

29th Annual Tax Forum
New Hampshire Tax Update: DRA Panel Discussion
November 18, 2011



2011 Legislative Review

This is only a brief summary of relevant 2011 Legislative changes. It is not intended to be relied upon as a full and complete text. Please refer to the applicable forms, instructions, rules and to the laws cited below to determine how this information applies to specific persons or situations.

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 from taxation under New Hampshire's Business Profits Tax (RSA 77-A) and the Business Enterprise Tax (RSA 77-E) "qualified community development entities," as defined in 26 U.S.C. § 45D, which are owned, controlled, or managed, directly or indirectly, by the New Hampshire Business Finance Authority.

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 deduction for reasonable compensation (RSA 77-A:4, III) 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 commission on the sale of business assets.

The new law sets forth that the business organization shall use the standards outlined 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 as may be necessary to determine that the deduction is reasonable under these standards.

The new 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

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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 chapter 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 Dividends 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 Dividends 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 shall not be considered a dividend under RSA chapter 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 fee for a 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) corrects the language in RSA chapter 78 to state that tobacco wholesalers file a "return" and not a "report" for Tobacco Tax purposes.

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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. The repeal was not applied retroactively and, therefore, those taxpayers who reported and paid New Hampshire Gambling Winnings Tax for gambling winnings received between July 1, 2009 and December 31, 2010 are not entitled to a refund based upon the repeal. Taxable gambling winnings received between January 1, 2011 and May 22, 2011 must be reported and the tax due paid in April of 2012.

UTILITY PROPERTY TAX:

Senate Bill 35 (Chapter 59, Laws of 2011 – effective July 1, 2011) 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 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.

House Bill 381 (Chapter 168, Laws of 2011 – effective July 1, 2011) authorizes net metering for micro-combined heat and power systems.

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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.

NURSING FACILITY QUALITY ASSESSMENT & INTERMEDIATE CARE FACILITIES:

House Bill 2 (Chapter 224:46-48 and 224:368, Laws of 2011 – effective July 1, 2011) provides a contingency that for the biennium ending June 30, 2013, the Nursing Facility Quality Assessment (NFQA) imposed by RSA chapter 84-C shall not be assessed and no return shall be required to be made upon the occurrence of any proceeds collected from nursing facilities (as defined in RSA 84-C:1, V(a)) from the NFQA being expended by the State or any State agency for any purpose other than funding nursing facility expenditures through the Nursing Facility Trust Fund under RSA 151-E:14 and long-term care services through the Department of Health and Human Services.

Also, for the biennium ending June 30, 2013, moneys from the Intermediate Care Facility (ICF) separate account may be expended by the State for long-term care services through the Department of Health and Human Services.

For the biennium ending June 30, 2013, 25% of the receipts from the NFQA and the ICF Quality Assessment shall be deposited as restricted revenue in accounts of the Department of Health and Human Services and will be used in support of long-term care services and not for any other purpose.

Moreover, under this new law, the Department of Health and Human Services shall make an additional American Recovery and Reinvestment Act of 2009 Medicaid Quality Incentive Program (MQIP) payment to nursing facilities prior to June 30, 2011. The payment will cover the period April 1, 2011 - May 31, 2011. The provisions of RSA chapter 84-C and RSA chapter 51-E shall govern the assessment and payment, except that the assessment period shall be April 1 to May 31, 2011; the returns shall be filed on or before June 27, 2011; and the Department of Health and Human Services shall make the MQIP payment to the nursing facilities prior to June 30, 2011.

With respect to the remainder of the assessment period as defined by RSA 84-C:1 (June 1 - June 30, 2011), the assessment and payment shall be carried out as would otherwise have been, except that the returns filed in July 2011 shall only cover the period June 1, 2011 - June 30, 2011.

MUNICIPAL:

Senate Bill 1 (Chapter 3, Laws of 2011 – effective March 1, 2011) eliminates the automatic continuation requirement for public employee collective bargaining agreements.

