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SENATE BILL 259

49TH LEGISLATURE - STATE OF NEW MEXICO - SECOND SESSION, 2010

INTRODUCED BY

Peter Wirth

AN ACT

RELATING TO TAXATION; AMENDING THE CORPORATE INCOME AND
FRANCHISE TAX ACT TO REQUIRE DEDUCTIBLE TANGIBLE EXPENSES AND
INTEREST TO BE ADDED BACK IN DETERMINING NET INCOME FOR CERTAIN
ENTITIES.

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

Section 1. Section 7-2A-2 NMSA 1978 (being Laws 1986,
Chapter 20, Section 33, as amended) is amended to read:

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

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

B. "aggregate effective rate of tax" means the sum
of the effective rates of tax imposed by a state or United

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1 States possession or any combination thereof on a related
2 member;

3 [~~B-~~] C. "bank" means any national bank, national
4 banking association, state bank or bank holding company;

5 [~~G-~~] D. "base income" means that part of the
6 taxpayer's income defined as taxable income and upon which the
7 federal income tax is calculated in the Internal Revenue Code
8 for income tax purposes plus, for taxable years beginning on or
9 after January 1, 1991, the amount of the net operating loss
10 deduction allowed by Section 172(a) of the Internal Revenue
11 Code, as that section may be amended or renumbered, and claimed
12 by the taxpayer for that year; "base income" also includes
13 interest received on a state or local bond;

14 [~~D-~~] E. "corporation" means corporations, joint
15 stock companies, real estate trusts organized and operated
16 under the Real Estate Trust Act, financial corporations and
17 banks, other business associations and, for corporate income
18 tax purposes, partnerships and limited liability companies
19 taxed as corporations under the Internal Revenue Code;

20 [~~E-~~] F. "department" means the taxation and revenue
21 department, the secretary of taxation and revenue or any
22 employee of the department exercising authority lawfully
23 delegated to that employee by the secretary;

24 G. "effective rate of tax" means, as to any state
25 or United States possession, the maximum statutory rate of tax

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1 imposed by the state or possession on a related member's net
2 income multiplied by the apportionment percentage, if any,
3 applicable to the related member under the laws of said
4 jurisdiction. For purposes of this definition, the effective
5 rate of tax as to any state or United States possession is zero
6 where the related member's net income tax liability in said
7 jurisdiction is reported on a combined or consolidated return,
8 including both the taxpayer and the related member where the
9 reported transactions between the taxpayer and the related
10 member are eliminated or offset. Also, for purposes of this
11 definition, when computing the effective rate of tax for a
12 jurisdiction in which a related member's net income is
13 eliminated or offset by a credit or similar adjustment that is
14 dependent upon the related member either maintaining or
15 managing intangible property or collecting interest income in
16 that jurisdiction, the maximum statutory rate of tax imposed by
17 said jurisdiction shall be decreased to reflect the statutory
18 rate of tax that applies to the related member as effectively
19 reduced by such credit or similar adjustment;

20 [F.] H. "fiscal year" means any accounting period
21 of twelve months ending on the last day of any month other than
22 December;

23 I. "intangible expense" means:

24 (1) expenses, losses and costs for, related to
25 or in connection directly or indirectly with the direct or

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1 indirect acquisition, use, maintenance or management,
2 ownership, sale, exchange or any other disposition of
3 intangible property to the extent such amounts are allowed as
4 deductions or costs in determining taxable income before
5 operating loss deductions and special deductions for the
6 taxable year under the Internal Revenue Code;

7 (2) amounts directly or indirectly allowed as
8 deductions under Section 163 of the Internal Revenue Code for
9 purposes of determining taxable income to the extent such
10 expenses and costs are directly or indirectly for, related to
11 or in connection with the expenses, losses and costs referenced
12 in Paragraph (1) of this subsection;

13 (3) losses related to, or incurred in
14 connection directly or indirectly with, factoring transactions
15 or discounting transactions;

16 (4) royalty, patent, technical and copyright
17 fees;

18 (5) licensing fees; and

19 (6) other similar expenses and costs;

20 J. "intangible property" includes patents, patent
21 applications, trade names, trademarks, service marks,
22 copyrights, mask works, trade secrets and similar types of
23 intangible assets;

