

GENERAL ASSEMBLY OF NORTH CAROLINA
SESSION 2011

S

1

SENATE BILL 824

Short Title: Expedited Rule Making for Forced Combination. (Public)

Sponsors: Senators Rucho, Hartsell; Blue, Brunstetter, Clodfelter, Harrington, McKissick, Rabon, Rouzer, and Stevens.

Referred to: Finance.

May 21, 2012

A BILL TO BE ENTITLED

AN ACT TO REQUIRE THE SECRETARY OF REVENUE'S INTERPRETATION OF THE LAW CONCERNING THE SECRETARY'S AUTHORITY TO ADJUST NET INCOME OR REQUIRE A COMBINED RETURN BE MADE THROUGH RULE MAKING AND TO PROVIDE AN EXPEDITED PROCESS FOR RULE MAKING ON THIS ISSUE.

The General Assembly of North Carolina enacts:

SECTION 1. G.S. 105-262(b) is repealed.

SECTION 2. Article 9 of Chapter 105 of the General Statutes is amended by adding a new section to read:

"§ 105-262A. Rules to exercise authority under G.S. 105-130.5A.

(a) Purpose and Scope. – It is the policy of the State to provide necessary guidance on a timely basis to corporate taxpayers subject under G.S. 105-130.5A to have their net income adjusted or to be required to file a combined return. Except for a voluntary redetermination as allowed under G.S. 105-130.5A(c), the Secretary may not redetermine the State net income of a corporation properly attributable to its business carried on in the State under G.S. 105-130.5A until a rule adopted by the Secretary in accordance with this section becomes effective. This section provides an expedited procedure for the adoption of rules needed to administer G.S. 105-130.5A. The Secretary may not interpret G.S. 105-130.5A in the form of a bulletin or directive under G.S. 105-264.

The Secretary is exempt from G.S. 150B-21.1 through G.S. 150B-21.4 of Part 2 of Article 2A of Chapter 150B of the General Statutes but is subject to the expedited procedure for the adoption of rules as established by this section. The Secretary is exempt from Part 3 of Article 2A of Chapter 150B of the General Statutes but is subject to the expedited review procedure as established by this section.

(b) Definition. – The definitions in G.S. 150B-2 apply in this section.

(c) Fiscal Note. – The Secretary must prepare a fiscal note for a proposed new rule or a proposed change to a rule that has a substantial economic impact. The fiscal note must be submitted with the proposed rule when the rule is submitted to the Codifier of Rules, and the Codifier of Rules must publish the fiscal note with the proposed rule on the Internet. The Secretary must accept a written comment on the fiscal note in the same manner the Secretary accepts written comments on the proposed rule. The Secretary is not subject to the fiscal note requirement under G.S. 105-262(c). For purposes of this section, a "substantial economic impact" has the same meaning as defined in G.S. 150B-21.4(b1).

(d) Adoption. – The Secretary may adopt a rule under this section by using the procedure for adoption of a temporary rule set forth in G.S. 150B-21.1(a3). The Secretary must



1 provide electronic notification of the adoption of a rule to persons on the mailing list
2 maintained in accordance with G.S. 150B-21.2(d) and any other interested parties, including
3 those originally given notice of the rule making and those who provided comment on the rule.
4 If the Secretary receives written comment objecting to the rule and requesting review by the
5 Commission, the rule must be reviewed in accordance with subsections (e) through (i) of this
6 section. A person may object to the rule and request review by the Commission at any point
7 prior to the adoption of the rule and by 5:00 P.M. on the third business day following electronic
8 notification from the Secretary of the adoption of a rule. If the Secretary receives no written
9 comment objecting to the rule and requesting review by the Commission, the Secretary must
10 deliver the rule to the Codifier of Rules. The Codifier of Rules must enter the rule into the
11 North Carolina Administrative Code upon receipt of the rule.

12 (e) Review. – If the Secretary receives written comment objecting to the rule and
13 requesting review by the Commission, the Secretary must submit the rule to the Commission
14 for review. The Commission may not consider questions relating to the quality or efficacy of
15 the rule but must restrict its review to a determination of whether the rule meets all of the
16 following criteria:

17 (1) It is within the authority delegated to the agency by the General Assembly.

18 (2) It is clear and unambiguous.

19 (3) It is reasonably necessary to implement or interpret an enactment of the
20 General Assembly, or of Congress, or a regulation of a federal agency. The
21 Commission must consider the cumulative effect of all rules adopted by the
22 agency related to the specific purpose for which the rule is proposed.

23 (4) It was adopted in accordance with this section.

24 (f) Manner of Review. – When the Commission reviews a rule under this section, the
25 time limits in subsections (b) and (b1) of G.S. 150B-21.1 apply. The Commission must review
26 the rule to determine whether the rule meets the standards in subsection (e) of this section. The
27 Commission must direct a member of its staff who is an attorney licensed to practice law in
28 North Carolina to review the rule. The staff member must make a recommendation to the
29 Commission or its designee. The Commission's designee must be a panel of at least three
30 members of the Commission. The staff member, Commission's designee, or the Commission
31 may also request technical changes as allowed in G.S. 150B-21.10. In reviewing the rule, the
32 Commission may consider any information submitted by the Secretary or another person.

