New Hampshire Department of Revenue Administration
109 Pleasant Street, Concord, NH 03301

TECHNICAL INFORMATION RELEASE
TIR 2019-006 Date: November 19, 2019

2019 Legislative Session in Review – Fiscal Years 2020/2021 State Budget

The purpose of this Technical Information Release (TIR) is to supplement TIR 2019-005, dated August 27, 2019, concerning statutory changes made during the 2019 legislative session impacting taxes administered by the New Hampshire Department of Revenue Administration (DRA). This TIR provides taxpayers and tax practitioners with a convenient reference guide of further tax law changes included in the biennial state budget enacted on September 26, 2019 (Laws of 2019, Ch. 346, HB 4). This TIR is for informational purposes only and is intended to provide a summary or synopsis of enacted legislation. It is not intended to be relied upon as a full and complete text or as a substitute for the law. Please refer to the applicable statute and rules to determine how this information applies to specific persons or situations.

BUSINESS TAX

Tax Rates

HB 4 (Chapter 346, Sections 200-202) amends RSA 77-A:2 and RSA 77-E:2 to establish the rates of the Business Profits Tax (BPT) and Business Enterprise Tax (BET). For taxable periods ending on or after December 31, 2019, the rates remain unchanged, namely, 7.7% for BPT, and 0.6% for BET. The rate reductions formerly established by Laws of 2017, 156:215-217, however, were repealed and instead replaced with varying rate levels contingent on the amount of revenue collected for the fiscal year ending June 30, 2020.

For all taxable periods ending on or after December 31, 2021, the BPT and BET rates depend on the combined amount of general and education trust fund revenue collected for the fiscal year ending June 30, 2020, excluding $68,100,000 appropriated to the education trust fund (the "combined revenue"). If the combined revenue is 6% or more below the official revenue estimates, the BPT and BET rates will be 7.9% and 0.675%. If the combined revenue is 6% or more above the official revenue estimates, the BPT and BET rates will be 7.5% and 0.50%. Otherwise, the BPT and BET rates will continue to be 7.7% and 0.60%.

Statutes Amended: *RSA 77-A:2 and RSA 77-E:2*
Effective Date: *July 1, 2019*

Internal Revenue Code applicable to BPT

HB 4 (Chapter 346, Sections 203-206, 251) amends RSA 77-A:1, XX to generally conform the BPT to the United States Internal Revenue Code (IRC) of 1986 in effect on December 31, 2018, subject to the adjustments provided in RSA 77-A:3-b, for taxable periods beginning on or after January 1, 2020. The starting point for calculating taxable business profits is federal taxable income before net operating loss and special deductions as determined under the provisions of the IRC as it existed at a specific point in time, subject to the adjustments provided in RSA 77-A:3-b. Currently, for taxable periods beginning on January 1, 2018 through December 31, 2019, the applicable version is the IRC of 1986 in effect on December 31, 2016. For all taxable periods beginning on or after January 1, 2020, the applicable version will be the IRC of 1986 in effect on December 31, 2018. This will incorporate the federal Tax Cut and Jobs Act changes into the BPT, including global intangible low-taxed income (GILTI), except that New Hampshire will continue to decouple from the section 168(k) bonus depreciation provision and the section 179 immediate expensing deduction.

GILTI is a new category of foreign earnings included in federal taxable income but subject to a special deduction under IRC section 250(a). Since the starting point for calculating taxable business profits does not include special deductions, chapter 346, section 204 inserts new RSA 77-A:4, XIX to permit an adjustment so that the BPT also conforms to the federal GILTI deduction. GILTI is a deemed income inclusion taxed federally at the time it is earned and not again if such earnings are ever repatriated to the United States as foreign dividends. Foreign dividends, however, are taxed under the BPT. Therefore, to avoid double taxation, chapter 346, section 203 amends RSA 77-A:3, II(b)(5) to provide an adjustment for repatriated foreign earnings also subject to BPT as GILTI.

