

## CHAPTER Rev 300 BUSINESS PROFITS TAX

## PART Rev 303 ADDITIONS AND DEDUCTIONS MADE TO GROSS BUSINESS PROFITS

**Readopt with amendment Rev 303.01, effective 1-16-15 (Document #10758), to read as follows:**Rev 303.01 Compensation for Personal Services of Proprietor, Partner or Member.

(a) For purposes of this section, the following definitions shall apply:

- (1) “Actual personal services” means the services performed by a natural person, who is a proprietor, partner or member of an unincorporated business organization, that are directly related to the operation of the unincorporated business organization taking the compensation deduction, but not in any capacity for another business organization;
- (2) “Amounts that are fairly attributable to the actual personal services of the proprietor, partner or member” means the amount as would be allowed using the standards set forth in section 162(a)(1) of the ~~United States Internal Revenue Code~~ **IRC**, as amended, and Treasury Regulations, administrative rulings, and judicial cases interpreting such provision;
- (3) “Business activity” means “business activity” as defined in RSA 77-A:1, XII;
- (4) “Capital business asset” for purposes of determining the amount of the addition to the fair and reasonable compensation deduction allowable under RSA 77-A:4, III(a) means a “capital asset” as defined in section 1221(a) of the ~~United States Internal Revenue Code~~ **IRC**, as amended, provided that the capital business asset is an asset used by the unincorporated business organization to conduct business activity;
- (5) “Unincorporated business organization” means a proprietorship, partnership, or limited liability company taxed as a proprietorship or partnership for federal income tax purposes;
- (6) “Gross selling price as commissions on the sale of business assets” for purposes of determining the amount of the addition to the fair and reasonable compensation deduction allowable under RSA 77-A:4, III(a) means the amount received in exchange for the sale or other disposition of a capital business asset measured by the sum of:
  - a. Money received;
  - b. Indebtedness assumed by the buyer or transferee; and
  - c. The fair market value of any property, other than money, received in exchange for the capital business asset;
- (7) “Natural person” means a human being, as well as a trustee of a grantor trust not recognized as a business organization; and
- (8) “Total compensation” means the sum of compensation, as defined in Rev 301.10, fringe benefits, as defined in Rev 301.16, and any other form of remuneration for all proprietors, partners or members rendering actual personal services to the unincorporated business organization.

(b) An unincorporated business organization shall be allowed a compensation deduction for the total compensation that is reasonable and fairly attributable to its proprietors, partners or members who render actual personal services to the unincorporated business organization.

(c) The compensation deduction shall be determined for each proprietor, partner or member who rendered actual personal services to the unincorporated business organization and shall be allowed for amounts that would be allowable as reasonable under ~~Internal Revenue Code~~ IRC section 162(a)(1), as amended in the year the deduction is taken, Treasury Regulation section 1.162-7, administrative rulings and judicial cases interpreting ~~Internal Revenue Code~~ IRC section 162(a)(1).

(d) The amount determined in (c) above shall not exceed the amount reported as earned income, as defined in Rev 301.123, on the federal income tax returns of the proprietor, partner, or member, but may also include:

(1) An amount not to exceed net income from rental properties from federal Form 1040, schedule E, federal Form 8825 and federal Form 4835; and

(2) An amount not to exceed 15 percent of the gross selling price as commissions on the sale of capital business assets. If the proprietor, partner or member acted as the broker or agent for the sale of capital business assets, the following shall apply:

a. If no other broker or agent representing the seller was involved in the sale of the capital business asset, a commission not to exceed 15 percent of the total gross sales price as shown on federal Form 4797, federal Form 6252, federal Form 1065 schedule D, and federal Form 1040 for the sale of business assets; or

b. If the partner, proprietor or member acts as a co-broker, the maximum deduction shall be the difference between the amount determined in a. above and the amounts paid to other brokers or agents.

(e) If an unincorporated business organization or group of related business organizations is under audit review by the department and did not elect the record-keeping safe harbor on the return being audited, the unincorporated business organization or group of related business organizations may elect the record-keeping safe harbor during the audit review by filing an amended return reporting a compensation deduction of up to \$75,000 as total compensation for the tax year under audit review, which the department shall accept as reasonable.

(f) The compensation deduction shall not reduce the taxable business profits of the unincorporated business organization to below zero.

(g) An unincorporated business organization that deducts the record-keeping safe harbor amount of up to \$75,000 as total compensation for the tax year shall not be required to keep records as provided under (d), above.

(h) An unincorporated business organization that deducts in excess of the record-keeping safe harbor amount of \$75,000 as total compensation for the tax year shall keep such records as are necessary to determine that the compensation deduction is reasonable under §162(a)(1) of the U.S. ~~Internal Revenue Code~~ IRC, as it may be amended in the year the deduction is taken, and Treasury Regulations, administrative rules, and judicial decisions rendered thereunder.

