

CORPORATE TAX AMENDMENTS

2021 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Curtis S. Bramble

House Sponsor: Robert M. Spendlove

LONG TITLE**Committee Note:**

The Revenue and Taxation Interim Committee recommended this bill.

Legislative Vote: 18 voting for 0 voting against 1 absent

General Description:

This bill amends corporate franchise and income tax provisions related to Utah net loss.

Highlighted Provisions:

This bill:

- ▶ allows a taxpayer to carry back, for up to three years, a Utah net loss realized during certain taxable years;

- ▶ provides a process for carrying back a Utah net loss;

- ▶ authorizes the State Tax Commission to make rules to administer the Utah net loss carry back;

- ▶ clarifies the calculation of the 80% limitation on carrying forward a Utah net loss;

and

- ▶ makes technical and conforming changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

This bill provides retrospective operation.

Utah Code Sections Affected:

AMENDS:

59-7-101, as last amended by Laws of Utah 2020, Sixth Special Session, Chapter 15

59-7-110, as last amended by Laws of Utah 2020, Sixth Special Session, Chapter 10

59-7-522, as last amended by Laws of Utah 2018, Second Special Session, Chapter 3

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **59-7-101** is amended to read:

59-7-101. Definitions.

As used in this chapter:

(1) "Adjusted income" means unadjusted income as modified by Sections **59-7-105** and **59-7-106**.

(2) (a) "Affiliated group" means one or more chains of corporations that are connected through stock ownership with a common parent corporation that meet the following requirements:

(i) at least 80% of the stock of each of the corporations in the group, excluding the common parent corporation, is owned by one or more of the other corporations in the group; and

(ii) the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

(b) "Affiliated group" does not include corporations that are qualified to do business but are not otherwise doing business in this state.

(c) For purposes of this Subsection (2), "stock" does not include nonvoting stock which is limited and preferred as to dividends.

(3) "Apportionable income" means adjusted income less nonbusiness income net of related expenses, to the extent included in adjusted income.

(4) "Apportioned income" means apportionable income multiplied by the apportionment fraction as determined in Section **59-7-311**.

(5) "Business income" means the same as that term is defined in Section **59-7-302**.

(6) "Captive insurance company" means the same as that term is defined in Section **31A-1-301**.

(7) (a) "Captive real estate investment trust" means a real estate investment trust if:

(i) the shares or beneficial interests of the real estate investment trust are not regularly traded on an established securities market; and

(ii) more than 50% of the voting power or value of the shares or beneficial interests of the real estate investment trust are directly, indirectly, or constructively:

(A) owned by a controlling entity of the real estate investment trust; or

(B) controlled by a controlling entity of the real estate investment trust.

(b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining "established securities market."

(8) (a) "Common ownership" means the direct or indirect control or ownership of more than 50% of the outstanding voting stock of:

(i) a parent-subsidary controlled group as defined in Section 1563, Internal Revenue Code, except that 50% shall be substituted for 80%;

(ii) a brother-sister controlled group as defined in Section 1563, Internal Revenue Code; or

(iii) three or more corporations each of which is a member of a group of corporations described in Subsection (2)(a)(i) or (ii), and one of which is:

(A) a common parent corporation included in a group of corporations described in Subsection (2)(a)(i); and

(B) included in a group of corporations described in Subsection (2)(a)(ii).

(b) Ownership of outstanding voting stock shall be determined by Section 1563, Internal Revenue Code.

(9) (a) "Controlling entity of a captive real estate investment trust" means an entity that:

(i) is treated as an association taxable as a corporation under the Internal Revenue Code;

(ii) is not exempt from federal income taxation under Section 501(a), Internal Revenue Code; and

(iii) directly, indirectly, or constructively holds more than 50% of:

(A) the voting power of a captive real estate investment trust; or

(B) the value of the shares or beneficial interests of a captive real estate investment trust.

