

Comparison of

An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto, 73 Stat. 555, Pub. Law 86-272, 15 U.S.C. 381 et seq.;

and

the Business Activity Tax Simplification Act of 2019, H.R. 3063 (116th Congress)

116th Congress

H.R. 3063

1st Session

To regulate certain State taxation of interstate commerce, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

June 3, 2019

Mr. CHABOT (for himself and Mr. SCOTT of Virginia) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To regulate certain State taxation of interstate commerce, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Business Activity Tax Simplification Act of 2019”.

SEC. 2. MODERNIZATION OF PUBLIC LAW 86-272.

- (a) SOLICITATIONS WITH RESPECT TO SALES AND TRANSACTIONS OF OTHER THAN TANGIBLE PERSONAL PROPERTY.—Section 101 of the Act entitled “An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto”, approved September 14, 1959 (15 U.S.C. 381 et seq.), is amended—

[EDITOR’S NOTE. H.R. 3063’s amendment of P.L. 86-272, 15 U.S.C. 381, 73 Stat. 555 references the numeration of the uncodified act, 73 Stat. 555. We therefore compare below the amendments proposed by H.R. 3063 to the uncodified act rather than to the codified version (15 U.S.C. 381). There is no difference in meaning between the two versions. The uncodified act (statute at large) is attached.]

[EDITOR’S NOTE. Here begins “An Act regulating the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto” (73 Stat. 555), marked to show H.R. 3063’s proposed amendments. Additions to 73 Stat. 555 are shown by underscore and deletions by strike-through.]

AN ACT

Relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I—IMPOSITION OF MINIMUM STANDARD

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of enactment of this Act [September 14, 1959], a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are ~~either, or both,~~ any one or more of the following:

1. ~~the solicitation of orders by such person, or his representative in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and (which are sent outside the State for approval or rejection) or customers by such person, or the representative of such person, in such State for sales or transactions, which are—~~

(A) in the case of tangible personal property, fulfilled by shipment or delivery from a point outside the State; and

(B) in the case of all other forms of property, services, and other transactions, fulfilled or distributed from a point outside the State;

- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1);

(3) the furnishing of information to customers of affiliates in such State, or the coverage of events or other gathering of information in such State by such person, or his representative, which information is used or disseminated from a point outside the State;

(4) those business activities directly related to such person's potential or actual purchase of goods or services within the State if the final decision to purchase is made outside the State; and

(5) by reason of sales or transactions of a digital good or a digital service.

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

~~(c) Sales or solicitation of orders for sales by independent contractors— For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or tangible personal property.~~

(c) For purposes of subsection (a), a person shall not be considered to have engaged in business activities within a State during any taxable year merely—

(1) by reason of sales or transactions in such State, the solicitation of orders for sales or transactions in such state, the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State, on behalf of such person by one or more independent contractors;

(2) by reason of the maintenance of an office in such State by one or more independent contractors whose activities on behalf of such person in such State are limited to making sales or fulfilling transactions, soliciting orders for sales or transactions, the furnishing of information to customers or affiliates, or the coverage of events or other gathering of information; or

(3) by reason of the furnishing of information to an independent contractor by such person ancillary to the solicitation of orders or transactions by the independent contractor on behalf of such person.

(d) Definitions — For purposes of this section—

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling or fulfilling transactions, or soliciting orders for ~~the sale of, tangible personal property a sale or transaction, furnishing information, or covering events, or otherwise gathering information~~ for more than one principal and who holds himself out as such in the regular course of his business activities; and

(2) the term "representative" does not include an independent contractor.

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to persons or circumstances other than those to which it is held invalid, shall not be affected thereby.

Sec. 105. For taxable periods beginning on or after January 1, 2019, the prohibitions of Sec. 101 that apply with respect to net income taxes shall also apply with respect to each other business activity tax, as defined in section 5(a)(2)ⁱ of the *Business Activity Tax Simplification Act of 2019*. A

State or political subdivision thereof may not assess or collect any tax which by reason of this section the State or political subdivision may not impose.

Sec. 106. For purposes of this title—

- (1) the term ‘digital good’ means any software or other good that is delivered or transferred electronically, including sounds, images, data, facts, or combinations thereof, maintained in digital format, where such software or other good is the true object of the transaction, rather than the activity or service performed to create such software or other good, that results in the delivery to the customer of a complete copy of such software or other good, with the right to use permanently or for a specified period, and includes as an incidental component charges for the delivery or transfer of such software or other good; and
- (2) the term ‘digital service’ means any service that is provided electronically, including but not limited to audio services, data processing, cloud computing, the provision of remote access to or use of a digital good, and includes as an incidental component charges for the electronic provision of the digital service to the customer.

Sec. 3 MINIMUM JURISDICTIONAL STANDARD FOR STATE AND LOCAL NET INCOME TAXES AND OTHER BUSINESS ACTIVITY TAXES.

