

ASSEMBLY, No. 833

STATE OF NEW JERSEY

INTRODUCED DECEMBER 5, 1996

By Assemblymen AZZOLINA and MALONE

1 AN ACT concerning the taxation of Foreign Sales Corporations, and
2 amending P.L.1945, c.162.

3

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

6

7 1. Section 3 of P.L.1945, c.162 (C.54:10A-3) is amended to read
8 as follows:

9 3. The following corporations shall be exempt from the tax
10 imposed by this act:

11 (a) Corporations subject to a tax assessed upon the basis of gross
12 receipts, or insurance premiums collected;

13 (b) Corporations which operate regular route autobus service
14 within this State under operating authority conferred pursuant to
15 R.S.48:4-3, provided, however, that such corporations shall not be
16 exempt from the tax on net income imposed by section 5(c) of
17 P.L.1945, c.162 (C.54:10A-5);

18 (c) Railroad, canal corporations, savings banks, production credit
19 associations organized under the Farm Credit Act of 1933, agricultural
20 cooperative associations incorporated or domesticated under or
21 subject to chapter 13 of Title 4 of the Revised Statutes and exempt
22 under Subtitle A, Chapter 1F, Part IV, Section 521 of the federal
23 Internal Revenue Code (26 U.S.C. §521), or building and loan or
24 savings and loan associations;

25 (d) Cemetery corporations not conducted for pecuniary profit or
26 any private shareholder or individual;

27 (e) Nonprofit corporations, associations or organizations
28 established, organized or chartered, without capital stock, under the
29 provisions of Title 15, 16 or 17 of the Revised Statutes, Title 15A of
30 the New Jersey Statutes or under a special charter or under any similar
31 general or special law of this or any other State, and not conducted for
32 pecuniary profit of any private shareholders or individual;

33 (f) Corporations subject to a tax under the provisions of P.L.1940,
34 c.4 (C.54:30A-16 et seq.), P.L.1940, c.5 (C.54:30A-49 et seq.), or

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 P.L.1991, c.184 (C.54:30A-18.6 et al.) or any statute or law imposing
2 a similar tax or taxes;

3 (g) Nonstock corporations organized under the laws of this State
4 or of any other state of the United States to provide mutual ownership
5 housing under federal law by tenants, provided, however, that the
6 exemption hereunder shall continue only so long as the corporations
7 remain subject to rules and regulations of the Federal Housing
8 [Authority] Administration and the [Commissioner of the] Federal
9 Housing [Authority] Commissioner holds membership certificates in
10 the corporations and the corporate property is encumbered by a
11 mortgage deed or deed of trust insured under the National Housing
12 Act (48 Stat. 1246) as amended by subsequent Acts of Congress. In
13 order to be exempted under this subsection, corporations shall
14 annually file a report on or before August 15 with the commissioner,
15 in the form required by the commissioner, to claim such exemption,
16 and shall pay a filing fee of \$25.00;

17 (h) Corporations not for profit organized under any law of this
18 State where the primary purpose thereof is to provide for its
19 shareholders or members housing in a retirement community as same
20 as defined under the provisions of the "Retirement Community Full
21 Disclosure Act," P.L.1969, c.215 (C.45:22A-1 et seq.); [and]

22 (i) Corporations which are licensed as insurance companies under
23 the laws of another state, including corporations which are surplus
24 lines insurers declared eligible by the Commissioner of Insurance
25 pursuant to section 11 of P.L.1960, c.32 (C.17:22-6.45) to insure risks
26 within this State[.]; and

27 (j) Corporations which qualify as Foreign Sales Corporations, as
28 defined in section 922 of the federal Internal Revenue Code, 26 U.S.C.
29 §922, and which are State-sponsored. As used in this subsection,
30 "State-sponsored" means promoted by the State as Foreign Sales
31 Corporations, provided the State has no ownership interest or
32 involvement in management or daily operations of the Foreign Sales
33 Corporations but retains access to essential non-confidential
34 information such as share ownership, export earnings and compliance
35 status with requirements for such corporations.