(b) "Controlling entity of a captive real estate investment trust" does not include:

- (i) a real estate investment trust, except for a captive real estate investment trust;
- (ii) a qualified real estate investment subsidiary described in Section 856(i), Internal Revenue Code, except for a qualified real estate investment trust subsidiary of a captive real estate investment trust; or
- (iii) a foreign real estate investment trust.

(c) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the commission may make rules defining "established securities market."

(10) "Corporate return" or "return" includes a combined report.

(11) "Corporation" includes:

- (a) entities defined as corporations under Sections 7701(a) and 7704, Internal Revenue Code; and
- (b) other organizations that are taxed as corporations for federal income tax purposes under the Internal Revenue Code.

(12) "COVID-19" means:

- (a) the severe acute respiratory syndrome coronavirus 2; or
- (b) the disease caused by severe acute respiratory syndrome coronavirus 2.

(13) "Dividend" means any distribution, including money or other type of property, made by a corporation to its shareholders out of its earnings or profits accumulated after December 31, 1930.

(14) (a) "Doing business" includes any transaction in the course of business by a domestic corporation or by a foreign corporation qualified to do or doing business in this state.

(b) Except as provided in Subsection (14)(c) or Subsection 59-7-102(3), "doing business" includes:

- (i) the right to do business through incorporation or qualification;
- (ii) owning, renting, or leasing of real or personal property within this state;
- (iii) the participation in joint ventures, working and operating agreements, the performance of which takes place in this state;
- (iv) selling or performing a service in this state; and
- (v) earning income from the use of intangible property in this state.

(c) "Doing business" does not include the business activity of a corporation if the

corporation's only business activity within the state is the solicitation of orders for sales of tangible personal property that are protected under 15 U.S.C. Secs. 381 through 384.

(15) "Domestic corporation" means a corporation that is incorporated or organized under the laws of this state.

(16) "Exercising a corporate franchise" does not include the business activity of a corporation if the corporation's only business activity within the state is the solicitation of orders for sales of tangible personal property that are protected under 15 U.S.C. Secs. 381 through 384.

(17) (a) "Farmers' cooperative" means an association, corporation, or other organization that is:

(i) (A) an association, corporation, or other organization of farmers or fruit growers; or

(B) an association, corporation, or other organization that is similar to an association, corporation, or organization described in Subsection (17)(a)(i)(A); and

(ii) organized and operated on a cooperative basis to:

(A) (I) market the products of members of the cooperative or the products of other producers; and

(II) return to the members of the cooperative or other producers the proceeds of sales less necessary marketing expenses on the basis of the quantity of the products of a member or producer or the value of the products of a member or producer; or

(B) (I) purchase supplies and equipment for the use of members of the cooperative or other persons; and

(II) turn over the supplies and equipment described in Subsection (17)(a)(ii)(B)(I) at actual costs plus necessary expenses to the members of the cooperative or other persons.

(b) (i) Subject to Subsection (17)(b)(ii), for purposes of this Subsection (17), the commission by rule, made in accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, shall define:

(A) the terms "member" and "producer"; and

(B) what constitutes an association, corporation, or other organization that is similar to an association, corporation, or organization described in Subsection (17)(a)(i)(A).

(ii) The rules made under this Subsection (17)(b) shall be consistent with the filing requirements under federal law for a farmers' cooperative.

152 (18) "Foreign corporation" means a corporation that is not incorporated or organized
153 under the laws of this state.

154 (19) (a) "Foreign operating company" means a corporation that:

155 (i) is incorporated in the United States;

156 (ii) conducts at least 80% of the corporation's business activity, as determined under
157 Section 59-7-401, outside the United States; and

158 (iii) as calculated in accordance with Part 3, Allocation and Apportionment of Income -
159 Utah UDITPA Provisions, has:

160 (A) at least \$1,000,000 of payroll located outside the United States; and

161 (B) at least \$2,000,000 of property located outside the United States.

