

ASSEMBLY, No. 670

STATE OF NEW JERSEY

Introduced Pending Technical Review by Legislative Counsel

PRE-FILED FOR INTRODUCTION IN THE 1996 SESSION

By Assemblyman BAGGER

1 AN ACT exempting certain income of certain corporations of foreign
2 countries from taxation under the corporation business tax,
3 amending P.L.1945, c.162.

4

5 **BE IT ENACTED** by the Senate and General Assembly of the State
6 of New Jersey:

7

8 1. Section 4 of P.L.1945, c.162 (C.54:10A-4) is amended to read
9 as follows:

10 4. For the purposes of this act, unless the context requires a
11 different meaning:

12 (a) "Commissioner" shall mean the Director of the Division of
13 Taxation of the State Department of the Treasury.

14 (b) "Allocation factor" shall mean the proportionate part of a
15 taxpayer's net worth or entire net income used to determine a measure
16 of its tax under this act.

17 (c) "Corporation" shall mean any corporation, joint-stock company
18 or association and any business conducted by a trustee or trustees
19 wherein interest or ownership is evidenced by a certificate of interest
20 or ownership or similar written instrument.

21 (d) "Net worth" shall mean the aggregate of the values disclosed
22 by the books of the corporation for (1) issued and outstanding capital
23 stock, (2) paid-in or capital surplus, (3) earned surplus and undivided
24 profits, and (4) surplus reserves which can reasonably be expected to
25 accrue to holders or owners of equitable shares, not including
26 reasonable valuation reserves, such as reserves for depreciation or
27 obsolescence or depletion. Notwithstanding the foregoing, net worth
28 shall not include any deduction for the amount of the excess
29 depreciation described in paragraph (2)(F) of subsection (k) of this
30 section. The foregoing aggregate of values shall be reduced by 50%
31 of the amount disclosed by the books of the corporation for investment
32 in the capital stock of one or more subsidiaries, which investment is

EXPLANATION - Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and intended to be omitted in the law.

Matter underlined thus is new matter.

1 defined as ownership (1) of at least 80% of the total combined voting
2 power of all classes of stock of the subsidiary entitled to vote and (2)
3 of at least 80% of the total number of shares of all other classes of
4 stock except nonvoting stock which is limited and preferred as to
5 dividends. In the case of investment in an entity organized under the
6 laws of a foreign country, the foregoing requisite degree of ownership
7 shall effect a like reduction of such investment from net worth of the
8 taxpayer, if the foreign entity is considered a corporation for any
9 purpose under the United States federal income tax laws, such as (but
10 not by way of sole examples) for the purpose of supplying deemed
11 paid foreign tax credits or for the purpose of status as a controlled
12 foreign corporation. In calculating the net worth of a taxpayer entitled
13 to reduction for investment in subsidiaries, the amount of liabilities of
14 the taxpayer shall be reduced by such proportion of the liabilities as
15 corresponds to the ratio which the excluded portion of the subsidiary
16 values bears to the total assets of the taxpayer.

17 In the case of banking corporations which have international
18 banking facilities as defined in subsection (n), the foregoing aggregate
19 of values shall also be reduced by retained earnings of the international
20 banking facility. Retained earnings means the earnings accumulated
21 over the life of such facility and shall not include the distributive share
22 of dividends paid and federal income taxes paid or payable during the
23 tax year.

24 If in the opinion of the commissioner, the corporation's books do
25 not disclose fair valuations the commissioner may make a reasonable
26 determination of the net worth which, in his opinion, would reflect the
27 fair value of the assets, exclusive of subsidiary investments as defined
28 aforesaid, carried on the books of the corporation, in accordance with
29 sound accounting principles, and such determination shall be used as
30 net worth for the purpose of this act.

31 (e) "Indebtedness owing directly or indirectly" shall include,
32 without limitation thereto, all indebtedness owing to any stockholder
33 or shareholder and to members of his immediate family where a
34 stockholder and members of his immediate family together or in the
35 aggregate own 10% or more of the aggregate outstanding shares of
36 the taxpayer's capital stock of all classes.

