

# What is the LLC Tax All About?

## **What is the LLC Tax?**

The amendment to HB 2 states: "122. Makes distributions from limited liability companies, partnerships, and associations subject to the interest and dividends tax regardless of whether they have transferable shares."

## **When was the LLC Tax passed?**

The LLC (Limited Liability Corporation) Tax was first created as an amendment to HB2 in the 2009 session. The amendment came out of the Finance Committee and was tacked onto HB2 at the eleventh hour of the budget creation process in June of 2009. When passed, it became retroactive to January 1, 2009.

## **Who is affected by this tax?**

Virtually every person in the State. This is a hidden tax to the consumer because we all patronize numerous businesses that are LLCs. This is also a hidden tax to LLCs who will not know how to handle this tax until approximately April of 2010 – a year and a quarter after this tax effects their businesses, their livelihoods, and the amount of compensation they will take home for 2009. At this late date, many LLCs still are unaware of this law and the impact it will have on their businesses. The consumers, mostly middle class, have no idea this tax affects them as well. As of January 11, 2010, rules are still being written in draft form by the Department of Revenue Administration.

## **How does this amendment effect the business climate in NH?**

This amendment will have a devastating effect on the business climate in NH. A retroactive and regressive law, this amendment took the ability to plan expenses for 2009 and a chunk of 2010 totally out of the hands of businesses and their advisors. The paperwork alone will cost businesses hundreds of thousands of dollars if not millions per year. Already CPA's are warning their clients to move their businesses out of NH. The estimated tax on businesses reaches as high as 13.5%.

## **What effect does this amendment have on job creation during this recession?**

Business owners have already said they are waiting for the rules to come out and a decision made on how their "reasonable compensation" will be determined by the "State". Jobs that would have been created are either on hold or have been lost. They will not be created or have been lost because businesses can't afford to both pay the State and an additional employee.

## **What does the term "reasonable compensation" mean?**

A new term, the State Legislature has decided to be the first in the nation to try out this concept at the State level. Now, what is deemed a reasonable compensation or salary for a business owner will not be determined by the business owner, but by the State.

A hearing on this issue before the NH State House Ways and Means Committee is scheduled for Thursday, January 14, 2010 at 9:00 am for HB 1607 which relates to the Business Profits Tax and not the LLC tax, but may set precedent for determining reasonable compensation for the LLC tax as well.

## **Why was no public hearing held on this amendment before passage?**

It is possible to tack an amendment on to a bill "in committee" after the bill has worked its way through the NH House and the NH Senate. Public hearings come in the front of the process so all legislators have an opportunity to hear from constituents. Placing the public hearings in front of the overall process benefits the public and helps to ensure the process is open and can be held to accountability as the bill or amendment works its way through the process.

However, in this case, no public hearings were held as the amendment was added at the last minute. This "dead of night" stealth tactic frequently results in bad laws that are not thoroughly vetted. Slipped into HB2 at the last minute, this unconstitutional amendment with a huge impact was passed by the Democrat controlled legislature in June of 2009 and subsequently signed into law by Governor Lynch.

### **Then why did I hear about public hearings in the North Country?**

These hearings were granted long after this amendment was passed (as opposed to prior to being passed) due to an angry business community that was requesting answers since July of 2009. A hearing was finally held in Concord on December 16th at which time the Department of Revenue Administration promised to hold more public hearings. Just before Christmas of 2009, it was announced that there would be 3 more hearings in Bristol, Plymouth, and Conway, NH— all located in Northern NH. The southern tier, where most businesses are located was understandably upset. More than 700 people traveled to these public hearings, many being bused in from Nashua and Manchester. For many, attending one hearing took as much as 7 or 8 hours of their time.

### **What is the current deadline for responses to this amendment?**

If you would like to make your views known to the Dept. of Revenue Administration, the deadline for written comments to be received is January 19, 2010. Please email: [FormsCmte@rev.state.nh.us](mailto:FormsCmte@rev.state.nh.us) or write to: NH DRA, Attn: John Hayes, Revenue Counsel, PO Box 457, Concord, NH 03302-0457.

### **Is there another way I can make my voice heard?**

Yes, please call Governor Lynch's office directly at 271-2121 and ask that these rules be stopped and the entire LLC tax sent back for review by the legislature.

### **Why this tax and why now?**

The Democratically controlled Legislature, was looking for money to cover shortfalls in the budget and decided this was a way \$15,000,000 could be raised. Instead of solving a real and existing problem, this legislative "income tax" was placed onto LLCs simply to cover increased spending in the 2009 budget in a way that it would be difficult to overturn.

