New Hampshire Department of Revenue Administration
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TECHNICAL INFORMATION RELEASE
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A Technical Information Release is designed to provide immediate information regarding tax laws administered by the Department or the policy positions of the Department as a service to taxpayers and practitioners. A Technical Information Release represents the position of the Department on the limited issues discussed herein based on current law and Department interpretation. For the current status of any tax law, practitioners and taxpayers should consult the source documents (i.e., Revised Statutes Annotated, Rules, Case Law, Session Laws, etc.). Questions should be directed to Taxpayer Services at (603) 230-5000.

New Hampshire 2011 Legislative Session in Review

The purpose of this Technical Information Release is to provide New Hampshire taxpayers and tax practitioners with general information regarding the recent legislation impacting several of the taxes administered by the New Hampshire Department of Revenue Administration. This release is for informational purposes only.

BUSINESS TAX

Senate Bill 58 (Chapter 181, Laws of 2011 – effective June 14, 2011 – and applicable to taxable periods ending on or after December 31, 2010) exempts "qualified community development entities," as defined in 26 U.S.C. § 45D, which are owned, controlled, or managed, directly or indirectly, by the Business Finance Authority of the State of New Hampshire, from taxation under New Hampshire's Business Profits Tax (RSA 77-A) and the Business Enterprise Tax (RSA 77-E). Section 45D of the United States Internal Revenue Code, entitled "New Markets Tax Credit," was enacted in 2000 under the federal Community Renewal Tax Relief Act. The New Markets Tax Credit program encourages investments into privately managed investment institutions - qualified community development entities. In turn, the qualified community development entities make loans and capital investments in businesses in underserved areas. By making an investment in a qualified community development entity, an individual or corporate investor receives a federal tax credit against federal income taxes worth 39% of the initial investment. The federal tax credit is distributed over a period of seven years (5% for each of the first three years and then 6% for the final four years).

Senate Bill 125 (Chapter 207, Laws of 2011 – effective June 25, 2011 and applicable for taxable periods beginning on or after January 1, 2011) modifies the standards and burden of proof with respect to the Business Profits Tax (RSA 77-A:4, III) deduction for reasonable compensation attributable to owners of partnerships, limited liability companies, and sole proprietorships that file a business tax return as a partnership or proprietorship. The new law allows a deduction equal to a fair and reasonable compensation for the actual personal services of a natural person who is a proprietor, partner, or member provided to the business organization. The amount of such deduction, however, cannot reduce the business organization's taxable business profits to less than zero. The deduction shall not exceed the amount reported as earned income on the federal income tax returns of the proprietor, partner, or member, but may include an amount not to exceed net rental income as compensation for operating rental property, and an amount not to exceed 15% of the gross selling price as commissions on the sale of business assets.

The new law sets forth that the business organization shall use the standards in section 162(a)(1) of the United States Internal Revenue Code (as it may be amended from time to time) and the Treasury Regulations, administrative rulings, and judicial cases issued thereunder to determine the amount of the deduction available. The law also requires the business organization to keep such records necessary to determine that the deduction is reasonable under these standards.

The law keeps in place the $50,000 "record-keeping safe harbor." Therefore, in lieu of substantiating the value of the personal services of proprietors, partners, or members, a business organization or group of related business organizations may elect, as a record-keeping safe harbor, to deduct up to $50,000 as total compensation for the tax year. Any such deduction claimed by a business organization or group of related business organizations shall not be subject to challenge by the Department; provided, that upon request, the business organization or group of related business organizations shall substantiate that the proprietor or at least one partner or member performed actual personal services for the business organization or group of related business organizations.

This law also amended the burden of proving the reasonableness of the compensation deduction. Under the new law, a business organization claiming a deduction shall bear the burden of proving that all proprietors, partners, or members for whom a deduction is being claimed provided actual personal services to the business organization at any time during the taxable period. Once a business organization has satisfied this burden of proof, the amount claimed as a deduction shall be presumed to be reasonable, unless the Department proves by a preponderance of the evidence that the deduction claimed by the business organization is clearly unreasonable.

House Bill 2 (Chapter 224:363, Laws of 2011 – *effective July 1, 2013*) increases the amount of Net Operating Loss (NOL) that may be generated in a tax year from $1,000,000 to$10,000,000.

House Bill 187 (Chapter 225, Laws of 2011 – *effective July 1, 2014 and applicable for taxable periods ending on or after July 1, 2014*) changes the carryforward periods for the Business Enterprise Tax (BET) credit against the Business Profits Tax (BPT). Under the new law, any unused portion of the BET credit may be carried forward and allowed against the BPT due for ten (instead of five) taxable periods from the taxable period in which the tax was paid.

INTEREST & DIVIDENDS TAX

Senate Bill 58 (Chapter 181, Laws of 2011 – effective June 14, 2011 – and applicable to taxable periods beginning on or after January 1, 2011, and also to taxable periods ending before January 1, 2011 if the taxable period is subject to assessment of tax and appealed pursuant to RSA 21-J:28-b) provides that amounts reported and taxed federally as interest or dividends to a holder of an ownership interest in a Qualified Investment Company (QIC) as defined in RSA 77-A:1, XXI, a mutual fund, or a unit investment trust are taxable under the Interest and Dividends Tax (RSA chp. 77). The new law also creates a special rule for QICs, mutual funds, and unit investment trusts. Amounts accruing to the holder of an ownership interest in a QIC or a mutual fund, or investment income earned or distributions received by the holder of an ownership interest in a unit investment trust, which QIC, mutual fund, or unit investment trust invests solely in New Hampshire tax-exempt tax anticipation notes, bond anticipation notes, and other instruments exempt under New Hampshire law are not treated as interest or dividend income for Interest and Dividend Tax purposes. In addition, amounts reported and taxed federally as capital gains to the holder of an ownership interest in a QIC, a

mutual fund, or a unit investment trust are not treated as interest or dividend income for Interest and Dividend Tax purposes.