Senate Bill 2 (Chapter 234, Laws of 2011 – effective July 5, 2011) allows a municipality to adopt a tax cap through the charter process or by a warrant article placed on the warrant for the annual meeting by the governing body or by petition. If the tax cap is proposed by warrant article, it requires a public hearing prior to vote and also needs a 3/5 majority to pass. The article must specify the parameters of any

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increase of local taxes. Parameters would be based on a fixed dollar amount or percentage of allowable increase to the proposed budget brought forward at the municipality's annual meeting. The new law also legalizes existing charter tax caps.

Senate Bill 15 (Chapter 19, Laws of 2011 – effective June 24, 2011) amends the requirement that tax collectors, city clerks or city officials must remit money collected to the town treasurer on a daily basis whenever the tax receipts totaled \$500 or more. The \$500 threshold was amended to \$1,500.

Senate Bill 16 (Chapter 57, Laws of 2011 – effective May 9, 2011) requires all votes relative to recommendations on ballot questions to be recorded votes and the numerical tally of any such vote shall be printed on the ballot next to the affected ballot question. If a town has not voted to require such tallies to be printed on the ballot next to the affected ballot question, the governing body may do so on its own initiative. Any ballot vote that includes a tally shall be valid, notwithstanding the fact that the vote occurred prior to May 9, 2011.

House Bill 32 (Chapter 4, Laws of 2011 – effective April 25, 2011) repeals RSA 669:16, VI-a, relative to a town auditor and removed the reference to RSA 41:31, which was repealed last year.

House Bill 70 (Chapter 91, Laws of 2011 – effective July 26, 2011) requires written notification by the State to the municipal clerk and the Chairman of the Charter Commission within 14 days of the State's receipt of the municipal clerk's report under RSA 49-B:5-a.

House Bill 77 (Chapter 1, Laws of 2011 – effective February 4, 2011) prohibits an amendment to a warrant article that eliminates the subject matter of the article, but allows an amendment that changes the dollar amount of an appropriation in a warrant article.

House Bill 144 (Chapter 68, Laws of 2011 – effective July 15, 2011) provides that revenue bonds and not general obligation bonds can be used for RSA 53-F qualifying energy conservation and clean energy improvements. Only grants, and not municipal revenues, can be used to fund the revolving fund. In addition, general municipal revenues cannot be used to fund the loss reserve account.

The new law also provides that the lien for the assessments under this chapter will be junior to other existing liens, such as a mortgage, and in the event of a foreclosure on the property, the municipality's lien is extinguished.

House Bill 198 (Chapter 71, Laws of 2011 – effective July 15, 2011) allows the County Treasurer to invest in units of pooled money market mutual funds which invest solely in obligations of the United States Treasury when the County Treasurer has an excess of funds which are not immediately needed for the purpose of expenditure. Investment by the County Treasurer requires approval of the County Commissioners and County Executive Committee.

House Bill 288 (Chapter 22, Laws of 2011 – effective June 27, 2011) provides that if an unincorporated place exceeds ten (10) voters, and has not organized pursuant to RSA 53:1, the county in which the unincorporated place is located shall pay the town designated pursuant to RSA 668:2 for costs it incurs in conducting a primary or general election for the unincorporated place. The county shall assess the cost for conducting an election to the unincorporated place.

House Bill 337 (Chapter 258, Laws of 2011 – effective July 1, 2011) changes the name of the "State Education Property Tax" to "Education Tax" and repeals the requirement for excess payments to be remitted to the Department, thereby allowing municipalities to retain all of the state tax assessed. It also repeals RSA 198:47 regarding the DP-5 form, amends the calculation of adequate education grants and makes other changes to the education grant formula and distribution.

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House Bill 521 (Chapter 112, Laws of 2011 – effective July 30, 2011) requires that a public hearing on county budget estimates be held no earlier than 5 days, nor later than 20 days, after the mailing of the Commissioners' statement.

House Bill 622 (Chapter 262, Laws of 2011 – effective July 13, 2011) allows for the adjustment in the method of calculating the partial payment of taxes related to an increase or decrease in local education taxes resulting from a change to the town's or city's adequate education grant. The changes apply to both semi-annual and quarterly collection of taxes.