36 (cf: P.L.1993, c.338, s.1)

37

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

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

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

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

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

5 (d) "Net worth" shall mean the aggregate of the values disclosed
6 by the books of the corporation for (1) issued and outstanding capital
7 stock, (2) paid-in or capital surplus, (3) earned surplus and undivided
8 profits, and (4) surplus reserves which can reasonably be expected to
9 accrue to holders or owners of equitable shares, not including
10 reasonable valuation reserves, such as reserves for depreciation or
11 obsolescence or depletion. Notwithstanding the foregoing, net worth
12 shall not include any deduction for the amount of the excess
13 depreciation described in paragraph (2)(F) of subsection (k) of this
14 section. The foregoing aggregate of values shall be reduced by 50%
15 of the amount disclosed by the books of the corporation for investment
16 in the capital stock of one or more subsidiaries, which investment is
17 defined as ownership (1) of at least 80% of the total combined voting
18 power of all classes of stock of the subsidiary entitled to vote and (2)
19 of at least 80% of the total number of shares of all other classes of
20 stock except nonvoting stock which is limited and preferred as to
21 dividends. In the case of investment in an entity organized under the
22 laws of a foreign country, the foregoing requisite degree of ownership
23 shall effect a like reduction of such investment from the net worth of
24 the taxpayer, if the foreign entity is considered a corporation for any
25 purpose under the United States federal income tax laws, such as (but
26 not by way of sole examples) for the purpose of supplying deemed
27 paid foreign tax credits or for the purpose of status as a controlled
28 foreign corporation. In calculating the net worth of a taxpayer entitled
29 to reduction for investment in subsidiaries, the amount of liabilities of
30 the taxpayer shall be reduced by such proportion of the liabilities as
31 corresponds to the ratio which the excluded portion of the subsidiary
32 values bears to the total assets of the taxpayer.

33 In the case of banking corporations which have international
34 banking facilities as defined in subsection (n), the foregoing aggregate
35 of values shall also be reduced by retained earnings of the international
36 banking facility. Retained earnings means the earnings accumulated
37 over the life of such facility and shall not include the distributive share
38 of dividends paid and federal income taxes paid or payable during the
39 tax year.

40 If in the opinion of the commissioner, the corporation's books do
41 not disclose fair valuations the commissioner may make a reasonable
42 determination of the net worth which, in his opinion, would reflect the
43 fair value of the assets, exclusive of subsidiary investments as defined
44 aforesaid, carried on the books of the corporation, in accordance with
45 sound accounting principles, and such determination shall be used as
46 net worth for the purpose of this act.

1 (e) "Indebtedness owing directly or indirectly" shall include,
2 without limitation thereto, all indebtedness owing to any stockholder
3 or shareholder and to members of his immediate family where a
4 stockholder and members of his immediate family together or in the
5 aggregate own 10% or more of the aggregate outstanding shares of
6 the taxpayer's capital stock of all classes.

7 (f) "Investment company" shall mean any corporation whose
8 business during the period covered by its report consisted, to the
9 extent of at least 90% thereof of holding, investing and reinvesting in
10 stocks, bonds, notes, mortgages, debentures, patents, patent rights and
11 other securities for its own account, but this shall not include any
12 corporation which: (1) is a merchant or a dealer of stocks, bonds and
13 other securities, regularly engaged in buying the same and selling the
14 same to customers; or (2) had less than 90% of its average gross
15 assets in New Jersey, at cost, invested in stocks, bonds, debentures,
16 mortgages, notes, patents, patent rights or other securities or
17 consisting of cash on deposit during the period covered by its report;
18 or (3) is a banking corporation or a financial business corporation as
19 defined in the Corporation Business Tax Act.

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

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

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

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

32 (k) "Entire net income" shall mean total net income from all
33 sources, whether within or without the United States, and shall include
34 the gain derived from the employment of capital or labor, or from both
35 combined, as well as profit gained through a sale or conversion of
36 capital assets. For the purpose of this act, the amount of a taxpayer's
37 entire net income shall be deemed prima facie to be equal in amount to
38 the taxable income, before net operating loss deduction and special
39 deductions, which the taxpayer is required to report to the United
40 States Treasury Department for the purpose of computing its federal
41 income tax; provided, however, that in the determination of such entire
42 net income,

43 (1) Entire net income shall exclude for the periods set forth in
44 paragraph (2)(F)(i) of this subsection, any amount, except with respect
45 to qualified mass commuting vehicles as described in section
46 168(f)(8)(D)(v) of the Internal Revenue Code as in effect immediately

1 prior to January 1, 1984, which is included in a taxpayer's federal
2 taxable income solely as a result of an election made pursuant to the
3 provisions of paragraph (8) of that section.

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

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

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

12 (C) Taxes paid or accrued to the United States, a possession or
13 territory of the United States, a state, a political subdivision thereof,
14 or the District of Columbia on or measured by profits or income, or
15 business presence or business activity, or the tax imposed by this act,
16 or any tax paid or accrued with respect to subsidiary dividends
17 excluded from entire net income as provided in paragraph (5) of
18 subsection (k) of this section;

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

20 (E) (Deleted by amendment, P.L.1995, c.418.)