Senate Bill 125 (Chapter 207, Laws of 2011 – effective June 25, 2011 and applicable for taxable periods beginning on or after January 1, 2011) provides that excess compensation determined by an audit of the Department of Revenue Administration shall not be considered a dividend under RSA chp. 77, unless such determination is accepted by the Internal Revenue Service.

MEALS & RENTALS TAX

House Bill 2 (Chapter 224:1, 224:16 and 224:316, Laws of 2011 – effective July 1, 2011) provides that for each fiscal year of the biennium ending June 30, 2013, the State Treasurer shall fund the distribution of revenue to New Hampshire cities and towns pursuant to the formula for determining the amount of revenue returnable to cities and towns under RSA 78-A:26, I and II at no more than the fiscal year 2011 distribution. In addition, for the biennium ending June 30, 2013, the State Treasurer shall suspend the distribution of net income pursuant to RSA 78-A:26, I(a)(2) credited to the Department of Resources and Economic Development, Division of Travel and Tourism Development.

The new law also repeals the $5.00 renewal fee for an Meals & Rentals Operator's License under RSA 78-A:4, II.

TOBACCO TAX

Senate Bill 43 (Chapter 27, Laws of 2011 – effective June 27, 2011) simply corrects language within RSA chp. 78 to state that tobacco wholesalers file a "return" and not a "report" for Tobacco Tax purposes.

House Bill 2 (Chapter 224:377-381, Laws of 2011 – effective July 1, 2011): decreases the Tobacco Tax rates as follows:

- The tax rate for each pack containing 20 cigarettes is decreased from $1.78 to **$1.68** per pack;
- The tax rate for each pack containing 25 cigarettes is decreased from $2.23 to **$2.10** per pack; and
- The tax rate for all other tobacco products, except premium cigars, is decreased from 65.03 percent **to 48 percent** of the wholesale sales price.

The new law has a contingency provision that requires the Department to report, on or before July 15, 2013, to the Speaker of the House, the Senate President, the Fiscal Committee of the General Court, the Secretary of State, and the Director of the Office of Legislative Services, the amount of Tobacco Tax revenue received, as reported in the Department's "Daily Cash Basis Revenue Report," for the period of July 1, 2011 through June 30, 2013. If the Department reports that the amount of Tobacco Tax revenue received for the period was below the amounts received for the period of July 1, 2009 through June 30, 2011, then the tax rate for each pack containing 20 cigarettes shall increase back to **$1.78** per pack; the tax rate for each pack containing 25 cigarettes shall increase back to **$2.23** per pack; and the tax rate for all other tobacco products, except premium cigars, shall increase back to **65.03 percent** of the wholesale sales price - *effective on August 1, 2013*. If, however, the Department reports that the amount of Tobacco Tax revenue received for the period was equal to or above the amount received

for the period of July 1, 2009 through June 30, 2011, then the Tobacco Tax rates shall remain at the decreased rates.

GAMBLING TAX

House Bill 229 (Chapter 47, Laws of 2011 – effective May 23, 2011 and applicable to all gambling winnings received on or after the effective date of this act) repeals the 10% Gambling Winnings Tax.

UTILITY PROPERTY TAX

Senate Bill 35 (Chapter 59, Laws of 2011 – effective July 1, 2011) puts into law the current practice of the Department, which is not to tax anything that does not go into the stream of commerce. As such, the new law provides that "utility property" shall not include:

- The electrical generation, production, and supply equipment of an "eligible customer-generator" as defined in RSA 362-A:1-a, II-b;
- Property used for the retail distribution of fuel for personal, non-commercial use, use as a fuel in a motorized vehicle, home cooking, or heating; and
- That portion of a manufacturing establishment's generation, production, supply, distribution, transmission, or transportation of electric power or natural gas, crude petroleum and refined petroleum products or combinations thereof, water, or sewage subject to tax under RSA 72:6, 72:7, and 72:8, but not exempt under RSA 72:23, that is expended, used, or consumed on-site primarily for the operation of the manufacturing establishment and that does not otherwise enter the stream of commerce.

MEDICAID ENHANCEMENT TAX

House Bill 2 (Chapter 224:34 and 224:38-40, Laws of 2011 – effective July 1, 2011) transfers the authority for the Medicaid Enhancement Tax Account from the Department of Health and Human Services to the Department of Revenue Administration. The new law also amended the definition of "hospital" under RSA 84-A:1, III to mean general hospitals and special hospitals for rehabilitation required to be licensed under RSA 151 that provide inpatient and outpatient hospital services, but not including government facilities. The definition of "net patient services revenue" under RSA 84-A:1, IV-a was amended to include revenues received from the State's uncompensated care account and revenues received from all payers of inpatient and outpatient patient care.

In addition, paragraphs I and II of RSA 84-A:3, as they were applied in 1991 and 1992, were declared null and void.

REAL ESTATE TRANSFER TAX

Senate Bill 42 (Chapter 179, Laws of 2011 – effective August 13, 2011) requires a buyer and seller in a real estate transfer (or transfer of interest therein) to each file a separate Declaration of Consideration (Form CD-57) with the Department.