162 (b) "Foreign operating company" does not include a corporation that qualifies for the
163 Puerto Rico and possession tax credit as provided in Section 936, Internal Revenue Code.

164 (20) (a) "Foreign real estate investment trust" means:

165 (i) a business entity organized outside the laws of the United States if:

166 (A) at least 75% of the business entity's total asset value at the close of the business
167 entity's taxable year is represented by:

168 (I) real estate assets, as defined in Section 856(c)(5)(B), Internal Revenue Code;

169 (II) cash or cash equivalents; or

170 (III) one or more securities issued or guaranteed by the United States;

171 (B) the business entity is:

172 (I) not subject to income taxation:

173 (Aa) on amounts distributed to the business entity's beneficial owners; and

174 (Bb) in the jurisdiction in which the business entity is organized; or

175 (II) exempt from income taxation on an entity level in the jurisdiction in which the
176 business entity is organized;

177 (C) the business entity distributes at least 85% of the business entity's taxable income,
178 as computed in the jurisdiction in which the business entity is organized, to the holders of the
179 business entity's:

180 (I) shares or beneficial interests; and

181 (II) on an annual basis;

182 (D) (I) not more than 10% of the following is held directly, indirectly, or constructively

183 by a single person:

184 (Aa) the voting power of the business entity; or

185 (Bb) the value of the shares or beneficial interests of the business entity; or

186 (II) the shares of the business entity are regularly traded on an established securities

187 market; and

188 (E) the business entity is organized in a country that has a tax treaty with the United

189 States; or

190 (ii) a listed Australian property trust.

191 (b) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the

192 commission may make rules defining:

193 (i) "cash or cash equivalents";

194 (ii) "established securities market"; or

195 (iii) "listed Australian property trust."

196 (21) "Income" includes losses.

197 (22) "Internal Revenue Code" means Title 26 of the United States Code as effective

198 during the year in which Utah taxable income is determined.

199 (23) "Nonbusiness income" means the same as that term is defined in Section

200 [59-7-302](#).

201 (24) "Real estate investment trust" means the same as that term is defined in Section

202 856, Internal Revenue Code.

203 (25) "Related expenses" means:

204 (a) expenses directly attributable to nonbusiness income; and

205 (b) the portion of interest or other expense indirectly attributable to both nonbusiness

206 and business income that bears the same ratio to the aggregate amount of such interest or other

207 expense, determined without regard to this Subsection (25), as the average amount of the asset

208 producing the nonbusiness income bears to the average amount of all assets of the taxpayer

209 within the taxable year.

210 (26) "S corporation" means an S corporation as defined in Section 1361, Internal

211 Revenue Code.

212 (27) "Safe harbor lease" means a lease that qualified as a safe harbor lease under

213 Section 168, Internal Revenue Code.

(28) "State of the United States" includes any of the 50 states or the District of Columbia.

(29) (a) "Taxable year" means the calendar year or the fiscal year ending during such calendar year upon the basis of which the adjusted income is computed.

(b) In the case of a return made for a fractional part of a year under this chapter or under rules prescribed by the commission, "taxable year" includes the period for which such return is made.

(30) "Taxpayer" means any corporation subject to the tax imposed by this chapter.

(31) "Threshold level of business activity" means business activity in the United States equal to or greater than 20% of the corporation's total business activity as determined under Section 59-7-401.

(32) (a) "Unadjusted income" means federal taxable income as determined on a separate return basis before intercompany eliminations as determined by the Internal Revenue Code, before the net operating loss deduction and special deductions for dividends received.

(b) "Unadjusted income" includes deferred foreign income described in Section 965(a), Internal Revenue Code.