24 [G.] K. "Internal Revenue Code" means the United
25 States Internal Revenue Code of 1986, as amended;

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1 [~~H-~~] L. "net income" means base income adjusted to
2 exclude:

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

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

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

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

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

16 (4) for taxable years beginning on or after
17 January 1, 1991, an amount equal to the sum of any net
18 operating loss carryover deductions to that year claimed and
19 allowed; provided that the amount of any net operating loss
20 carryover from a taxable year beginning on or after January 1,
21 1991 may be excluded only as follows:

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

25 (b) in the case of amended returns or

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

4 (c) in either case, if the net operating
5 loss carryover exceeds the amount of net income exclusive of
6 the net operating loss carryover for the taxable year to which
7 the exclusion first applies, in the next four succeeding
8 taxable years in turn until the net operating loss carryover is
9 exhausted; in no event may a net operating loss carryover be
10 excluded in any taxable year after the fourth taxable year
11 beginning after the taxable year to which the exclusion first
12 applies;

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

19 [~~J.~~] N. "net operating loss carryover" means the
20 amount, or any portion of the amount, of a net operating loss
21 for any taxable year that, pursuant to Paragraph (3) or (4) of
22 Subsection [~~H.~~] L. of this section, may be excluded from base
23 income;

24 [~~K.~~] O. "person" means any individual, estate,
25 trust, receiver, cooperative association, club, corporation,

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1 company, firm, partnership, limited liability company, joint
2 venture, syndicate or other association; "person" also means,
3 to the extent permitted by law, any federal, state or other
4 governmental unit or subdivision or agency, department or
5 instrumentality thereof;

6 P. "related entity" means:

7 (1) a stockholder who is an individual, or a
8 member of the stockholder's family as set forth in Section 318
9 of the Internal Revenue Code, if the stockholder and the
10 members of the stockholder's family own, directly, indirectly,
11 beneficially or constructively, in the aggregate, at least
12 fifty percent of the value of the taxpayer's outstanding stock;

13 (2) a stockholder, or a stockholder's
14 partnership, limited liability company, estate, trust or
15 corporation, if the stockholder and the stockholder's
16 partnerships, limited liability companies, estates, trusts and
17 corporations own directly, indirectly, beneficially or
18 constructively, in the aggregate, at least fifty percent of the
19 value of the taxpayer's outstanding stock; or

20 (3) a corporation, or a party related to the
21 corporation in a manner that would require an attribution of
22 stock from the corporation to the party or from the party to
23 the corporation under the attribution rules of the Internal
24 Revenue Code, if the taxpayer owns, directly, indirectly,
25 beneficially or constructively, at least fifty percent of the

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1 value of the corporation's outstanding stock. The attribution
2 rules of the Internal Revenue Code shall apply for purposes of
3 determining whether the ownership requirements of this
4 definition have been met;

5 Q. "related member" means a person that, with
6 respect to the taxpayer during all or any portion of the
7 taxable year, is:

8 (1) a related entity;

9 (2) a component member as defined in
10 Subsection (b) of section 1563 of the Internal Revenue Code;

11 (3) a person to or from which there is
12 attribution of stock ownership in accordance with Subsection
13 (e) of Section 1563 of the Internal Revenue Code; or

14 (4) a person that, notwithstanding its form of
15 organization, bears the same relationship to the taxpayer as a
16 person described in Paragraphs (1) through (3) of this
17 subsection;

18 [~~E.~~] R. "secretary" means the secretary of taxation
19 and revenue or the secretary's delegate;

20 [~~M.~~] S. "state" means any state of the United
21 States, the District of Columbia, the commonwealth of Puerto
22 Rico, any territory or possession of the United States or
23 political subdivision thereof or any political subdivision of a
24 foreign country;

25 [~~N.~~] T. "state or local bond" means a bond issued

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

6 ~~[U.]~~ U. "taxable year" means the calendar year or
7 fiscal year upon the basis of which the net income is computed
8 under the Corporate Income and Franchise Tax Act and includes,
9 in the case of the return made for a fractional part of a year
10 under the provisions of that act, the period for which the
11 return is made;