37 (f) "Investment company" shall mean any corporation whose
38 business during the period covered by its report consisted, to the
39 extent of at least 90% thereof of holding, investing and reinvesting in
40 stocks, bonds, notes, mortgages, debentures, patents, patent rights and
41 other securities for its own account, but this shall not include any
42 corporation which: (1) is a merchant or a dealer of stocks, bonds and
43 other securities, regularly engaged in buying the same and selling the
44 same to customers; or (2) had less than 90% of its average gross
45 assets in New Jersey, at cost, invested in stocks, bonds, debentures,
46 mortgages, notes, patents, patent rights or other securities or

1 consisting of cash on deposit during the period covered by its report;
2 or (3) is a banking corporation or a financial business corporation as
3 defined in the Corporation Business Tax Act.

4 (g) "Regulated investment company" shall mean any corporation
5 which for a period covered by its report, is registered and regulated
6 under the Investment Company Act of 1940 (54 Stat. 789), as
7 amended.

8 (h) "Taxpayer" shall mean any corporation required to report or to
9 pay taxes, interest or penalties under this act.

10 (i) "Fiscal year" shall mean an accounting period ending on any day
11 other than the last day of December on the basis of which the taxpayer
12 is required to report for federal income tax purposes.

13 (j) Except as herein provided, "privilege period" shall mean the
14 calendar or fiscal accounting period for which a tax is payable under
15 this act.

16 (k) "Entire net income" shall mean total net income from all
17 sources, whether within or without the United States, and shall include
18 the gain derived from the employment of capital or labor, or from both
19 combined, as well as profit gained through a sale or conversion of
20 capital assets. For the purpose of this act, the amount of a taxpayer's
21 entire net income shall be deemed prima facie to be equal in amount to
22 the taxable income, before net operating loss deduction and special
23 deductions, which the taxpayer is required to report to the United
24 States Treasury Department for the purpose of computing its federal
25 income tax; provided, however, that in the determination of such entire
26 net income,

27 (1) Entire net income shall exclude for the periods set forth in
28 paragraph (2)(F)(i) of this subsection, any amount, except with respect
29 to qualified mass commuting vehicles as described in section
30 168(f)(8)(D)(v) of the Internal Revenue Code as in effect immediately
31 prior to January 1, 1984, which is included in a taxpayer's federal
32 taxable income solely as a result of an election made pursuant to the
33 provisions of paragraph (8) of that section.

34 (2) Entire net income shall be determined without the exclusion,
35 deduction or credit of:

36 (A) The amount of any specific exemption or credit allowed in any
37 law of the United States imposing any tax on or measured by the
38 income of corporations;

39 (B) Any part of any income from dividends or interest on any kind
40 of stock, securities or indebtedness, except as provided in paragraph
41 (5) of subsection (k) of this section;

42 (C) Taxes paid or accrued to the United States, a possession or
43 territory of the United States, a state, a political subdivision thereof,
44 or the District of Columbia on or measured by profits or income, or
45 business presence or business activity, or the tax imposed by this act,
46 or any tax paid or accrued with respect to subsidiary dividends

1 excluded from entire net income as provided in paragraph (5) of
2 subsection (k) of this section;

3 (D) (Deleted by amendment, P.L.1985, c.143.)

4 (E) 90% of interest on indebtedness owing directly or indirectly to
5 holders of 10% or more of the aggregate outstanding shares of the
6 taxpayer's capital stock of all classes; except that such interest may, in
7 any event, be deducted:

8 (i) Up to an amount not exceeding \$1,000.00;

9 (ii) In full to the extent that it relates to bonds or other evidences
10 of indebtedness issued, with stock, pursuant to a bona fide plan of
11 reorganization, to persons, who, prior to such reorganization, were
12 bona fide creditors of the corporation or its predecessors, but were not
13 stockholders or shareholders thereof;

14 (iii) In full to the extent that it relates to debt of a financial
15 business corporation owed to an affiliate corporation; provided that
16 such interest rate does not exceed 2% over prime rate; the prime rate
17 to be determined by the Commissioner of Banking;

18 (iv) In full to the extent that it relates to financing of motor vehicle
19 inventory held for sale to customers; provided said indebtedness is
20 owed to a taxpayer customarily and routinely providing this type of
21 financing;

22 (v) In full to the extent it relates to debt of a banking corporation
23 to a bank holding company, of which the banking corporation is a
24 subsidiary, or to a debt of a banking corporation to another banking
25 corporation with respect to federal funds transactions governed by
26 section 23A of the Federal Reserve Act (12 U.S.C. §371c.) when both
27 banking corporations are subsidiaries of the same bank holding
28 company, as defined in 12 U.S.C. §1841.