Statute Added: *RSA 77-A:4, XIX*
Statutes Amended: *RSA 77-A:1, XX and RSA 77-A:3, II(b)(5)*
Statute Repealed: *RSA 77-A:3-b, II*
Effective Date: *July 1, 2019, for taxable periods beginning on or after January 1, 2020*

Apportionment

Market-Based Sourcing

HB 4 (Chapter 346, Sections 424-425, 430) amends RSA 77-A:3, I(c) and RSA 77-E:4, I(c)(3) to adopt the market-based sourcing method of apportioning sales of services and intangibles for purposes of the BPT and BET. The change is effective January 1, 2021, for taxable periods ending on or after December 31, 2021. The BPT currently utilizes a three factor apportionment formula based on payroll, property, and a double-weighted sales factor. Each of these three factors consist of a numerator which reflects the payroll, property, and sales within New Hampshire, and a denominator which reflects the payroll, property, and sales everywhere. Each numerator is divided by the respective denominator. The three factors are summed and divided by four to arrive at the New Hampshire apportionment percentage. The sales factor consists of two broad categories: (1) sales of tangible personal property (e.g., merchandise) and (2) everything else (intangible property and services). For BET purposes, the sales factor is onethird of the apportionment formula for the portion of the enterprise value tax base from dividends.

Market-based sourcing impacts the second category of sales only: sales that are not tangible personal property, particularly sales of services. Under current law, sales of services are apportioned to the state where the income-producing activity is performed. If the income-producing activity is performed in more than one state, the sales are assigned entirely to the state where a greater proportion of the income-producing activity is performed than in any other state, based on "costs of performance." The cost-of-performance method is an "all or nothing" approach, because it assigns all the sales of services to the state that has a plurality of the costs of performance. Thus, a state with 5% of the costs (whether New Hampshire or another state) gets 100% of the sales if each of the other states account for less than 5% of the costs.

Market-based sourcing will replace the cost-of-performance method and assign sales of services to a state based on the location of the market where the service is delivered (or where the customer "receives" the service). Market-based sourcing abandons the all-or-nothing approach. Instead, if New Hampshire has 4% of the market for sales of services then it gets 4% of the sales, regardless of where the plurality of the costs of performance occurs.

Statutes Amended: *RSA 77-A:3, I(c) and RSA 77-E:4, I(c)(3)*
Effective Date: *January 1, 2021, for taxable periods ending on or after December 31, 2021*

Single Sales Factor Apportionment

HB 4 (Chapter 346, Sections 426-429) amends RSA 77-A:3, I-III and related provisions to change the BPT apportionment formula from a three-factor formula that includes payroll, property, and double-weighted sales to a single sales factor apportionment formula. The change is effective January 1, 2022 for taxable periods ending on or after December 31, 2022, unless rescinded by majority vote of the Legislative Committee on Apportionment described below in November 2020. For example, under the current three factor apportionment formula based on payroll, property, and a double-weighted sales factor, if a taxpayer has half of its property and half of its employees in New Hampshire but makes no sales within the state, then one-quarter of the taxpayer's income is subject to BPT ((50% + 50% + (0%*2))/4 = 25%). In contrast, a single sales factor apportionment formula is based on sales only. The share of a taxpayer's income subject to BPT is based solely on the percentage of the taxpayer's sales occurring in New Hampshire. Thus, under single sales factor apportionment, the taxpayer described above will pay no BPT because 0% of its sales are made to New Hampshire customers. However, a taxpayer with 10% of its sales made to New Hampshire customers will have 10% of its income subject to BPT, even if the taxpayer has no property and/or payroll in this state.

Statute Added: *RSA 77-A:1, XVIII-a*
Statutes Amended: *RSA 77-A:3, I-III; RSA 77-A:5, XIII(b)(1); and RSA 77-E:13, I and II*
Effective Date: *January 1, 2022, for taxable periods ending on or after December 31, 2022, unless rescinded by majority vote of the Legislative Committee on Apportionment*

Legislative Committee on Apportionment

<u>HB 4</u> (Chapter 346, Sections 431-433) enacts RSA 77-A:23-a to establish a legislative committee to study apportionment under the BPT, including by monitoring the laws and legislation of other states concerning market-based sourcing and related issues. The committee is also authorized to rescind the enactment of the single sales factor apportionment formula described above by majority vote in November 2020. The committee will be repealed effective December 1, 2020.