(i) A partnership business organization electing to be taxed as a corporation for federal income tax purposes shall:

- (1) Not take a compensation deduction under RSA 77-A:4, III; and
- (2) Take a reasonable compensation deduction as allowed under ~~Internal Revenue Code~~ IRC section 162 when such deduction is:
  - a. Taken on the entity's federal corporate return filed with the Internal Revenue Service; and
  - b. In accordance with Rev 302.14.

(j) Where a proprietor, partner, or member provides actual personal services for multiple business organizations, the records of each business organization shall comply with the requirements of (i), above.

(k) Where a proprietor, partner, or member provides actual personal services for multiple business organizations, the deduction claimed by each business organization shall be for the actual personal services rendered to it by the individual in the capacity of the proprietor, partner, or member of the specific business organization for which the deduction is taken.

(l) Remuneration for the actual personal services performed by a spouse shall be deductible:

- (1) As compensation in determining the gross business profits of the business organization when the spouse is an employee; or
- (2) Under the provisions of RSA 77-A:4, III if the spouse is not an employee of the business organization and performs the personal services as a surrogate for the proprietor, partner or member.

**Readopt with amendment Rev 303.03, effective 9-24-22 (Document #13450), to read as follows:**

Rev 303.03 Net Operating Loss Deduction.

(a) Section 172 of the IRC for purposes of calculating the amount of any net operating loss deduction allowed under RSA 77-A:4, XIII, shall be followed, except:

- (1) The carryback of loss required by IRC section 172 (b)(1) is not required for New Hampshire's purposes; and
- (2) The amount is limited as provided in (c), (d), and (e), below.

(b) Net operating losses may be carried forward for 10 years following the loss year.

(c) Business organizations, subject to RSA 77-A:3, regarding the apportionment of income shall apportion any net operating loss carried forward using the formula provided in RSA 77-A:3 and Rev 304.

(d) Combined groups with more than one member subject to RSA 77-A shall:

- (1) Calculate separate apportionment percentages for each business organization as follows:

a. The denominators used to calculate these percentages shall be the sales, payroll, and property denominators of the combined group for tax periods ending before December 31, 2022, and shall be the sales denominator of the combined group for tax periods ending on or after December 31, 2022; and

b. The numerators shall be the New Hampshire sales, payroll, and property of each respective business organization subject to RSA 77-A for tax periods ending before December 31, 2022, and shall be the sales numerators of each respective business organization subject to RSA 77-A for tax periods ending on or after December 31, 2022;

(2) Treat each business organization's apportioned share of the combined loss amount as a tax attribute which remains with that business organization;

(3) Total the apportioned loss carry forward amounts of each business organization in the combined group possessing such tax attributes; and

(4) Apply the result in (3) above as a deduction from the gross business profits of the combined group ~~before~~*after* apportionment under RSA 77-A:3 in the taxable period in which the deduction is to be used.

(e) The net operating loss carry forward calculated in either (a), (c), or (d) above, shall be limited as provided in RSA 77-A:4, XIII, (a), (b), (c), (d), and (e) for each business organization.

(f) The resulting net operating loss shall be applied to the gross business profits ~~before~~*after* apportionment under RSA 77-A:3.

(g) Business organizations availing themselves of the net operating loss deduction shall:

(1) Maintain detailed records that confirm each step in the calculation of the:

- a. Net operating loss;
- b. Net operating loss carry forward; and
- c. Net operating loss deduction amounts; and

(2) Retain the federal and state tax returns and the detailed records relating to a net operating loss for all taxable periods to which the net operating loss relates.

(h) During a department audit of a taxable period where a New Hampshire net operating loss deduction is taken on a return, within the statute of limitations, the business organization shall:

(1) Provide the department with all state and federal tax returns and detailed records with an impact on the proper calculation of the deduction taken by the business organization;

(2) Not receive a refund for a prior year overpayment nor be assessed additional tax liability for prior year deficiencies resulting from an inquiry that reveals adjustments to prior taxable period net operating loss calculations would be appropriate in the liability of the business organization in any of the prior taxable periods outside the statute of limitations;

(3) Deduct the appropriate New Hampshire net operating loss deduction in the audit years as if the extra-statutory year adjustments had been made; and

(4) Adjust the carry forward amount in the years subsequent to the audit year.

#### APPENDIX

<b>Rule</b>	<b>Specific State Statute the Rule Implements</b>
Rev 303.01	RSA 21-J:13, I; RSA 77-A:4, III
Rev 303.03	RSA 77-A:4, XIII; RSA 77-A:15, II