2017 Tennessee Code
Title 67 - Taxes and Licenses
Chapter 4 - Privilege and Excise Taxes
Part 20 - Excise Tax Law of 1999
§ 67-4-2006. "Net earnings" and "net loss" defined.

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(a)

For a corporation or any other taxpayer treated as a corporation for federal tax purposes, including any limited liability company treated as a corporation for federal income tax purposes, or any other taxpayer required to file a federal income tax return on a federal form 1120 or any variation of that form, except for a corporation electing S corporation status under 26 U.S.C. §§ 1361-1363, and except for a unitary business as is defined in § 67-4-2004, "net earnings" or "net loss" is defined as federal taxable income or loss before the operating loss deduction and special deductions provided for in 26 U.S.C. §§ 241, 242 [repealed], 243-247, and as adjusted by subsections (b) and (c).

For a corporation electing S corporation status under 26 U.S.C. §§ 1361-1363, "net earnings" means federal taxable income calculated as if the corporation had not elected S status, taken before the operating loss deduction and special deductions provided for in 26 U.S.C. §§ 241, 242 [repealed], 243-247 and 249-250, and subject to the adjustments in subsections (b) and (c).

For financial institutions that form a unitary business, as defined in § 67-4-2004, "net earnings" or "net loss" is defined as the combined net earnings or net loss, as defined in subdivision (a)(1), for all members of the unitary group, with all dividends, receipts and expenses resulting from transactions between members of the unitary group excluded when computing combined net earnings, and subject to the adjustments in subsections (b) and (c) on a combined basis, even if some of the members would not be subject to taxation under this part, if considered apart from their unitary group.

In the case of a person or taxpayer treated as a partnership for federal tax purposes, or any other person required to file a federal partnership return on a federal form 1065 or any variation of that form, including, but not limited to, limited liability companies, "net earnings" or "net loss" is defined as an amount equal to:

The amount of ordinary income or loss determined under the applicable provisions of the Internal Revenue Code, including, but not limited to, guaranteed payments to partners and capital gains, which additional items are not already included in ordinary income or loss; less

The amount subject to self-employment taxes, without regard to any cap, distributable or paid to each partner or member; provided, that this amount shall not create or increase any net loss; less

The amount contributed to qualified pension or benefit plans, including all plans described in 26 U.S.C. § 401, of any partner or member; provided, however, that this amount shall not create or increase any net loss; and

As adjusted by subsections (b) and (c).

(5)

In the case of a person or taxpayer treated as a partnership for federal tax purposes that is directly or indirectly owned by a public REIT, "net earnings" or "net loss" is defined as an amount equal to the amount determined pursuant to subdivision (a)(4), less the amount distributed either directly or indirectly to a public REIT; and

As adjusted by subsections (b) and (c).

Any law to the contrary notwithstanding, a single member limited liability company whose single member is a general partnership and that is disregarded for federal income tax purposes shall be subject to the taxes imposed by this part and part 21 of this chapter. The single member limited liability company's "net earnings" or "net loss" for excise tax purposes shall be determined in the same manner as set forth in subdivision (a)(4).

In the case of a single member limited liability company that is treated as an individual taxpayer for federal income tax purposes, "net earnings" or "net loss" means an amount equal to:

The amount of net profit or loss from all businesses engaged in by the taxpayer, determined by applicable provisions of the Internal Revenue Code as is reported on federal form 1040 or any variation of that form, and appropriate schedules, including any amount subject to self employment tax, without regard to any cap, and including the amount of any gains or losses from the sale of assets held or used in the business; less

The amount subject to self-employment taxes; provided, that this amount shall not create or increase any net loss;

As adjusted by subsections (b) and (c).

In the case of a business trust, or any other person doing business in Tennessee and not covered in subdivisions (a)(1)-(4), "net earnings" or "net loss" is defined as taxable income or loss determined under applicable provisions of the Internal Revenue Code, excluding any net operating loss deduction or special deductions similar to those provided for in 26 U.S.C. §§ 241, 243-247 and 249, as adjusted by subsections (b) and (c).

In the case of a captive REIT affiliated group, "net earnings" or "net loss" is defined as the combined net earnings or net loss, as defined in subdivision (a)(1), for all members of the affiliated group, with all dividends, receipts, and expenses resulting from transactions between members of the affiliated group excluded when computing combined net earnings, and subject to the adjustments in subsections (b) and (c) on a combined basis, even if some of the members would not be subject to taxation under this part if considered apart from the affiliated group.