21 (F) (i) The amount by which depreciation reported to the United
22 States Treasury Department for property placed in service on and after
23 January 1, 1981, but prior to taxpayer fiscal or calendar accounting
24 years beginning on and after the effective date of P.L.1993, c.172, for
25 purposes of computing federal taxable income in accordance with
26 section 168 of the Internal Revenue Code in effect after December 31,
27 1980, exceeds the amount of depreciation determined in accordance
28 with the Internal Revenue Code provisions in effect prior to January 1,
29 1981, but only with respect to a taxpayer's accounting period ending
30 after December 31, 1981; provided, however, that where a taxpayer's
31 accounting period begins in 1981 and ends in 1982, no modification
32 shall be required with respect to this paragraph (F) for the report filed
33 for such period with respect to property placed in service during that
34 part of the accounting period which occurs in 1981.

35 (ii) For the periods set forth in subparagraph (F)(i) of this
36 subsection, any amount, except with respect to qualified mass
37 commuting vehicles as described in section 168(f)(8)(D)(v) of the
38 Internal Revenue Code as in effect immediately prior to January 1,
39 1984, which the taxpayer claimed as a deduction in computing federal
40 income tax pursuant to a qualified lease agreement under paragraph
41 (8) of that section.

42 The director shall promulgate rules and regulations necessary to
43 carry out the provisions of this section, which rules shall provide,
44 among others, the manner in which the remaining life of property shall
45 be reported.

46 (G) (1) The amount of any civil, civil administrative, or criminal

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

17 (2) The amount of treble damages paid to the Department of
18 Environmental Protection pursuant to subsection a. of section 7 of
19 P.L.1976, c.141 (C.58:10-23.11f), for costs incurred by the
20 department in removing, or arranging for the removal of, an
21 unauthorized discharge upon failure of the discharger to comply with
22 a directive from the department to remove, or arrange for the removal
23 of, the discharge.

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

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

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

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

38 (i) Making, arranging for, placing or carrying loans to foreign
39 persons, provided, however, that in the case of a foreign person which
40 is an individual, or which is a foreign branch of a domestic corporation
41 (other than a bank), or which is a foreign corporation or foreign
42 partnership which is controlled by one or more domestic corporations
43 (other than banks), domestic partnerships or resident individuals, all
44 the proceeds of the loan are for use outside of the United States;

45 (ii) Making or placing deposits with foreign persons which are
46 banks or foreign branches of banks (including foreign subsidiaries) or

- 1 foreign branches of the taxpayers or with other international banking
2 facilities;
- 3 (iii) Entering into foreign exchange trading or hedging transactions
4 related to any of the transactions described in this paragraph; or
- 5 (iv) Such other activities as an international banking facility may,
6 from time to time, be authorized to engage in;
- 7 (C) Applicable expenses shall be any expense or other deductions
8 attributable, directly or indirectly, to the eligible gross income
9 described in subparagraph (B) of this paragraph.
- 10 (5) Entire net income shall exclude 100% of dividends which were
11 included in computing such taxable income for federal income tax
12 purposes, paid to the taxpayer by one or more subsidiaries owned by
13 the taxpayer to the extent of the 80% or more ownership of investment
14 described in subsection (d) of this section. With respect to other
15 dividends, entire net income shall not include 50% of the total included
16 in computing such taxable income for federal income tax purposes.
- 17 (6) (A) Net operating loss deduction. There shall be allowed as a
18 deduction for the taxable year the net operating loss carryover to that
19 year.
- 20 (B) Net operating loss carryover. A net operating loss for any
21 taxable year ending after June 30, 1984 shall be a net operating loss
22 carryover to each of the seven years following the year of the loss. The
23 entire amount of the net operating loss for any taxable year (the "loss
24 year") shall be carried to the earliest of the taxable years to which the
25 loss may be carried. The portion of the loss which shall be carried to
26 each of the other taxable years shall be the excess, if any, of the
27 amount of the loss over the sum of the entire net income, computed
28 without the exclusions permitted in paragraphs (4) and (5) of this
29 subsection or the net operating loss deduction provided by
30 subparagraph (A) of this paragraph, for each of the prior taxable years
31 to which the loss may be carried.
- 32 (C) Net operating loss. For purposes of this paragraph the term
33 "net operating loss" means the excess of the deductions over the gross
34 income used in computing entire net income without the net operating
35 loss deduction provided for in subparagraph (A) of this paragraph and
36 the exclusions in paragraphs (4) and (5) of this subsection.
- 37 (D) Change in ownership. Where there is a change in 50% or more
38 of the ownership of a corporation because of redemption or sale of
39 stock and the corporation changes the trade or business giving rise to
40 the loss, no net operating loss sustained before the changes may be
41 carried over to be deducted from income earned after such changes.
42 In addition where the facts support the premise that the corporation
43 was acquired under any circumstances for the primary purpose of the
44 use of its net operating loss carryover, the director may disallow the
45 carryover.
- 46 (l) "Real estate investment trust" shall mean any corporation, trust

1 or association qualifying and electing to be taxed as a real estate
2 investment trust under federal law.

