

**SENATE BILL NO. 2104**

Introduced by

Finance and Taxation Committee

(At the request of the Tax Commissioner)

1 A BILL for an Act to create and enact a new section to chapter 57-38 of the North Dakota  
2 Century Code, relating to income tax withholding on oil and gas royalty payments to  
3 nonresidents; to amend and reenact sections 57-38-31.1 and 57-38-61 of the North Dakota  
4 Century Code, relating to composite withholding returns for nonresident members of  
5 passthrough entities and the provisions of the income tax chapter applicable to oil and gas  
6 royalty payments; and to provide an effective date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1.** A new section to chapter 57-38 of the North Dakota Century Code is created  
9 and enacted as follows:

- 10 1. For purposes of this section:
- 11 a. "Publicly traded partnership" means a publicly traded partnership. As defined in  
12 section 7704 of the Internal Revenue Code [26 U.S.C. 7704] that is not treated as  
13 a corporation.
- 14 b. "Remitter" means any person who distributes royalty payments to royalty owners.
- 15 c. "Royalty owner" means a person or entity entitled to receive periodic royalty  
16 payments for a nonworking interest in the production of oil or gas.
- 17 2. Except as provided in subsection 3, each remitter shall deduct and withhold from the  
18 net amount of the royalty payment made to each nonresident individual or business  
19 entity who does not have its commercial domicile in this state at the highest marginal  
20 rate provided in sections 57-38-30 and 57-38-30.3. The provisions of sections  
21 57-38-59 and 57-38-60 apply to the filing of the returns and payment of the tax under  
22 this subsection.
- 23 3. This section does not apply to royalty payments made to a royalty owner if the royalty  
24 owner is:

- 1           a. The United States or an agency of the federal government, this state or a political  
2           subdivision of this state, or another state or a political subdivision of another  
3           state;
- 4           b. A federally recognized Indian tribe with respect to on-reservation oil and gas  
5           production pursuant to a lease entered under the Indian Mineral Leasing Act of  
6           1938 [25 U.S.C. 396a through 396g];
- 7           c. The United States as trustee for individual Indians;
- 8           d. A publicly traded partnership;
- 9           e. An organization that is exempt from the tax under this chapter; or
- 10          f. The same person or entity as the remitter.
- 11          4. a. This section does not apply to a remitter that produced less than one hundred  
12           thousand barrels of oil or less than five hundred million cubic feet of gas in the  
13           preceding calendar year as certified to the tax commissioner in the manner and  
14           on forms prescribed by the tax commissioner.
- 15          b. Each remitter that is exempt from withholding under this subsection shall make  
16           an annual return to report royalty payments that exceed the dollar amounts in  
17           subsection 6 and must be reported in the same manner as provided in section  
18           57-38-60.
- 19          5. a. Each year, a publicly traded partnership that is exempt from withholding under  
20           subsection 3 shall transmit to the tax commissioner, in an electronic format  
21           approved by the tax commissioner, each partner's United States department of  
22           the treasury schedule K-1, form 1065, or form 1065-B, as applicable, filed  
23           electronically for the year with the United States internal revenue service.
- 24          b. A royalty owner that is a publicly traded partnership, or organization exempt from  
25           taxation under section 57-38-09, shall report to the remitter and tax commissioner  
26           under oath, on a form prescribed by the tax commissioner, all information  
27           necessary to establish that the remitter is not required under subsection 2 to  
28           withhold royalty payments made to the partnership or organization.
- 29          6. If the royalty payment made to a royalty owner under this section is less than six  
30           hundred dollars for the current withholding period, or is less than one thousand dollars  
31           if the payment is annualized, the tax commissioner may grant a remitter's request to

1           forgo withholding the tax from the royalty payment made to that royalty owner for the  
2           current withholding period or, if applicable, the royalty payments for the annual period.

3           **SECTION 2. AMENDMENT.** Section 57-38-31.1 of the North Dakota Century Code is  
4 amended and reenacted as follows:

5           **57-38-31.1. Composite returns.**

6           1. For purposes of this section, unless the context otherwise requires:

- 7           a. "Member" means ~~an individual who is~~ a shareholder of an S corporation; a  
8           partner in a general partnership, a limited partnership, or a limited liability  
9           partnership; a member of a limited liability company; settlor of a grantor trust, or  
10          a beneficiary of a trust.
- 11          b. "Nonresident" means an individual who is not a resident of or domiciled in the  
12          state ~~or, a trust not organized in the state, or a business entity that does not have~~  
13          its commercial domicile in the state.
- 14          c. "Passthrough entity" means ~~an entity that for the applicable tax year is treated as~~  
15          ~~an S corporation under this chapter or a general partnership, limited partnership,~~  
16          ~~limited liability partnership, trust, or limited liability company that for the applicable~~  
17          ~~tax year is not taxed as a corporation under this chapter~~ a corporation that for the  
18          applicable tax year is treated as an S corporation under the Internal Revenue  
19          Code, a limited liability company that for the applicable tax year is not taxed as a  
20          corporation for federal income tax purposes, or a general partnership, limited  
21          partnership, limited liability partnership, limited liability limited partnership, trust,  
22          grantor trust, or similar entity recognized by the laws of this state that is not taxed  
23          for federal income tax purposes at the entity level.
- 24          2. a. A passthrough entity may file a composite income tax return on behalf of electing  
25          nonresident members reporting and paying income tax, at the highest marginal  
26          rate provided in section 57-38-30.3 ~~for individuals~~, on the members' pro rata or  
27          distributive shares of income of the passthrough entity from doing business in, or  
28          deriving income from sources within, this state.
- 29          b. A nonresident member whose only source of income within the state is from one  
30          or more passthrough entities may elect to be included in a composite return filed  
31          under this section.