29 (F) (i) The amount by which depreciation reported to the United
30 States Treasury Department for property placed in service on and after
31 January 1, 1981, but prior to taxpayer fiscal or calendar accounting
32 years beginning on and after the effective date of P.L.1993, c.172, for
33 purposes of computing federal taxable income in accordance with
34 section 168 of the Internal Revenue Code in effect after December 31,
35 1980, exceeds the amount of depreciation determined in accordance
36 with the Internal Revenue Code provisions in effect prior to January
37 1, 1981, but only with respect to a taxpayer's accounting period ending
38 after December 31, 1981; provided, however, that where a taxpayer's
39 accounting period begins in 1981 and ends in 1982, no modification
40 shall be required with respect to this paragraph (F) for the report filed
41 for such period with respect to property placed in service during that
42 part of the accounting period which occurs in 1981.

43 (ii) For the periods set forth in subparagraph (F)(i) of this
44 subsection, any amount, except with respect to qualified mass
45 commuting vehicles as described in section 168(f)(8)(D)(v) of the
46 Internal Revenue Code as in effect immediately prior to January 1,

1 1984, which the taxpayer claimed as a deduction in computing federal
2 income tax pursuant to a qualified lease agreement under paragraph
3 (8) of that section.

4 The director shall promulgate rules and regulations necessary to
5 carry out the provisions of this section, which rules shall provide,
6 among others, the manner in which the remaining life of property shall
7 be reported.

8 (G) (1) The amount of any civil, civil administrative, or criminal
9 penalty or fine, including a penalty or fine under an administrative
10 consent order, assessed and collected for a violation of a State or
11 federal environmental law, an administrative consent order, or an
12 environmental ordinance or resolution of a local governmental entity,
13 and any interest earned on the penalty or fine, and any economic
14 benefits having accrued to the violator as a result of a violation, which
15 benefits are assessed and recovered in a civil, civil administrative, or
16 criminal action, or pursuant to an administrative consent order. The
17 provisions of this paragraph shall not apply to a penalty or fine
18 assessed or collected for a violation of a State or federal
19 environmental law, or local environmental ordinance or resolution, if
20 the penalty or fine was for a violation that resulted from fire, riot,
21 sabotage, flood, storm event, natural cause, or other act of God
22 beyond the reasonable control of the violator, or caused by an act or
23 omission of a person who was outside the reasonable control of the
24 violator.

25 (2) The amount of treble damages paid to the Department of
26 Environmental Protection and Energy pursuant to subsection a. of
27 section 7 of P.L.1976, c.141 (C.58:10-23.11f) for costs incurred by
28 the department in removing, or arranging for the removal of, an
29 unauthorized discharge upon failure of the discharger to comply with
30 a directive from the department to remove, or arrange for the removal
31 of, the discharge.

32 (3) The commissioner may, whenever necessary to properly reflect
33 the entire net income of any taxpayer, determine the year or period in
34 which any item of income or deduction shall be included, without
35 being limited to the method of accounting employed by the taxpayer.

36 (4) There shall be allowed as a deduction from entire net income
37 of a banking corporation, to the extent not deductible in determining
38 federal taxable income, the eligible net income of an international
39 banking facility determined as follows:

40 (A) The eligible net income of an international banking facility shall
41 be the amount remaining after subtracting from the eligible gross
42 income the applicable expenses;

43 (B) Eligible gross income shall be the gross income derived by an
44 international banking facility, which shall include, but not be limited to,
45 gross income derived from:

46 (i) Making, arranging for, placing or carrying loans to foreign

1 persons, provided, however, that in the case of a foreign person which
2 is an individual, or which is a foreign branch of a domestic corporation
3 (other than a bank), or which is a foreign corporation or foreign
4 partnership which is controlled by one or more domestic corporations
5 (other than banks), domestic partnerships or resident individuals, all
6 the proceeds of the loan are for use outside of the United States;

7 (ii) Making or placing deposits with foreign persons which are
8 banks or foreign branches of banks (including foreign subsidiaries) or
9 foreign branches of the taxpayers or with other international banking
10 facilities;

11 (iii) Entering into foreign exchange trading or hedging transactions
12 related to any of the transactions described in this paragraph; or

13 (iv) Such other activities as an international banking facility may,
14 from time to time, be authorized to engage in;

15 (C) Applicable expenses shall be any expense or other deductions
16 attributable, directly or indirectly, to the eligible gross income
17 described in subparagraph (B) of this paragraph.