***Statute Added**: RSA 77-A:23-a*
***Effective Date:** July 1, 2019*

Coos County Job Creation Tax Credit

<u>HB 4</u> (Chapter 346, Section 199) amends RSA 77-E:3-c, II to extend the Coos county job creation tax credit awarded by the Department of Business and Economic Affairs to any tax period ending on or before December 31, 2027.

***Statute Amended:** RSA 77-E:3-c, II*
***Effective Date:** July 1, 2019*

<u>COMMUNICATIONS SERVICES TAX</u>

<u>HB 4</u> (Chapter 346, Sections 252-258) clarifies the applicability of the Communications Services Tax (CST), RSA 82-A, to voice over Internet protocol (VoIP) and prepaid wireless telecommunications services, effective January 1, 2020. Under new RSA 82-A:4-d, VoIP services will be subject to CST if they are used by a person whose residential or primary business street address (or "place of primary use") is in this state. In addition, under new RSA 82-A:4-e, prepaid wireless telecommunications services will be subject to the CST if the purchase occurs in person in this state, or, alternatively, if the consumer gives a New Hampshire delivery or billing address at the time of the sale or has a New Hampshire telephone number, consistent with the sourcing rules for the e911 surcharge on prepaid commercial mobile radio service.

The CST is paid by the consumer but collected and remitted by the retailer/seller. Every retailer/seller of VoIP and/or prepaid wireless telecommunications services must register with the DRA, collect and remit the CST, and file monthly returns. If a retailer/seller is registered for purposes of the e911 surcharge with the New Hampshire Department of Safety, Bureau of Emergency Communications, it must also register with the DRA for collection and payment of the CST.

***Statutes Added:** RSA 82-A:2, XXVII-XXX; RSA 82-A:4-d; RSA 82-A:4-e*
***Statutes Amended:** RSA 82-A:1; RSA 82-A:2, III; RSA 82-A:2, X; RSA 82-A:4*
***Effective Date:** January 1, 2020, for taxable periods ending after December 31, 2019*

ICF QUALITY ASSESSMENT

HB 4 (Chapter 346, Section 358, I) repeals the ICF quality assessment under RSA 84-D.

Statute Repealed: *RSA 84-D*
Effective Date: *July 1, 2019*

TOBACCO TAX

HB 4 (Chapter 346, Sections 92-94) amends "tobacco products" as defined in RSA 78:1, XIII to include electronic cigarettes (or "e-cigarettes," among other names), and separately defines "electronic cigarette" in new RSA 78:1, III-a, effective January 1, 2020. The result is to impose the Tobacco Tax on e-cigarettes, particularly on the liquids or other substances containing nicotine that are intended to be used with or in such devices. E-cigarettes will be treated as tobacco products other than cigarettes (or "other tobacco products") but subject to different tax rates under RSA 78:2, II, one for closed cartridges or containers that are not intended to be opened (or "closed system" devices), and the other for containers that are intended to be opened ("open system" devices). For closed system devices, the tax is imposed at a rate of $0.30 per milliliter on the volume of the liquid or other substance containing nicotine in the cartridge or container. For open system devices, the tax is imposed at a rate of 8% of the wholesale sales price of the container of liquid or other substance containing nicotine.

The tax must be pre-collected and paid along with the filing of monthly returns by every wholesaler that ships or transports e-cigarettes to retailers in this state. Also, every manufacturer, wholesaler, retailer, and sampler in the business of selling or distributing e-cigarettes in this state must register with the New Hampshire Secretary of State, obtain a license issued by the DRA or the New Hampshire Liquor Commission under RSA 178, as applicable, and otherwise comply with the Tobacco Tax law.

Statute Added: *RSA 78:1, III-a*
Statutes Amended: *RSA 78:1, XIII and RSA 78:2, II*
Effective Date: *January 1, 2020*

Individuals who need auxiliary aids for effective communication in programs and services of the Department of Revenue Administration are invited to make their needs and preferences known to the N.H. Department of Revenue Administration, 109 Pleasant Street, Concord, NH 03301 or by contacting them at (603) 230-5920.