12 ~~[P.]~~ V. "taxpayer" means any corporation subject to
13 the taxes imposed by the Corporate Income and Franchise Tax
14 Act; ~~[and~~

15 ~~[Q.]~~ W. "unitary corporations" means two or more
16 integrated corporations, other than any foreign corporation
17 incorporated in a foreign country and not engaged in trade or
18 business in the United States during the taxable year, that are
19 owned in the amount of more than fifty percent and controlled
20 by the same person and for which at least one of the following
21 conditions exists:

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

25 (2) there is a centralized management or

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1 executive force and centralized system of operation; or

2 (3) the operations of the corporations are
3 dependent upon or contribute property or services to one
4 another individually or as a group; and

5 X. "valid business purpose" means one or more
6 business purposes, other than the avoidance or reduction of
7 taxation, which alone or in combination constitute the primary
8 motivation for a business activity or transaction, which
9 activity or transaction changes in a meaningful way, apart from
10 tax effects, the economic position of the taxpayer. The
11 economic position of the taxpayer includes an increase in the
12 market share of the taxpayer or the entry by the taxpayer into
13 new business markets."

14 Section 2. Section 7-2A-3 NMSA 1978 (being Laws 1981,
15 Chapter 37, Section 36, as amended) is amended to read:

16 "7-2A-3. IMPOSITION AND LEVY OF TAXES.--

17 A. A tax to be known as the "corporate income tax"
18 is imposed at the rate specified in the Corporate Income and
19 Franchise Tax Act upon the net income of every domestic
20 corporation and upon the net income of every foreign
21 corporation employed or engaged in the transaction of business
22 in, into or from this state or deriving any income from any
23 property or employment within this state.

24 B. A tax to be known as the "corporate franchise
25 tax" is imposed in the amount specified in the Corporate Income

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1 and Franchise Tax Act upon every domestic corporation and upon
2 every foreign corporation employed or engaged in the
3 transaction of business in, into or from this state or deriving
4 any income from any property or employment within this state
5 and upon every domestic or foreign corporation, whether engaged
6 in active business or not, but having or exercising its
7 corporate franchise in this state.

8 C. For purposes of determining net income subject
9 to the tax imposed pursuant to this section, a taxpayer shall
10 add back otherwise deductible intangible expense directly or
11 indirectly paid, accrued or incurred in connection with one or
12 more direct or indirect transactions with one or more related
13 members. For the purposes of this subsection:

14 (1) if the related member was subject to tax
15 in this state or another state or a possession of the United
16 States or a foreign nation or some combination thereof on a tax
17 base that included the intangible expense paid, accrued or
18 incurred by the taxpayer, the taxpayer shall receive a credit
19 against tax due in this state in an amount equal to the higher
20 of the tax paid by the related member with respect to the
21 portion of its income representing the intangible expense paid,
22 accrued or incurred by the taxpayer, or the tax that would have
23 been paid by the related member with respect to that portion of
24 its income if that portion of its income had not been offset by
25 expenses or losses, or the tax liability had not been offset by

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1 a credit or credits. The credit so determined shall be
2 multiplied by the apportionment factor of the taxpayer in this
3 state. However, in no case shall the credit exceed the
4 taxpayer's liability in this state attributable to the net
5 income taxed as a result of the adjustment required by this
6 subsection; and

7 (2) the adjustment required by this subsection
8 and the credit allowed in Paragraph (1) of this subsection
9 shall not apply:

10 (a) to the portion of the intangible
11 expense that the taxpayer establishes by clear and convincing
12 evidence meets both of the following requirements: 1) the
13 related member during the same taxable year directly or
14 indirectly paid, accrued or incurred such portion to a person
15 that is not a related member; and 2) the transaction giving
16 rise to the intangible expense between the taxpayer and the
17 related member was undertaken for a valid business purpose;

18 (b) if the taxpayer establishes by clear
19 and convincing evidence of the type and in the form specified
20 by the secretary that: 1) the related member was subject to
21 tax on its net income in this state or another state or a
22 possession of the United States or some combination thereof;
23 2) the tax base for said tax included the intangible expense
24 paid, accrued or incurred by the taxpayer; and 3) the aggregate
25 effective rate of tax applied to the related member is no less