(c) "Unadjusted income" does not include income received from:

(i) a loan forgiven in accordance with 15 U.S.C. Sec. 636(a)(36), to the extent that a deduction for the expenditures paid with the loan is disallowed; or

(ii) a similar paycheck protection loan that is:

(A) authorized by the federal government;

(B) provided in response to COVID-19;

(C) forgiven if the borrower meets the expenditure requirements; and

(D) exempt from federal income tax, to the extent that a deduction for the expenditures paid with the loan is disallowed.

(33) (a) "Unitary group" means a group of corporations that:

(i) are related through common ownership; and

(ii) by a preponderance of the evidence as determined by a court of competent jurisdiction or the commission, are economically interdependent with one another as demonstrated by the following factors:

(A) centralized management;

(B) functional integration; and

(C) economies of scale.

(b) "Unitary group" includes a captive real estate investment trust.

(c) "Unitary group" does not include an S corporation.

(34) "United States" includes the 50 states and the District of Columbia.

(35) "Utah net loss" means the current year Utah taxable income before Utah net loss deduction, if determined to be less than zero.

(36) "Utah net loss deduction" means the amount of Utah net losses from other taxable years that a taxpayer may carry back or carry forward to the current taxable year in accordance with Section 59-7-110.

(37) (a) "Utah taxable income" means Utah taxable income before net loss deduction less Utah net loss deduction.

(b) "Utah taxable income" includes income from tangible or intangible property located or having situs in this state, regardless of whether carried on in intrastate, interstate, or foreign commerce.

(38) "Utah taxable income before net loss deduction" means apportioned income plus nonbusiness income allocable to Utah net of related expenses.

(39) (a) "Water's edge combined report" means a report combining the income and activities of:

(i) all members of a unitary group that are:

(A) corporations organized or incorporated in the United States, including those corporations qualifying for the Puerto Rico and Possession Tax Credit as provided in Section 936, Internal Revenue Code, in accordance with Subsection (39)(b); and

(B) corporations organized or incorporated outside of the United States meeting the threshold level of business activity; and

(ii) an affiliated group electing to file a water's edge combined report under Subsection 59-7-402(2).

(b) There is a rebuttable presumption that a corporation which qualifies for the Puerto Rico and possession tax credit provided in Section 936, Internal Revenue Code, is part of a unitary group.

(40) "Worldwide combined report" means the combination of the income and activities

of all members of a unitary group irrespective of the country in which the corporations are incorporated or conduct business activity.

Section 2. Section **59-7-110** is amended to read:

59-7-110. Utah net loss -- Carry back and carry forward -- Deduction.

(1) A taxpayer shall determine the amount of Utah net loss that the taxpayer may carry back or carry forward to offset income of another taxable year as provided in this section.

(2) Subject to the other provisions of this section, a taxpayer:

(a) for a taxable year other than a taxable year described in Subsection (2)(b):

(i) may carry forward a Utah net loss from a taxable year to a future taxable year; and

~~[(b)]~~ (ii) may not carry back a Utah net loss from a taxable year[-]; and

(b) for a taxable year that begins on or after July 1, 2019, but ends on or before June 29, 2022:

(i) shall carry back a Utah net loss from a taxable year to the three taxable years immediately preceding the taxable year of the Utah net loss; and

(ii) may carry forward any remaining Utah net loss after the carry back from a taxable year to a future taxable year.

(3) (a) A taxpayer that carries back a Utah net loss:

(i) shall carry back the Utah net loss in the following order before the taxpayer carries forward any Utah net loss:

(A) to the earliest eligible year for which the Utah taxable income before net loss deduction, minus Utah net losses from previous years that a taxpayer applied or was required to apply to offset income, is not less than zero;

(B) to the next earliest year for which the Utah taxable income before net loss deduction, minus Utah net losses from previous years that a taxpayer applied or was required to apply to offset income, is not less than zero, if any; and

(C) to the next earliest year for which the Utah taxable income before net loss deduction, minus Utah net losses from previous years that a taxpayer applied or was required to apply to offset income, is not less than zero, if any; and

(ii) may not combine a Utah net loss that the taxpayer carries forward from previous taxable years with the amount of the Utah net loss that the taxpayer carries back.