(b) (1) There shall be added to a taxpayer's net earnings or net losses:

Excise tax imposed by this state to the extent deducted in determining net earnings;

Interest income from obligations defined in 26 U.S.C. § 103(a), reduced by allowable amortization, including any interest expense disallowed for federal purposes pursuant to 26 U.S.C. §§ 265 and 291;

Any deduction made pursuant to 26 U.S.C. §§ 611-614, 615 [repealed], 616 and 617, to the extent the deduction, when added with similar deductions in prior years, exceeds the cost of the property;

The charitable contributions deduction claimed under 26 U.S.C. § 170;

Any capital loss carrybacks or carryovers, arising in the course of a trade or business and deducted pursuant to 26 U.S.C. § 1212(a);

Any gross premiums tax deducted in determining net earnings, but taken as a credit against the excise tax under § 67-4-2009(1);

Any expense or depreciation, permitted as a deduction in computing federal taxable income solely as a result of lease characterizations permitted under § 168 of the Economic Recovery Tax Act of 1981 that would not have been permitted in the absence of such act; it being the legislative intent that excise tax revenue not be reduced due to lease characterizations made for the purpose of transferring investment tax credits and depreciation allowances from one business entity to another;

Any depreciation that the taxpayer deducted in computing its federal taxable income in excess of that which the taxpayer could have deducted in computing such income, if the taxpayer had computed its depreciation under § 168 of the Internal Revenue Code as it existed and applied immediately prior to the passage of title 1, § 101, of the Job Creation and Worker Assistance Act of 2002;

Any gain not already included in the taxpayer's net earnings or loss on the sale of an asset distributed by the taxpayer to an entity or individual not otherwise subject to the tax imposed by this part, when such asset is sold within twelve (12) months of the date of distribution. Thus, in such a case, the gain for excise tax purposes is recognized by the taxpayer making the asset distribution rather than the seller. However, if the taxpayer making the asset distribution ceases to exist prior to the sale, the gain shall be reported and tax paid by the seller in accordance with § 67-4-2007(f);

Any net loss or any item of expense or loss that meets all of the following criteria:

(i) Is included in the determination of the taxpayer's net earnings or loss;

(ii) Is from a pass-through entity that is subject to and files a return for the tax imposed by this part; and

(iii) Is allocated to a partner, shareholder, beneficiary or other owner of such pass-through entity;

Any otherwise deductible intangible expense paid, accrued or incurred in connection with a transaction with one or more affiliates;

Any deduction made pursuant to 26 U.S.C. § 199;

In the case of a corporation that has elected S corporation status under 26 U.S.C. §§ 1361-1363, any gain that is not included in net earnings or loss and that is attributable to an election under 26 U.S.C. § 338(h)(10);

Any amount in excess of reasonable rent that is paid, accrued or incurred for the rental, leasing or comparable use of industrial and commercial property owned by an affiliate, whether or not the affiliate is subject to the tax imposed by this part. For purposes of this subdivision (b)(1)(N), "industrial and commercial property" has the same meaning as in § 67-5-501 and "reasonable rent" means rent that does not exceed two percent (2%) per month of the appraised value of the property under chapter 5 of this title. When any person fails to make the adjustment to net earnings or net losses required by this subdivision (b)(1)(N) and the failure is determined by the commissioner to be due to negligence, there shall be imposed a penalty equal to fifty percent (50%) of the amount of the adjustment required by this subdivision (b)(1)(N). The commissioner is authorized to waive the penalty, in whole or in part, for good and reasonable cause under § 67-1-803. This subdivision (b)(1)(N) shall not apply to "commercial and industrial tangible personal property" as defined in § 67-5-501; and

Any deduction by a captive REIT for dividends paid, as defined under 26 U.S.C. § 561, that is allowed and taken under 26 U.S.C. § 857(b)(2)(B); provided, however, that this subdivision (b)(1)(O) shall not apply to a captive REIT that is owned, directly or indirectly, by a bank, a bank holding company, or a public REIT.

(2) There shall be subtracted from the net earnings and losses:

Dividends earned by a taxpayer who owns eighty percent (80%) or more of the outstanding capital stock of a corporation;

Any amount included in federal taxable income but not taxable under the laws of this state;

A portion of the gain or loss of the sale or other disposition of property having a higher basis for state excise tax purposes than federal income tax purposes measured by the difference in the state basis and the federal basis; provided, however, that there shall be no adjustment under this subdivision (b)(2)(C) as a result of the taxpayer not having been subject to the tax imposed by this part during any portion of the period during which the taxpayer took depreciation expense on the property for federal income tax purposes;

The actual charitable contributions made during the tax year by a taxpayer;

Any capital losses incurred during the fiscal year, arising in the course of a trade or business, and not deductible under 26 U.S.C. § 1211(a);

Any expense, other than income taxes, not deducted in determining federal taxable income for which a credit against the federal income tax is allowable;

Any amount included in federal taxable income solely as a result of lease characterizations permitted under § 168 of the Economic Recovery Tax Act of 1981, codified in 26 U.S.C. § 168, that would not have been permitted in the absence of such act;

Any amount of depreciation or other expense that the taxpayer could have deducted in computing federal taxable income had it not made the election to enter into a lease transaction permitted under § 168 of the Economic Recovery Tax Act of 1981 that would not have been permitted in the absence of such act;

Any depreciation in excess of that which the taxpayer deducted in computing its federal taxable income that could have been deducted in computing such income if the taxpayer had computed its depreciation under § 168 of the Internal Revenue Code as it existed and applied immediately prior to the passage of title 1, § 101, of the Job Creation and Worker Assistance Act of 2002;

An amount equal to the difference, if any, between the reserve for bad debts allowed under 26 U.S.C. §§ 585 and 593, as such sections existed on December 31, 1986, and such reserve as it may have been modified subsequently;