### **Why do people say this amendment is unconstitutional?**

The NH State Constitution: Part 1, Article 23 reads as follows: (Art. 23 Retrospective Laws Prohibited). "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." Because this law is likely to be retroactive to January 1, 2009, the amendment is unconstitutional. Both Commissioner Kevin Clougherty and Revenue Counsel John Hayes have stated in all likelihood that this amendment will be retroactive to 01/2009 thus making this amendment unconstitutional.

### **What triggers the amendment to HB2?**

HB 1607 will determine what reasonable compensation is. There is a public hearing scheduled for 9:00 AM on Thursday, January 14, 2010 in the LOB (Legislative Office Building located behind the Capitol in Concord).

### **So, how will HB1607 affect you?**

There are a number of things, but in general HB 1607:

- gives the DRA the power to say you make too much money
- requires you to keep a massive amount of new record keeping to fight back
- eliminates "loss carry forwards" or allowing you to recoup your investment for creating things
- requires significant new record keeping if you or your company makes over \$50,001 or over
- mandates that you are not allowed to lose money
- dictates a "percentage" on the sale of assets, as to the limit you can claim, all up to the NH DRA to determine
- offers a paperwork safe harbor, then a paragraph later takes it back at their discretion

### **Who is responsible for passing this tax?**

The buck stops at the top – Governor Lynch and also those members of the Committee of Conference who said yes and passed the amendment on to the NH House Ways and Means Committee and then onto the Senate Finance Committee. See below also for the HB2 roll call voting record with a list of names for those members who voted yes.

### **Who recommended the tax to begin with?**

It is our understanding, that this tax was recommended to the Governor by the Department of Revenue Administration Commissioner Kevin Clougherty.

### **How does Governor Lynch fit into the passage of this bill?**

Governor Lynch was fully aware of this amendment and the effect it would have on businesses in NH and he subsequently signed this into law.

This quote was taken from a letter to the Union Leader and comes from David H. Mirsky, an attorney in Exeter. To view the entire letter please click here.

"From the time of his election in 2004, Democratic Gov. John Lynch was able to gain the support of a wide cross-section of New Hampshire voters, Republicans and independents as well as Democrats, by refusing steadfastly to capitulate to the demands of many liberal New Hampshire Democrats who favor an income tax to pay for the type of increased government spending we are now seeing on a national level with Democrats in Washington, D.C. Republicans and independents have favored Gov. Lynch largely because of the clarity and consistency of his opposition to a statewide income tax.

That clarity and consistency is apparently coming to an end, as Gov. Lynch has embraced the move by some Democrats in the Legislature to begin instituting major changes in our tax structure with little or no input from the people of New Hampshire. That is what is happening right now as our leaders in Concord continue to contemplate the details of a new tax on the income of small business people who have chosen to organize their businesses as limited liability companies, or LLCs."

### **What is the HB2 Committee of Conference voting record?**

Here is how each member voted on the final budget containing the LLC Tax and 40 other news and increased taxes and fees. Special thanks goes to Brian Tilton for this information – you will be directed to Brian's website. [\(Please go to website for critical links.\)](#)

House Roll Call  
Senate Roll Call

### **Who is on the Committee Of Conference?**

The following legislators put together the state budget including the LLC tax in the middle of the night: House: (C)Marjorie Smith, Sharon Nordgren, Daniel Eaton, Susan Almy, William Hatch, (a)John DeJoie, (a)Norman Major Senate: Sylvia B. Larsen, Margaret W. Hassan, Harold W. Janeway, Deborah Reynolds, Martha Fuller Clark, (a)Bob Odell

### **Who is on the Ways and Means Committee?**

These people helped craft the budget in the House. [\(Please go to website for critical links.\)](#)  
Members of the NH House Ways & Means Committee

### **Who are the members of the NH Senate Finance Committee?**

These people helped craft the budget in the Senate: Lou D'Allesandro, Chairman, Harold W. Janeway, V Chairman, Sylvia B. Larsen, Margaret W. Hassan, Kathleen G. Sgambati, John T. Gallus, Bob Odell

### **Where can I sign a petition against this tax?**

Andy Sanborn and Andrew Heminway have kindly begun a petition. Go to either Stop the LLC Tax or Petition FM (you'll find a link on the home page) or go directly to <http://www.petition.fm/petitions/stopthellctax>. To contact Andy or Andrew email: [stopllctax@gmail.com](mailto:stopllctax@gmail.com).

### **Where can I learn more?**

One of the best places to learn more is by listening to the "Pulse" radio from 1:00 – 3:00 PM daily with Brian Tilton. His website is also full of information and resources you can explore for more information with direct links to many newspaper articles, opinion pieces and letters. Visit Brian at [www.BrianTilton.com](http://www.BrianTilton.com) and click on the LLC link.

Also visit the Union Leader, the Concord Monitor, Fosters Daily Democrat, and the Nashua Telegraph.