

G. Taxable in Another State (G.S. 105-130.4) (17 NCAC 05C.0600)

1. Preliminary Statement

A taxpayer must have income from business activity taxable by this State and at least one other state to allocate and apportion income. Income from business activity includes apportionable or nonapportionable income. Thus, if a taxpayer has nonapportionable income taxable by one state and apportionable income taxable by another state, the taxpayer's income shall be allocated and apportioned in accordance with G.S. 105-130.4. Where a corporation is not taxable in any other state on its apportionable income but is taxable in another state only because of nonapportionable income, all apportionable income shall be attributed to this State.

2. Definition of Taxpayer

The word "taxpayer" includes any corporation subject to the tax imposed by Article 4 of Chapter 105 of the General Statutes.

3. Taxable in Another State - In General

A taxpayer is "taxable in another state" if it meets either one of two tests:

- a. If by reason of business activity in another state the taxpayer is "subject to" a net income tax or any other tax measured by net income.
- b. If another state has jurisdiction to subject the taxpayer to a net income tax based on business activity regardless of whether or not that state imposes such a tax on the taxpayer.

4. Taxable in Another State - When a Taxpayer is "Subject To" Tax

- a. A taxpayer is "subject to" one of the taxes specified above only if it carries on business activities in another state. If the taxpayer voluntarily files and pays such tax when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but
 - i. Does not actually engage in business activities in that state, or
 - ii. Does actually engage in some activity not sufficient for nexus and the minimum tax bears no relation to the corporation's activities within such state, the taxpayer is not "subject to" tax within that state and is therefore not "taxable" in another state.

Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the \$50 minimum tax, although it carries on no activities in State A. Corporation X is not "taxable" in State A.

- b. The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activities may impose an income tax even though every state does not do so. In some states other types of taxes may be imposed as a substitute for an income tax. Therefore, only those taxes which may be considered as basically revenue generating rather than regulatory measures shall be considered in determining whether the taxpayer is "taxable in another state."

Example 1: State A requires all nonresident corporations which qualify or register in State A to pay to the Secretary of State an annual license fee or tax for the privilege

of doing business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation; the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of \$50 and a maximum fee of \$500. Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the Secretary of State but does not carry on any activities in State A other than utilizing its courts. Corporation X is not “taxable” in State A.

Example 2: Same facts as Example 1 except that Corporation X has sufficient business activities in State A to establish nexus under the criteria followed in this state and is, therefore, subject to and pays the corporate income tax. Corporation X is “taxable” in State A.

Example 3: State B requires all nonresident corporations qualified or registered in State B to pay to the Secretary of State an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of (1) outstanding capital stock, and (2) surplus and undivided profits. The fee or tax base attributable to State B is determined by a three-factor apportionment formula. Nonresident Corporation X that operates a plant in State B, pays the required fee or tax to the Secretary of State. Corporation X is “taxable” in State B because of its business activities there.

Example 4: State C has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activities in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is “taxable” in State C

5. Taxable in Another State - When a State has Jurisdiction to Subject a Taxpayer to a Net Income Tax

The second test in Example 3 above applies if the taxpayer’s business activities are sufficient to give the state jurisdiction to impose a net income tax under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272, 15 U.S.C.A. §§ 381-385. In the case of any “state”, as defined in G.S. 105-130.4, other than a state of the United States or political subdivision of each state, the determination of whether such “state” has jurisdiction to subject the taxpayer to a net income tax shall be made as though the jurisdictional standards applicable to a state of the United States applied in that “state.” If jurisdiction is otherwise present, such “state” is not considered as without jurisdiction by reason of the provisions of a treaty between that state and the United States.

Example: Corporation X is actively engaged in manufacturing farm equipment in State A and in foreign country B. Both State A and foreign country B impose a net income tax but foreign country B exempts corporations engaged in manufacturing farm equipment. Corporation X is subject to the jurisdiction of State A and foreign country B.