annuities;
- 9 (10) income from life insurance and endowment
- 10 contracts;
- 11 (11) pensions;
- 12 (12) discharge of indebtedness;
- 13 (13) distributive share of partnership income;
- 14 (14) income in respect of a decedent;
- 15 (15) income from an interest in an estate or a
- 16 trust;
- 17 (16) social security benefits;
- 18 (17) unemployment compensation benefits;
- 19 (18) workers' compensation benefits;
- 20 (19) public assistance and welfare benefits;
- 21 (20) cost-of-living allowances; and
- 22 (21) gifts;

M. "modified gross income" excludes:

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

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

5                   (3) payments pursuant to a federal, state or  
6 local government program directly or indirectly to a third  
7 party on behalf of the taxpayer when identified to a particular  
8 use or invoice by the payer; or

9                   (4) payments for credits and rebates pursuant  
10 to the Income Tax Act and made for a credit pursuant to Section  
11 7-3-9 NMSA 1978;

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

17                   (1) an amount equal to the standard deduction  
18 allowed the taxpayer for the taxpayer's taxable year by Section  
19 63 of the Internal Revenue Code, as that section may be amended  
20 or renumbered;

21                   (2) an amount equal to the itemized deductions  
22 defined in Section 63 of the Internal Revenue Code, as that  
23 section may be amended or renumbered, allowed the taxpayer for  
24 the taxpayer's taxable year less the amount excluded pursuant  
25 to Paragraph (1) of this subsection and less the amount of

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1 state and local income and sales taxes included in the  
2 taxpayer's itemized deductions;

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

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

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

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

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

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

21 (7) for taxable years beginning on or after  
22 January 1, 1991 and prior to January 1, 2013, an amount equal  
23 to the sum of any net operating loss carryover deductions to  
24 that year claimed and allowed, provided that the amount of any  
25 net operating loss carryover from a taxable year beginning on

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1 or after January 1, 1991 and prior to January 1, 2013 may be  
2 excluded only as follows:

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

6 (b) in the case of amended returns or  
7 original returns not timely filed, in the first taxable year  
8 beginning after the date on which the return or amended return  
9 establishing the net operating loss is filed; and

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

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

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

4 (b) in the case of amended returns or  
5 original returns not timely filed, in the first taxable year  
6 beginning after the date on which the return or amended return  
7 establishing the net operating loss is filed; and

8 (c) in either case, if the net operating  
9 loss carryover exceeds the amount of net income exclusive of  
10 the net operating loss carryover for the taxable year to which  
11 the exclusion first applies, in the next nineteen succeeding  
12 taxable years in turn until the net operating loss carryover is  
13 exhausted for any net operating loss carryover from a taxable  
14 year beginning on or after January 1, 2013; in no event shall a  
15 net operating loss carryover from a taxable year beginning: 1)  
16 prior to January 1, 2013 be excluded in any taxable year after  
17 the fourth taxable year beginning after the taxable year to  
18 which the exclusion first applies; and 2) on or after January  
19 1, 2013 be excluded in any taxable year after the nineteenth  
20 taxable year beginning after the taxable year to which the  
21 exclusion first applies; and

22 (9) for taxable years beginning on or after  
23 January 1, 2011, an amount equal to the amount included in  
24 adjusted gross income that represents a refund of state and  
25 local income and sales taxes that were deducted for federal tax

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1 purposes in taxable years beginning on or after January 1,  
2 2010;

3 O. "net operating loss" means any net operating  
4 loss, as defined by Section 172(c) of the Internal Revenue  
5 Code, as that section may be amended or renumbered, for a  
6 taxable year as further increased by the income, if any, from  
7 obligations of the United States for that year less related  
8 expenses;

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

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

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

22 S. "resident" means an individual who is domiciled  
23 in this state during any part of the taxable year or an  
24 individual who is physically present in this state for one  
25 hundred eighty-five days or more during the taxable year; but

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1 any individual, other than someone who was physically present  
2 in the state for one hundred eighty-five days or more during  
3 the taxable year, who, on or before the last day of the taxable  
4 year, changed the individual's place of abode to a place  
5 without this state with the bona fide intention of continuing  
6 actually to abide permanently without this state is not a  
7 resident for the purposes of the Income Tax Act for periods  
8 after that change of abode;

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

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

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

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

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

25 Y. "taxable year" means the calendar year or fiscal

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1 year upon the basis of which the net income is computed under  
2 the Income Tax Act and includes, in the case of the return made  
3 for a fractional part of a year under the provisions of the  
4 Income Tax Act, the period for which the return is made; and

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

7 SECTION 2. Section 7-2A-2 NMSA 1978 (being Laws 1986,  
8 Chapter 20, Section 33, as amended) is amended to read:

9 "7-2A-2. DEFINITIONS.--For the purpose of the Corporate  
10 Income and Franchise Tax Act and unless the context requires  
11 otherwise:

12 A. "affiliated group" means that term as it is used  
13 in the Internal Revenue Code;

14 B. "bank" means any national bank, national banking  
15 association, state bank or bank holding company;

16 C. "base income" means that part of the taxpayer's  
17 income defined as taxable income and upon which the federal  
18 income tax is calculated in the Internal Revenue Code for  
19 income tax purposes [~~plus~~] and:

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

25 (2) includes interest received on a state or

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1 local bond; ~~and~~

2 (3) includes the amount of any deduction  
3 claimed in calculating taxable income for all expenses and  
4 costs directly or indirectly paid, accrued or incurred to a  
5 captive real estate investment trust; and