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

38 (n) "International banking facility" shall mean a set of asset and
39 liability accounts segregated on the books and records of a depository
40 institution, United States branch or agency of a foreign bank, or an
41 Edge or Agreement Corporation that includes only international
42 banking facility time deposits and international banking facility
43 extensions of credit as such terms are defined in section 204.8(a)(2)
44 and section 204.8(a)(3) of Regulation D of the board of governors of
45 the Federal Reserve System, 12 CFR Part 204, effective December 3,
46 1981. In the event that the United States enacts a law, or the board

1 of governors of the Federal Reserve System adopts a regulation which
2 amends the present definition of international banking facility or of
3 such facilities' time deposits or extensions of credit, the Commissioner
4 of Banking shall forthwith adopt regulations defining such terms in the
5 same manner as such terms are set forth in the laws of the United
6 States or the regulations of the board of governors of the Federal
7 Reserve System. The regulations of the Commissioner of Banking
8 shall thereafter provide the applicable definitions.

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

12 (p) "New Jersey S corporation" means a corporation that is an S
13 corporation; which has made a valid election pursuant to section 3 of
14 P.L.1993, c.173 (C.54:10A-5.22); and which has been an S
15 corporation continuously since the effective date of the valid election
16 made pursuant to section 3 of P.L.1993, c.173 (C.54:10A-5.22).

17 (7) Entire net income shall exclude dividends received by a
18 taxpayer from a State-sponsored shared Foreign Sales Corporation,
19 as defined in subsection (g) of section 927 of the federal Internal
20 Revenue Code of 1986, 26 U.S.C. §927 (g), that is qualified as a
21 Foreign Sales Corporation, as defined in section 922 of the federal
22 Internal Revenue Code of 1986, 26 U.S.C. §922, to the extent that
23 such dividends are deductible under subsection (c) of section 245 of
24 the federal Internal Revenue Code, 26 U.S.C §245 (c). No exclusion
25 shall be allowable under subparagraph (5) of subsection (k) of section
26 4 of P.L.1945, c.162 (C.54:10A-4 (k) (5)) with respect to any
27 dividend which is distributed out of earnings and profits of a
28 corporation accumulated while the corporation was a Foreign Sales
29 Corporation. As used in this subparagraph, "State-sponsored" means
30 promoted by the State as a shared Foreign Sales Corporation,
31 provided that the State has no ownership interest or involvement in
32 management or daily operation of the shared Foreign Sales
33 Corporation but retains access to essential non-confidential
34 information such as share ownership, export earnings and compliance
35 status with requirements for such a corporation.

36 (cf: P.L.1995, c.418)

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38 3. This act shall take effect immediately.
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41 STATEMENT

42
43 This bill exempts State-sponsored Foreign Sales Corporations from
44 the tax imposed under the Corporation Business Tax Act, P.L.1945,
45 c.162 (C.54:10A-1 et seq.). A Foreign Sales Corporation (FSC) is an
46 entity established pursuant to sections 921 et seq. of the federal

1 Internal Revenue Code, 26 U.S.C. §921 et seq., that provides certain
2 incentive benefits to corporations which organize themselves as FSCs.
3 According to the Department of Commerce and Economic
4 Development, the primary benefit to be derived by participating
5 corporations is the equivalent of a 15 percent exemption from federal
6 income tax on export profits.

7 The bill also excludes dividends from a taxpayer's entire net income
8 when dividends are received from a State-sponsored shared Foreign
9 Sales Corporation qualified as an FSC under section 922 of the federal
10 Internal Revenue Code to the extent that such dividends are
11 deductible under 26 U.S.C. §245.

12 A shared FSC (SFSC) is essentially the same as an FSC except that
13 rather than being composed of one participating exporting company,
14 called a "shareholder," an SFSC can have up to 25 unrelated exporters.
15 An exporter member of an SFSC could own as little as 4 percent of an
16 SFSC. As used in this bill, "State-sponsored" means promoted by the
17 State as an FSC or an SFSC, provided that the State has no ownership
18 interest or managerial involvement in daily operations of an FSC or
19 SFSC but does retain access to essential nonconfidential information
20 such as share ownership, export earnings and compliance status.

21 According to the Department of Commerce and Economic
22 Development, participation in an SFSC can significantly reduce the
23 costs of maintaining an FSC for a corporation and can yield significant
24 tax savings on income earned from exports.

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29 Exempts Foreign Sales Corporations from the Corporate Business Tax
30 and exempts certain dividends received from shared Foreign Sales
31 Corporations.