(b) (i) The total amount of Utah net loss from a taxable year for each return filed under

307 this chapter that a taxpayer may carry back is \$1,000,000, regardless of whether the taxpayer
308 carries the Utah net loss back to one taxable year or multiple taxable years.

309 (ii) A taxpayer may carry forward an amount of Utah net loss that exceeds \$1,000,000.

310 (c) In accordance with Title 63G, Chapter 3, Utah Administrative Rulemaking Act, the
311 commission may make rules for administering the carry back of a Utah net loss.

312 ~~[(3)]~~ (4) A taxpayer that carries forward a Utah net loss shall carry forward the Utah
313 net loss to the earliest eligible year for which the Utah taxable income before net loss
314 deduction, minus Utah net losses from previous years that a taxpayer applied or was required to
315 apply to offset income, is not less than zero.

316 ~~[(4)]~~ (5) (a) Subject to Subsection ~~[(4)]~~ (5)(b), the amount of Utah net loss that a
317 taxpayer may carry to the year identified in Subsection (3) or (4) is the lesser of:

318 (i) the remaining Utah net loss after deduction of any amounts of the Utah net loss that
319 a taxpayer carried to previous years; or

320 (ii) the remaining Utah taxable income before net loss deduction of the year identified
321 in Subsection (3) or (4) after deduction of Utah net losses from previous years that a taxpayer
322 carried or was required to carry to the year identified in Subsection (3) or (4).

323 (b) (i) For a taxable year beginning on or after January 1, 2021, the amount of Utah net
324 loss that a taxpayer may carry forward to a taxable year may not exceed 80% of Utah taxable
325 income computed without regard to the deduction ~~[allowable under this section]~~ of any Utah
326 net loss.

327 (ii) A taxpayer may carry a remaining Utah net loss to one or more taxable years in
328 accordance with this section.

329 (c) If a taxpayer may carry forward a Utah net loss from a taxable year beginning
330 before January 1, 2018, and a Utah net loss from a taxable year beginning on or after January 1,
331 2018, the commission shall instruct a taxpayer to calculate the 80% limitation described in
332 Subsection (5)(b) by:

333 (i) following federal guidance for calculating the 80% of taxable income limitation for
334 federal income tax purposes; or

335 (ii) if the commission determines that adequate federal corporate guidance on how to
336 calculate the 80% limitation is unavailable, by:

337 (A) calculating 80% of Utah taxable income before deducting any Utah net losses from

Utah taxable income; and

(B) applying the limitation that the Utah net loss that a taxpayer carries forward may not exceed 80% of Utah taxable income to Utah net losses incurred on or after January 1, 2018, without regard to Utah net losses from a previous taxable year that the taxpayer carries forward.

(d) The commission shall:

(i) make a determination annually, on or before April 15 of the year after the taxable year ends, about whether adequate federal corporate guidance on how to calculate the 80% limitation is available; and

(ii) if the commission determines that adequate federal corporate guidance on how to calculate the 80% limitation is unavailable, notify the Revenue and Taxation Interim Committee, electronically before the next interim committee meeting, that the commission intends to issue instructions in accordance with Subsection (5)(c)(ii).

~~[(5)]~~ (6) (a) (i) Subject to Subsection ~~[(5)]~~ (6)(a)(ii), a corporation acquiring the assets or stock of another corporation may not deduct any net loss incurred by the acquired corporation prior to the date of acquisition.

(ii) Subsection ~~[(5)]~~ (6)(a)(i) does not apply if the only change in the corporation is that of the state of incorporation.

(b) An acquired corporation may deduct the acquired corporation's net losses incurred before the date of acquisition against the acquired corporation's separate income as calculated under Subsections ~~[(6)]~~ (7) and ~~[(7)]~~ (8) if the acquired corporation has continued to carry on a trade or business substantially the same as that conducted before the acquisition.