- 1           c. A nonresident member that has been included in a composite return may file an  
2           individual income tax return and shall receive credit for tax paid on the member's  
3           behalf by the passthrough entity.
- 4           3. a. A passthrough entity shall withhold income tax, at the highest tax rate provided in  
5           section 57-38-30.3 ~~for individuals~~, on the share of income of the entity distributed  
6           to each nonresident member and pay the withheld amount in the manner  
7           prescribed by the tax commissioner. The passthrough entity is liable to the state  
8           for the payment of the tax required to be withheld under this section and is not  
9           liable to any member for the amount withheld and paid ~~over~~ in compliance with  
10          this section. A member of a passthrough entity that is itself a passthrough entity  
11          (a lower-tier passthrough entity) is subject to this same requirement to withhold  
12          and pay ~~over~~ income tax on the share of income distributed by the lower-tier  
13          passthrough entity to each of its nonresident members. The tax commissioner  
14          shall apply tax withheld and paid ~~over~~ by a passthrough entity on distributions to  
15          a lower-tier passthrough entity to the withholding required of that lower-tier  
16          passthrough entity.
- 17          b. At the time of a payment made under this section, a passthrough entity shall  
18          deliver to the tax commissioner a return ~~upon~~ on a form prescribed by the tax  
19          commissioner showing the total amounts paid or credited to its nonresident  
20          members, the amount withheld in accordance with this section, and any other  
21          information the tax commissioner may require. A passthrough entity shall furnish  
22          to its nonresident member annually, but not later than the fifteenth day of the third  
23          month after the end of its taxable year, a record of the amount of tax withheld on  
24          behalf of ~~such~~ the member on a form prescribed by the tax commissioner.
- 25          c. Notwithstanding subdivision a, a passthrough entity is not required to withhold tax  
26          for a nonresident member if:
- 27               (1) The member has a pro rata or distributive share of income of the  
28               passthrough entity from doing business in, or deriving income from sources  
29               within, this state of less than one thousand dollars per annual accounting  
30               period;

- 1                   (2) The tax commissioner has determined by rule, ruling, or instruction that the  
2                   member's income is not subject to withholding;
- 3                   (3) The member elects to have the tax due paid as part of a composite return  
4                   filed by the passthrough entity under subsection 2; or
- 5                   (4) The entity is a publicly traded partnership as defined by section 7704(b) of  
6                   the Internal Revenue Code which is treated as a partnership for the  
7                   purposes of the Internal Revenue Code and which has agreed to file an  
8                   annual information return reporting the name, address, taxpayer  
9                   identification number, and other information requested by the tax  
10                  commissioner of each unitholder with an income in the state in excess of  
11                  five hundred dollars.
- 12                  d. A passthrough entity failing to file a return, or failing to withhold or remit the tax  
13                  withheld, as required by this section, is subject to the provisions of  
14                  section 57-38-45.

15                  **SECTION 3. AMENDMENT.** Section 57-38-61 of the North Dakota Century Code is  
16                  amended and reenacted as follows:

17                  **57-38-61. Provisions of chapter applicable.**

18                  The provisions of sections 57-38-33, 57-38-34, 57-38-38, 57-38-39, 57-38-40, 57-38-44,  
19                  57-38-45, 57-38-46, 57-38-47, 57-38-53, 57-38-54, 57-38-55, 57-38-56, and 57-38-57 shall,  
20                  insofar as consistent therewith, govern the administration of section 1 of this Act and sections  
21                  57-38-59, 57-38-60, and 57-38-60.1, and 57-38-60.2. The ~~term~~terms "remitter" as used in  
22                  section 1 of this Act and "employer" as used in sections 57-38-59, 57-38-60, and 57-38-60.1,  
23                  and 57-38-60.2 also ~~means~~mean "taxpayer" as used in this chapter. Sections 57-38-60.1 and  
24                  57-38-60.2 apply to section 1 of this Act. In addition, the authority of the tax commissioner to  
25                  adopt rules includes the authority to make such agreements with the United States government  
26                  or any of its agencies as are necessary to provide for the deducting and withholding of tax from  
27                  the wages of federal employees in this state.

28                  **SECTION 4. EFFECTIVE DATE.** This Act is effective for taxable years beginning after  
29                  December 31, 2013.