18 (5) Entire net income shall exclude 100% of dividends which were
19 included in computing such taxable income for federal income tax
20 purposes, paid to the taxpayer by one or more subsidiaries owned by
21 the taxpayer to the extent of the 80% or more ownership of investment
22 described in subsection (d) of this section. With respect to other
23 dividends, entire net income shall not include 50% of the total included
24 in computing such taxable income for federal income tax purposes.

25 (6) (A) Net operating loss deduction. There shall be allowed as
26 a deduction for the taxable year the net operating loss carryover to
27 that year.

28 (B) Net operating loss carryover. A net operating loss for any
29 taxable year ending after June 30, 1984 shall be a net operating loss
30 carryover to each of the seven years following the year of the loss. The
31 entire amount of the net operating loss for any taxable year (the "loss
32 year") shall be carried to the earliest of the taxable years to which the
33 loss may be carried. The portion of the loss which shall be carried to
34 each of the other taxable years shall be the excess, if any, of the
35 amount of the loss over the sum of the entire net income, computed
36 without the exclusions permitted in paragraphs (4) and (5) of this
37 subsection or the net operating loss deduction provided by
38 subparagraph (A) of this paragraph, for each of the prior taxable years
39 to which the loss may be carried.

40 (C) Net operating loss. For purposes of this paragraph the term
41 "net operating loss" means the excess of the deductions over the gross
42 income used in computing entire net income without the net operating
43 loss deduction provided for in subparagraph (A) of this paragraph and
44 the exclusions in paragraphs (4) and (5) of this subsection.

45 (D) Change in ownership. Where there is a change in 50% or more
46 of the ownership of a corporation because of redemption or sale of

1 stock and the corporation changes the trade or business giving rise to
2 the loss, no net operating loss sustained before the changes may be
3 carried over to be deducted from income earned after such changes.
4 In addition where the facts support the premise that the corporation
5 was acquired under any circumstances for the primary purpose of the
6 use of its net operating loss carryover, the director may disallow the
7 carryover.

8 (7) Notwithstanding paragraph (1) of this subsection, entire net
9 income shall not include the income derived by a corporation
10 organized in a foreign country from the international operation of a
11 ship or ships, or from the international operation of aircraft, if such
12 income is exempt from federal taxation pursuant to section 883 of the
13 federal Internal Revenue Code of 1986, 26 U.S.C. §883.

14 (l) "Real estate investment trust" shall mean any corporation, trust
15 or association qualifying and electing to be taxed as a real estate
16 investment trust under federal law.

17 (m) "Financial business corporation" shall mean any corporate
18 enterprise which is (1) in substantial competition with the business of
19 national banks and which (2) employs moneyed capital with the object
20 of making profit by its use as money, through discounting and
21 negotiating promissory notes, drafts, bills of exchange and other
22 evidences of debt; buying and selling exchange; making of or dealing
23 in secured or unsecured loans and discounts; dealing in securities and
24 shares of corporate stock by purchasing and selling such securities and
25 stock without recourse, solely upon the order and for the account of
26 customers; or investing and reinvesting in marketable obligations
27 evidencing indebtedness of any person, copartnership, association or
28 corporation in the form of bonds, notes or debentures commonly
29 known as investment securities; or dealing in or underwriting
30 obligations of the United States, any state or any political subdivision
31 thereof, or of a corporate instrumentality of any of them. This shall
32 include, without limitation of the foregoing, business commonly
33 known as industrial banks, dealers in commercial paper and
34 acceptances, sales finance, personal finance, small loan and mortgage
35 financing businesses, as well as any other enterprise employing
36 moneyed capital coming into competition with the business of national
37 banks; provided that the holding of bonds, notes, or other evidences
38 of indebtedness by individual persons not employed or engaged in the
39 banking or investment business and representing merely personal
40 investments not made in competition with the business of national
41 banks, shall not be deemed financial business. Nor shall "financial
42 business" include national banks, production credit associations
43 organized under the Farm Credit Act of 1933 or the Farm Credit Act
44 of 1971, Pub.L.92-181 (12 U.S.C. §2091 et seq.), stock and mutual
45 insurance companies duly authorized to transact business in this State,
46 security brokers or dealers or investment companies or bankers not