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1 than the tax rate imposed pursuant to Section 7-2A-5 NMSA 1978;

2 (c) if the taxpayer establishes by clear
3 and convincing evidence of the type and in the form specified
4 by the secretary that: 1) the intangible expense was paid,
5 accrued or incurred to a related member organized under the
6 laws of a country other than the United States; 2) the related
7 member's income from the transaction was subject to a
8 comprehensive income tax treaty between such country and the
9 United States; 3) the related member's income from the
10 transaction was taxed in such country at a tax rate at least
11 equal to that imposed by this state; and 4) the intangible
12 expense was paid, accrued or incurred pursuant to a transaction
13 that was undertaken for a valid business purpose and using
14 terms that reflect an arm's length relationship; or

15 (d) if the taxpayer and the secretary
16 agree in writing to the application or use of alternative
17 adjustments or computations. The secretary may agree to the
18 application or use of alternative adjustments or computations
19 when the secretary concludes that, in the absence of such
20 agreement, the income of the taxpayer would not be properly
21 reflected.

22 D. For purposes of determining net income subject
23 to the tax imposed pursuant to this section, a taxpayer shall
24 add back otherwise deductible interest paid, accrued or
25 incurred to a related member during the taxable year. For the

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1 purposes of this subsection:

2 (1) if the related member was subject to tax
3 in this state or another state or a possession of the United
4 States or a foreign nation or some combination thereof on a tax
5 base that included the interest expense paid, accrued or
6 incurred by the taxpayer, the taxpayer shall receive a credit
7 against tax due in this state in an amount equal to the higher
8 of the tax paid by the related member with respect to the
9 portion of its income representing the interest expense paid,
10 accrued or incurred by the taxpayer, or the tax that would have
11 been paid by the related member with respect to that portion of
12 its income if that portion of its income had not been offset by
13 expenses or losses, or the tax liability had not been offset by
14 a credit or credits. The credit so determined shall be
15 multiplied by the apportionment factor of the taxpayer in this
16 state. However, in no case shall the credit exceed the
17 taxpayer's liability in this state attributable to the net
18 income taxed as a result of the adjustment required by this
19 subsection; and

20 (2) the adjustment required by this subsection
21 and the credit allowed in Paragraph (1) of this subsection
22 shall not apply:

23 (a) if the taxpayer establishes by clear
24 and convincing evidence of the type and in the form determined
25 by the secretary that the transaction giving rise to the

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1 interest expense between the taxpayer and the related member
2 was undertaken for a valid business purpose and the interest
3 expense was paid, accrued or incurred using terms that reflect
4 an arm's length relationship;

5 (b) if the taxpayer establishes by clear
6 and convincing evidence of the type and in the form specified
7 by the secretary that: 1) the related member was subject to
8 tax on its net income in this state or another state or a
9 possession of the United States or some combination thereof; 2)
10 the tax base for said tax included the interest expense paid,
11 accrued or incurred by the taxpayer; and 3) the aggregate
12 effective rate of tax applied to the related member is no less
13 than the tax rate imposed pursuant to Section 7-2A-5 NMSA 1978;

14 (c) if the taxpayer establishes by clear
15 and convincing evidence of the type and in the form specified
16 by the secretary that: 1) the interest expense was paid,
17 accrued or incurred to a related member organized under the
18 laws of a country other than the United States; 2) the related
19 member's income from the transaction was subject to a
20 comprehensive income tax treaty between such country and the
21 United States; 3) the related member's income from the
22 transaction was taxed in such country at a tax rate at least
23 equal to that imposed by this state; and 4) the interest
24 expense was paid, accrued or incurred pursuant to a transaction
25 that was undertaken for a valid business purpose and using

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1 terms that reflect an arm's length relationship; or
2 (d) if the taxpayer and the secretary
3 agree in writing to the application or use of alternative
4 adjustments or computations. The secretary may agree to the
5 application or use of alternative adjustments or computations
6 when the secretary concludes that, in the absence of such
7 agreement, the income of the taxpayer would not be properly
8 reflected."

9 Section 3. APPLICABILITY.--The provisions of this act are
10 applicable to taxable years beginning on or after January 1,
11 2011.

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