6 (4) for taxpayers that conduct lawful  
7 businesses pursuant to the laws of this state, excludes an  
8 amount equal to any expenditure that is eligible to be claimed  
9 as a federal income tax deduction but is disallowed pursuant to  
10 Section 280E of the Internal Revenue Code, as that section may  
11 be amended or renumbered;

12 D. "captive real estate investment trust" means a  
13 corporation, trust or association taxed as a real estate  
14 investment trust pursuant to Section 857 of the Internal  
15 Revenue Code, the shares or beneficial interests of which are  
16 not regularly traded on an established securities market;  
17 provided that more than fifty percent of any class of  
18 beneficial interests or shares of the real estate investment  
19 trust are owned directly, indirectly or constructively by the  
20 taxpayer during all or a part of the taxpayer's taxable year;

21 E. "corporation" means corporations, joint stock  
22 companies, real estate trusts organized and operated under the  
23 Real Estate Trust Act, financial corporations and banks, other  
24 business associations and, for corporate income tax purposes,  
25 partnerships and limited liability companies taxed as

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1 corporations under the Internal Revenue Code;

2 F. "department" means the taxation and revenue  
3 department, the secretary of taxation and revenue or any  
4 employee of the department exercising authority lawfully  
5 delegated to that employee by the secretary;

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

9 H. "Internal Revenue Code" means the United States  
10 Internal Revenue Code of 1986, as that code may be amended;

11 I. "net income" means base income adjusted to  
12 exclude:

13 (1) income from obligations of the  
14 United States less expenses incurred to earn that income;

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

18 (3) for taxable years that began prior to  
19 January 1, 1991, an amount equal to the sum of:

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

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

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

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

11                   (b) in the case of amended returns or  
12 original returns not timely filed, in the first taxable year  
13 beginning after the date on which the return or amended return  
14 establishing the net operating loss is filed; and

15                   (c) in either case, if the net operating  
16 loss carryover exceeds the amount of net income exclusive of  
17 the net operating loss carryover for the taxable year to which  
18 the exclusion first applies, in the next four succeeding  
19 taxable years in turn until the net operating loss carryover is  
20 exhausted for any net operating loss carryover from a taxable  
21 year prior to January 1, 2013; in no event may a net operating  
22 loss carryover from a taxable year beginning prior to January  
23 1, 2013 be excluded in any taxable year after the fourth  
24 taxable year beginning after the taxable year to which the  
25 exclusion first applies; and

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

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

9 (b) in the case of amended returns or  
10 original returns not timely filed, in the first taxable year  
11 beginning after the date on which the return or amended return  
12 establishing the net operating loss is filed; and

13 (c) in either case, if the net operating  
14 loss carryover exceeds the amount of net income exclusive of  
15 the net operating loss carryover for the taxable year to which  
16 the exclusion first applies, in the next nineteen succeeding  
17 taxable years in turn until the net operating loss carryover is  
18 exhausted for any net operating loss carryover from a taxable  
19 year beginning on or after January 1, 2013; in no event shall a  
20 net operating loss carryover from a taxable year beginning: 1)  
21 prior to January 1, 2013 be excluded in any taxable year after  
22 the fourth taxable year beginning after the taxable year to  
23 which the exclusion first applies; and 2) on or after January  
24 1, 2013 be excluded in any taxable year after the nineteenth  
25 taxable year beginning after the taxable year to which the

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1 exclusion first applies;

2 J. "net operating loss" means any net operating  
3 loss, as defined by Section 172(c) of the Internal Revenue  
4 Code, as that section may be amended or renumbered, for a  
5 taxable year as further increased by the income, if any, from  
6 obligations of the United States for that year less related  
7 expenses;

8 K. "net operating loss carryover" means the amount,  
9 or any portion of the amount, of a net operating loss for any  
10 taxable year that, pursuant to Paragraph (3), (4) or (5) of  
11 Subsection I of this section, may be excluded from base income;

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

19 M. "real estate investment trust" has the meaning  
20 ascribed to the term in Section 856 of the Internal Revenue  
21 Code, as that section may be amended or renumbered;

22 N. "secretary" means the secretary of taxation and  
23 revenue or the secretary's delegate;

24 O. "state" means any state of the United States,  
25 the District of Columbia, the commonwealth of Puerto Rico, any

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1 territory or possession of the United States or political  
2 subdivision thereof or any political subdivision of a foreign  
3 country;

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

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

16 R. "taxpayer" means any corporation subject to the  
17 taxes imposed by the Corporate Income and Franchise Tax Act;  
18 and

19 S. "unitary corporations" means two or more  
20 integrated corporations, other than any foreign corporation  
21 incorporated in a foreign country and not engaged in trade or  
22 business in the United States during the taxable year, that are  
23 owned in the amount of more than fifty percent and controlled  
24 by the same person and for which at least one of the following  
25 conditions exists:

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1 (1) there is a unity of operations evidenced  
2 by central purchasing, advertising, accounting or other  
3 centralized services;

4 (2) there is a centralized management or  
5 executive force and centralized system of operation; or

6 (3) the operations of the corporations are  
7 dependent upon or contribute property or services to one  
8 another individually or as a group."

9 SECTION 3. APPLICABILITY.--The provisions of this act  
10 apply to taxable years beginning on or after January 1, 2018.

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