~~[(6)]~~ (7) For purposes of Subsection ~~[(5)]~~ (6)(b), the amount of net loss an acquired corporation that is acquired by a unitary group may deduct is calculated by:

(a) subject to Subsection ~~[(7)]~~ (8):

(i) except as provided in Subsection ~~[(6)]~~ (7)(a)(ii), calculating the sum of:

(A) an amount determined by dividing the average value of the acquired corporation's real and tangible personal property owned or rented and used in this state during the taxable year by the average value of all of the unitary group's real and tangible personal property owned or rented and used during the taxable year;

(B) an amount determined by dividing the total amount paid in this state during the

taxable year by the acquired corporation for compensation by the total compensation paid everywhere by the unitary group during the taxable year; and

(C) an amount determined by:

(I) dividing the total sales of the acquired corporation in this state during the taxable year by the total sales of the unitary group everywhere during the taxable year; and

(II) if the unitary group elects or is required to calculate the fraction for apportioning business income to this state using the method described in Subsection 59-7-311(4) in taxable year 2019 or taxable year 2020, multiplying the amount calculated under Subsection [6] (7)(a)(i)(C)(I) by, for the taxable year 2019, four, or, for the taxable year 2020, eight; or

(ii) if the unitary group is required or elects to calculate the fraction for apportioning business income to this state using the method described in Subsection 59-7-311(2), calculating an amount determined by dividing the total sales of the acquired corporation in this state during the taxable year by the total sales of the unitary group everywhere during the taxable year;

(b) dividing the amount calculated under Subsection [6] (7)(a) by the same denominator of the fraction the unitary group uses to apportion business income to this state for that taxable year in accordance with Section 59-7-311;

(c) multiplying the amount calculated under Subsection [6] (7)(b) by the business income of the unitary group for the taxable year that is subject to apportionment under Section 59-7-311; and

(d) calculating the sum of:

(i) the amount calculated under Subsection [6] (7)(c); and

(ii) the following amounts allocable to the acquired corporation for the taxable year:

(A) nonbusiness income allocable to this state; or

(B) nonbusiness loss allocable to this state.

[7] (8) The amounts calculated under Subsection [6] (7)(a) shall be derived in the same manner as those amounts are derived for purposes of apportioning the unitary group's business income before deducting the net loss, including a modification made in accordance with Section 59-7-320.

Section 3. Section 59-7-522 is amended to read:

59-7-522. Overpayments.

(1) As used in this section, "overpayment" means the same as that term is defined in

Section 59-1-1409.

(2) (a) Subject to Subsection (2)(b), a taxpayer shall file a claim for credit or refund of an overpayment that is attributable to a Utah net loss carry forward ~~[shall be filed]~~ or carry back within three years from the due date of the return for the taxable year of the Utah net loss.

(b) The three-year period described in Subsection (2)(a) shall be extended by any extension of time provided in statute for filing the return described in Subsection (2)(a).

(c) A taxpayer shall file a claim described in Subsection (2)(a) in the format required by the commission.

(3) The commission shall make a credit against or refund of any overpayment of a tax under this chapter for a taxable year if, in accordance with Section 59-7-519:

(a) (i) a corporation agrees with the commissioner of internal revenue for an extension, or a renewal of an extension, of the period for proposing and assessing a deficiency in federal income tax for that taxable year; or

(ii) there is a change in or correction of federal taxable income for that taxable year; and

(b) the corporation files a claim for the credit or refund before the expiration of the time period within which the commission may assess a deficiency.

(4) The commission shall make a credit or refund within a 30-day period after the day on which a court's decision to require the commission to credit or refund the amount of an overpayment to a taxpayer is final.

Section 4. **Retrospective operation.**

This bill has retrospective operation for a taxable year beginning on or after July 1, 2019.