33 (g) Objection. – If the Commission or its designee finds that the rule does not meet the
34 standards in subsection (e) of this section and objects to the rule, the Commission or its
35 designee must send the Secretary a written statement of the objection and the reason for the
36 objection within one business day. The Secretary must take one of the following actions:

37 (1) Change the rule to satisfy the Commission's objection and submit the revised
38 rule to the Commission.

39 (2) Submit a written response to the Commission indicating that the Secretary
40 has decided not to change the rule.

41 (h) Changes. – When the Secretary changes a rule in response to an objection by the
42 Commission, the Commission must determine whether the change satisfies the Commission's
43 objection. If it does, the Commission must approve the rule. If it does not, the Commission
44 must send the Secretary a written statement of the Commission's continued objection and the
45 reason for the continued objection.

46 (i) Approval. – If the Commission or its designee finds that the rule meets the standards
47 in subsection (e) of this section, the Commission or its designee must approve the rule and
48 deliver the rule to the Codifier of Rules. The Codifier of Rules must enter the rule into the
49 North Carolina Administrative Code upon receipt from the Commission or its designee.

50 (j) Return of Rule. – A rule to which the Commission has objected remains under
51 review by the Commission until the Secretary decides not to satisfy the Commission's objection

1 and makes a written request to the Commission to return the rule to the Secretary. When the
2 Commission returns a rule to the Secretary in accordance with this section, the Secretary may
3 file an action for declaratory judgment in Wake County Superior Court pursuant to Article 26
4 of Chapter 1 of the General Statutes.

5 (k) Effective Date. – G.S. 150B-21.3 does not apply to a rule adopted under this
6 section. A rule adopted under this section becomes effective on the last day of the month the
7 Codifier of Rules enters the rule in the North Carolina Administrative Code."

8 **SECTION 3.** G.S. 150B-1(d)(4) reads as rewritten:

9 "(d) Exemptions from Rule Making. – Article 2A of this Chapter does not apply to the
10 following:

11 ...

12 (4) The Department of Revenue, with respect to the notice and hearing
13 requirements contained in Part 2 of Article 2A. With respect to the Secretary
14 of Revenue's authority to redetermine the State net taxable income of a
15 corporation under G.S. 105-130.5A, the Department is subject to the
16 rule-making requirements of G.S. 105-262A.

17"

18 **SECTION 4.** On June 30, 2011, the Governor signed into law S.L. 2011-390,
19 House Bill 619, as passed by the General Assembly. The law repealed the Secretary of
20 Revenue's authority to adjust a corporation's net income or require a combined return under
21 G.S. 105-130.6, 105-130.15, and 105-130.16 and replaced it with a new authority under
22 G.S. 105-130.5A. The Fiscal Research Division of the North Carolina General Assembly
23 prepared a fiscal memo on House Bill 619. Therefore, notwithstanding G.S. 105-262A(c), as
24 enacted by Section 2 of this act, G.S. 105-262(c), and Section 7 of the Budget Manual prepared
25 by the Office of State Budget and Management, the Secretary of Revenue shall not be required
26 to prepare a fiscal note for a proposed new rule submitted to the Codifier of Rules under
27 G.S. 105-262A, as enacted by this act, prior to December 31, 2012.

28 **SECTION 5.** On April 17, 2012, the Department of Revenue published a directive
29 pursuant to G.S. 105-264, CD-12-02, that explains the Secretary's authority under
30 G.S. 105-130.5A to redetermine a corporation's net income by adjusting the corporation's
31 intercompany transactions or requiring a corporation to file a combined income tax return for
32 tax years beginning on or after January 1, 2012. This act supersedes the Directive; however, a
33 taxpayer who relied upon the interpretation in the Directive and whose North Carolina taxable
34 income for the 2012 taxable year is less under the Directive's interpretation than under an
35 interpretation of G.S. 105-130.5A by a rule adopted pursuant to G.S. 105-262A, as enacted by
36 this act, is entitled to rely on the interpretation under the Directive for the 2012 taxable year.

37 **SECTION 6.** S.L. 2011-390, as amended by S.L. 2011-411, enacted
38 G.S. 105-130.5A, effective for taxable years beginning on or after January 1, 2012. The
39 Secretary of Revenue's authority under G.S. 105-130.5A exists continuously for taxable years
40 beginning on or after January 1, 2012. G.S. 105-262A, as enacted by Section 2 of this act,
41 prevents the Secretary from exercising the authority granted under G.S. 105-130.5A until a rule
42 adopted in accordance with G.S. 105-262A becomes effective. After the rule becomes
43 effective, the Secretary may issue a proposed denial of a refund or a proposed assessment under
44 the authority of G.S. 105-130.5A for any taxable year beginning on or after January 1, 2012,
45 subject to the applicable statute of limitations.

46 **SECTION 7.** This act is effective when it becomes law.