

Sixty-third  
Legislative Assembly  
of North Dakota

ENGROSSED SENATE BILL NO. 2104

Introduced by

Finance and Taxation Committee

(At the request of the Tax Commissioner)

1 A BILL for an Act to amend and reenact section 57-38-31.1 of the North Dakota Century Code,  
2 relating to composite withholding returns for nonresident members of passthrough entities; and  
3 to provide an effective date.

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

5 **SECTION 1. AMENDMENT.** Section 57-38-31.1 of the North Dakota Century Code is  
6 amended and reenacted as follows:

7 **57-38-31.1. Composite returns.**

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

9 a. "Member" means an individual ~~who~~ or passthrough entity that is a shareholder of  
10 an S corporation; a partner in a general partnership, a limited partnership, or a  
11 limited liability partnership; a member of a limited liability company; settlor of a  
12 grantor trust, or a beneficiary of a trust.

13 b. "Nonresident" means an individual who is not a resident of or domiciled in the  
14 state ~~or~~, a trust not organized in the state, or a passthrough entity that does not  
15 have its commercial domicile in the state.

16 c. "Passthrough entity" means ~~an entity that for the applicable tax year is treated as~~  
17 ~~an S corporation under this chapter or a general partnership, limited partnership,~~  
18 ~~limited liability partnership, trust, or limited liability company that for the applicable~~  
19 ~~tax year is not taxed as a corporation under this chapter~~ a corporation that for the  
20 applicable tax year is treated as an S corporation under the Internal Revenue  
21 Code, a limited liability company that for the applicable tax year is not taxed as a  
22 corporation for federal income tax purposes, or a general partnership, limited  
23 partnership, limited liability partnership, limited liability limited partnership, trust,

1                    grantor trust, or similar entity recognized by the laws of this state that is not taxed  
2                    for federal income tax purposes at the entity level.

3            2.    a.    A passthrough entity may file a composite income tax return on behalf of electing  
4                    nonresident members reporting and paying income tax, at the highest marginal  
5                    rate provided in section 57-38-30.3 ~~for individuals~~, on the members' pro rata or  
6                    distributive shares of income of the passthrough entity from doing business in, or  
7                    deriving income from sources within, this state.

8                    b.    A nonresident member whose only source of income within the state is from one  
9                    or more passthrough entities may elect to be included in a composite return filed  
10                    under this section.

11                    c.    A nonresident member that has been included in a composite return may file an  
12                    individual income tax return and shall receive credit for tax paid on the member's  
13                    behalf by the passthrough entity.

14            3.    a.    A passthrough entity shall withhold income tax, at the highest tax rate provided in  
15                    section 57-38-30.3 ~~for individuals~~, on the share of income of the entity distributed  
16                    to each nonresident member and pay the withheld amount in the manner  
17                    prescribed by the tax commissioner. The passthrough entity is liable to the state  
18                    for the payment of the tax required to be withheld under this section and is not  
19                    liable to any member for the amount withheld and paid ~~over~~ in compliance with  
20                    this section. A member of a passthrough entity that is itself a passthrough entity  
21                    (a lower-tier passthrough entity) is subject to this same requirement to withhold  
22                    and pay ~~over~~ income tax on the share of income distributed by the lower-tier  
23                    passthrough entity to each of its nonresident members. The tax commissioner  
24                    shall apply tax withheld and paid ~~over~~ by a passthrough entity on distributions to  
25                    a lower-tier passthrough entity to the withholding required of that lower-tier  
26                    passthrough entity.

27                    b.    At the time of a payment made under this section, a passthrough entity shall  
28                    deliver to the tax commissioner a return ~~upon~~ upon a form prescribed by the tax  
29                    commissioner showing the total amounts paid or credited to its nonresident  
30                    members, the amount withheld in accordance with this section, and any other  
31                    information the tax commissioner may require. A passthrough entity shall furnish

1 to its nonresident member annually, but not later than the fifteenth day of the third  
2 month after the end of its taxable year, a record of the amount of tax withheld on  
3 behalf of ~~such~~the member on a form prescribed by the tax commissioner.

4 c. Notwithstanding subdivision a, a passthrough entity is not required to withhold tax  
5 for a nonresident member if:

6 (1) The member has a pro rata or distributive share of income of the  
7 passthrough entity from doing business in, or deriving income from sources  
8 within, this state of less than one thousand dollars per annual accounting  
9 period;

10 (2) The tax commissioner has determined by rule, ruling, or instruction that the  
11 member's income is not subject to withholding;

12 (3) The member elects to have the tax due paid as part of a composite return  
13 filed by the passthrough entity under subsection 2; or

14 (4) The entity is a publicly traded partnership as defined by section 7704(b) of  
15 the Internal Revenue Code which is treated as a partnership for the  
16 purposes of the Internal Revenue Code and which has agreed to file an  
17 annual information return reporting the name, address, taxpayer  
18 identification number, and other information requested by the tax  
19 commissioner of each unitholder with an income in the state in excess of  
20 five hundred dollars; or

21 (5) The member is a lower-tier passthrough entity that elects to be exempted  
22 from the withholding requirement under this subsection. The election must  
23 be made on a form and in a manner prescribed by the tax commissioner.  
24 The form must include a statement that the member certifies that the  
25 member will file any return and pay any tax required by this chapter on its  
26 distributive share of income from the source passthrough entity and that the  
27 member is subject to this state's jurisdiction for the collection of that tax and  
28 any applicable penalty and interest. The tax commissioner may revoke the  
29 exemption under this paragraph if the source passthrough entity or member  
30 fails to comply with the requirements of this paragraph. If the exemption is  
31 revoked, the source passthrough entity shall begin withholding from the

1                                   member within sixty days of receiving notification of the revocation from the  
2                                   tax commissioner. The tax commissioner may prescribe any procedures and  
3                                   guidelines necessary to administer this paragraph.

4                   d.   A passthrough entity failing to file a return, or failing to withhold or remit the tax  
5                   withheld, as required by this section, is subject to the provisions of  
6                   section 57-38-45.

7                   **SECTION 2. EFFECTIVE DATE.** This Act is effective for taxable years beginning after  
8                   December 31, 2013.