(a) IN GENERAL.—No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any person relating to such person’s activities in interstate commerce unless such person has a physical presence in the State during the taxable period with respect to which the tax is imposed.

(b) REQUIREMENTS FOR PHYSICAL PRESENCE.

(1) IN GENERAL.— For purposes of subsection (a), a person has a physical presence in a State only if such person’s business activities in the State include any of the following during such person’s taxable year:

A. Being an individual physically in the State, or assigning one or more employees to be in the State.

B. Using the services of an agent (excluding an employee) to establish or maintain the market in the State if such agent does not perform business services in the State for any other person during such taxable year.

(c). TAXABLE PERIODS NOT CONSISTING OF A YEAR.— If the taxable period for which the tax is imposed is not a year, then any requirements expressed in days for establishing physical presence under this Act shall be adjusted pro rata accordingly.

(d). MINIMUM JURISDICTIONAL STANDARD.— This section provides for minimum jurisdictional standards and shall not be construed to modify, affect, or supersede the authority of a State or any other provision of Federal law allowing persons to conduct greater activities without the impositions of tax jurisdiction.

(e). EXCEPTIONS.—

(1) DOMESTIC BUSINESS ENTITIES AND INDIVIDUALS DOMICILED IN, OR RESIDENTS OF, THE STATE.—Subsection (a) does not apply with respect to—

(A) a person (other than an individual) that is incorporated or formed under the laws of the State (or domiciled in the State) in which the tax is imposed; or

(B) an individual who is domiciled in, or a resident of, the State in which the tax is imposed.

(2) TAXATION OF PARTNERS AND SIMILAR PERSONS.—This section shall not be construed to modify or affect any State business activity tax liability of an owner or beneficiary of an entity that is a partnership, an S corporation (as defined in [section 1361 of the Internal Revenue Code of 1986](#)), a limited liability company (classified as a partnership for Federal income tax purposes), a

trust, an estate, or any other similar entity has a physical presence in the State in which the tax is imposed.

(3) PRESERVATION OF AUTHORITY.— This section shall not be construed—

(A) to modify, affect, or supersede the authority of a State to enact a law and bring an enforcement action under such law or existing law against a person or entity, including related person or entity, that is engaged in an illegal activity, a sham transaction, or an actual abuse in its business activities in order to ensure a proper reflection of its tax liabilities; or

(B) to supersede the authority of a State to require combined reporting.

SEC 4. GROUP RETURNS.

If, in computing the net income tax or other business activity tax liability of a person for a taxable year, the net income or other economic results of affiliated persons is taken into account, the portion of such combined or consolidated net income or other economic results that may be subject to tax by the State shall be computed using the methodology that is generally applicable to businesses conducting similar business activities and, if that generally applicable methodology employs an apportionment formula, the denominator or denominators of that formula shall include the aggregate factors of all persons whose net income or other economic results are included in such combined or consolidated net income or other economic results and the numerator or numerators shall include the factors attributable to the State of only those persons that are themselves subject to taxation by the State pursuant to the provisions of this Act and subject to all other legal constraints on State taxation of interstate or foreign commerce.

[Editor's note. The dense text above means in short that H.R. 3603 does not require that states must use combined filing methods (many taxpayers prefer separate entity filing), but if they do, they must use the Joyce

method to determine the apportionment formula.] [The Multistate Tax Commission is preparing model legislation for states to use that want to adopt the *Finnigan* method, which some commentators believe discourages income shifting better than the *Joyce* method.]

SEC. 5. DEFINITIONS AND EFFECTIVE DATE.

(a) DEFINITIONS.— For purposes of this Act:

(1) NET INCOME TAX.— The term “net income tax” has the meaning given that term for the purposes of the Act entitled “An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto”, approved September 14, 1959 (15 U.S.C. 381 et seq.). [Editor’s Note. See sec. 103, supra.]

(2) OTHER BUSINESS ACTIVITY TAX.—

(A) IN GENERAL.— The term “other business activity tax” means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.

(B) EXCLUSION.— The term “other business activity tax” does not include a sales tax, a use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a tax imposed on the privilege of doing business.

(3) PERSON.— The term “person” has the meaning given such term by [section 1 of title 1 of the United States Code](#). Each corporation that is a member of

a group of affiliated corporations, whether unitary or not, is itself a separate “person”.

(4) STATE.— The term “State” means any of several States, the District of Columbia, or any territory or possession of the United States, or political subdivision of any of the foregoing.

(5) TANGIBLE PERSONAL PROPERTY.— For purposes of section 3(b)(1)(C), the leasing or owning of tangible personal property does not include the leasing or licensing of computer software.

(b) EFFECTIVE DATE.— This Act shall apply with respect to taxable periods beginning on or after January 1, 2020.

ⁱ (2) OTHER BUSINESS ACTIVITY TAX.—

(A) IN GENERAL.—The term “other business activity tax” means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.

(B) EXCLUSION.—The term “other business activity tax” does not include a sales tax, a use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services whether or not denominated a tax imposed on the privilege of doing business.