1 employing moneyed capital coming into competition with the business
2 of national banks, real estate investment trusts, or any of the following
3 entities organized under the laws of this State: credit unions, savings
4 banks, savings and loan and building and loan associations,
5 pawnbrokers, and State banks and trust companies.

6 (n) "International banking facility" shall mean a set of asset and
7 liability accounts segregated on the books and records of a depository
8 institution, United States branch or agency of a foreign bank, or an
9 Edge or Agreement Corporation that includes only international
10 banking facility time deposits and international banking facility
11 extensions of credit as such terms are defined in section 204.8(a)(2)
12 and section 204.8(a)(3) of Regulation D of the board of governors of
13 the Federal Reserve System, 12 CFR Part 204, effective December 3,
14 1981. In the event that the United States enacts a law, or the board
15 of governors of the Federal Reserve System adopts a regulation which
16 amends the present definition of international banking facility or of
17 such facilities' time deposits or extensions of credit, the Commissioner
18 of Banking shall forthwith adopt regulations defining such terms in the
19 same manner as such terms are set forth in the laws of the United
20 States or the regulations of the board of governors of the Federal
21 Reserve System. The regulations of the Commissioner of Banking
22 shall thereafter provide the applicable definitions.

23 (o) "S corporation" means a corporation included in the definition
24 of an "S corporation" pursuant to section 1361 of the federal Internal
25 Revenue Code of 1986, 26 U.S.C. §1361.

26 (p) "New Jersey S corporation" means a corporation that is an S
27 corporation; which has made a valid election pursuant to section 3 of
28 P.L.1993, c.173 (C.54:10A-5.22); and which has been an S
29 corporation continuously since the effective date of the valid election
30 made pursuant to section 3 of P.L.1993, c.173 (C.54:10A-5.22).
31 (cf: P.L.1993, c.173, s.1)

32

33 2. This act shall take effect immediately.

34

35

36

STATEMENT

37

38 This Bill exempts the international ship operation income of foreign
39 national shipping companies and the international aircraft operation
40 income of foreign airline companies from New Jersey corporation
41 business tax if their home countries provide a similar exemption for the
42 income of United States shipping and airline companies.

43 New Jersey has never subjected the carrier income of foreign
44 carriers to taxation. However, under a strict reading of the
45 corporation business tax, foreign carrier corporations with offices or
46 regular business agents in New Jersey might be found to be subject to

1 the tax. If subject to the tax, they would determine their taxable
2 income under the three-factor apportionment formula to determine the
3 portion of their corporations' world-wide income that will be subject
4 to tax. Because of their limited contacts with the State, their
5 apportionment percentage would be very small and their tax liabilities
6 minimal.

7 Federal and international income tax laws use a different system and
8 a different kind of bookkeeping from the formula apportionment
9 method used by states. Because of the difference in systems, an
10 international corporation subject to state taxation on a small fraction
11 of its income could have a tax reporting and compliance cost that far
12 exceeds its tax liability. Most states, including New Jersey, do not
13 exercise their power to impose taxes on the income from the
14 international operation of ships and or aircraft by foreign corporations
15 to avoid discouraging international commerce. Foreign carrier
16 corporations, if subjected to tax in New Jersey, would be encouraged
17 to move their shipping traffic, offices and employment of business
18 agents to neighboring states that do not tax carrier income.

19 Most states that exempt the income of foreign national shipping and
20 aircraft companies, including New Jersey, do so under administrative
21 regulations or under uncodified administrative determinations. This
22 bill puts the exemption in statute, which can only be changed by a
23 subsequent act of the Legislature, to send a clear message that New
24 Jersey is a willing and responsible partner in international commerce.

25

26

27

28

29 Exempts shipping and aircraft operation income of foreign national
30 corporations from corporation business tax if their home countries
31 exempt such income of U.S. corporations.