House Bill 650 (Chapter 211, Laws of 2011 – effective June 27, 2011 – sunsets July 1, 2012) and House Bill 2 (Chapter 224:155 and 224:156, Laws of 2011 – effective July 1, 2011 and sunsets July 1, 2012) in response to statutory changes resulting in reductions or increases in distribution of state revenues for education to school districts, the new law allows the governing body of any school district (including those that have adopted RSA 40:13) to call a special meeting of the legislative body to consider a reduction, rescission, or increase of appropriations made at an annual meeting. The special meeting is subject to certain provisions for giving notice and voting.

PROPERTY APPRAISAL:

Senate Bill 42 (Chapter 179, Laws of 2011 – effective August 13, 2011) requires a purchaser 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.

Senate Bill 97 (Chapter 237, Laws of 2011 – effective July 5, 2011 and the authority conferred by this act shall apply retroactively to cities and towns that adopted the provisions of RSA chapter 79-E in effect prior to the effective date of this act) allows for buildings which have been destroyed by fire or other acts of nature to be included as a "qualifying structure" eligible for the Community Revitalization Tax Relief Incentive. This includes where such destruction occurred within 15 years prior to the adoption of SB 97 by the city or town.

House Bill 2 (Chapter 224:199, Laws of 2011 – effective July 1, 2011) beginning on July 1, 2011, the administrative and business processing functions of the Equalization Standards Board under RSA 21-J:14-c shall be merged with and performed by the Assessing Standards Board under RSA 21-J:14-a.

House Bill 46 (Chapter 33, Laws of 2011 – effective July 8, 2011) modifies the membership of the Current Use Board by stating that no other member of the Board shall or have been certified under RSA 21-J:14-f, except for the Commissioner of the Department of Revenue or the Commissioner's designee.

The new law also allows the Executive Director of the New Hampshire Association of Conservation Commissions to have a designee on the Board.

House Bill 316 (Chapter 206, Laws of 2011 – effective July 24, 2011) sets forth that anyone who fails to file an inventory form shall not lose the right of appeal, including the subsequent owner if the property is transferred during the tax year to a different owner and the inventory blank was mailed or delivered to the previous owner. Furthermore, the owner does not lose their right to appeal for refusing to grant inspection of the property.

House Bill 541 (Chapter 138, Laws of 2011 – effective April 1, 2011) amends RSA 72:29, VI to state that ownership of real estate, as expressed by such words as "owner," "owned" or "own," shall include those who have placed their property in a grantor/revocable trust.

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RSA CHAPTER 21-J ADMINISTRATIVE:

Senate Bill 18 (Chapter 23, Laws of 2011 – effective June 27, 2011) removes the responsibility of the internal control of all tax receivables from the Central Tax Services Unit within the Department.

Senate Bill 56 (Chapter 180, Laws of 2011 – effective August 13, 2011) authorizes the Department to accept credit card and debit card payments of taxes.

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 in an appeal under RSA 21-J:28-b, the Department is required to prove any change in the compensation deduction under RSA chapter 77-A.

House Bill 2 (Chapter 224:195, Laws of 2011 – effective July 1, 2011) Flood Control expenditures will be reduced by approximately \$590,500 for each fiscal year, as New Hampshire would only distribute to cities and towns New Hampshire's required portion of the reimbursements. Payments made by states are to be applied first to existing outstanding balances.

House Bill 579 (Chapter 173, Laws of 2011 – effective August 13, 2011) allows the Legislative Budget Assistant to conduct performance audits of the Department without violation of the confidentiality statute, RSA 21-J:14. This exception does not authorize disclosure to any member of the Legislature. Moreover, the records, files, returns, or information deemed confidential and privileged under RSA 21-J:14 shall not be subject to disclosure under RSA 14:31-a, II or RSA 91-A.

The new law also clarifies that the Department of Revenue Administration Revenue Counsel shall serve at the pleasure of the Commissioner.