Any loss on the sale of an asset not already included in the taxpayer's net earnings or loss distributed by a taxpayer treated as a partnership for federal tax purposes, by an S corporation or by a business trust, to a member, partner, shareholder or certificate holder, when such asset is sold within twelve (12) months of the date of distribution. Thus, in such a case, the loss for excise tax purposes is recognized by the entity making the asset distribution rather than by the seller;

Any net gain or any item of income that meets all of the following criteria:

Is included in the determination of the taxpayer's net earnings or loss;

Is from a pass-through entity that is subject to and files a return for the tax imposed by this part; and

Is allocated to a partner, shareholder, beneficiary or other owner of such pass-through entity;

(i) Seventy-five percent (75%) of the value of charitable donations, including those otherwise deductible under any other provision of this part, that are made to a qualified public school support organization and meet all of the following requirements:

For purposes of this subdivision (b)(2)(M), "qualified public school support organization" means an entity, other than a natural person, that is registered with the department for sales and use tax purposes pursuant to chapter 6 of this title and whose sole purpose is to promote and enhance Tennessee public schools;

The deduction provided by this subdivision (b)(2)(M) shall apply only in the tax year in which the qualified public school support organization certifies to the taxpayer making the donation that it has spent the donation to purchase goods or services subject to the tax imposed by chapter 6 of this title and upon which such tax has actually been paid. The taxpayer making the donation must maintain a copy of such certification to establish entitlement to the deduction;

Donations pursuant to this subdivision (b)(2)(M) must be monetary donations and not donations of goods or services;

The taxpayer making the donation shall not designate a specific child as the beneficiary of the donation;

Qualified public school support organizations receiving such donations must maintain adequate records to prove that the requirements of this subdivision (b)(2)(M) have been met, including proof in the form of invoices or other documentation to establish that the donation was used to purchase goods or services subject to the tax imposed by chapter 6 of this title and that such tax was actually paid; and

If the qualified public school support organization falsely certifies to the taxpayer making the donation that the donation has been spent and tax paid in the manner required by this subdivision (b)(2)(M), the qualified public school support organization shall be liable for the tax imposed by chapter 6 of this title, including applicable penalties and interest, as if the donation had been spent on items subject to that tax;

The department of revenue is authorized to share with the department of education information necessary to effectuate the purposes of subdivision (b)(2)(M)(i). The department of education shall be bound by restrictions on disclosure of such information otherwise applicable to the department of revenue;

The commissioner of revenue and the commissioner of education are authorized to promulgate rules and regulations to effectuate the purposes of this subdivision (b)(2)(M). All such rules and regulations shall be promulgated in accordance with the Uniform Administrative Procedures Act, compiled in title 4, chapter 5;

Any intangible expense paid, accrued, or incurred in connection with a transaction with one (1) or more affiliates, if the intangible expense has been disclosed in accordance with subdivision (d)(1) and either of the following conditions are met:

(i) The affiliate to whom the expense has been paid, accrued, or incurred is registered for and paying the tax imposed by this part; or

(ii) The expense was paid, accrued, or incurred to an affiliate in a foreign nation that is a signatory to a comprehensive income tax treaty with the United States or to an affiliate that is otherwise not required to be registered for or to pay the tax imposed by this part;

(O) Any intangible income included in the computation of a taxpayer's net earnings that is accrued or earned in connection with a transaction with one (1) or more affiliates to the extent that the corresponding intangible expense is included in the affiliate's Tennessee net earnings or net losses and is not deducted by the affiliate under subdivision (b)(2)(N);

(P)

(i) Seventy-five percent (75%) of the value of charitable donations, including those otherwise deductible under any other provision of this part, that are made to nonprofit corporations,

associations and organizations that are exempt from federal income taxation under § 501(c)(3) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 501(c)(3), to not-for-profit civic leagues or organizations that are exempt from federal income taxation under § 501(c)(4) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 501(c)(4), and to associations and organizations that are exempt from federal income taxation under § 501(c)(5) of the Internal Revenue Code of 1986, codified in 26 U.S.C. § 501(c)(5), and meet all of the requirements of this subdivision (b)(2)(P);

(ii) The deduction provided by this subdivision (b)(2)(P) shall apply only in the tax year in which the qualified nonprofit corporation, association or organization certifies to the taxpayer making the donation that it has spent the donation to purchase goods or services subject to the tax imposed by chapter 6 of this title and upon which such tax has actually been paid. The taxpayer making the donation must maintain a copy of such certification to establish entitlement to the deduction;

(iii) Donations pursuant to this subdivision (b)(2)(P) must be monetary donations and not donations of goods and services;

(iv) The taxpayer making the donation shall not designate a specific purpose for the donation;

(v) Qualified nonprofit corporations, associations and organizations receiving such donations must maintain adequate records to prove that the requirements of this subdivision (b)(2)(P) have been met, including proof in the form of invoices or other documentation to establish that the donation was used to purchase goods or services subject to the tax imposed by chapter 6 of this title and that such tax was actually paid;

(vi) If the qualified nonprofit corporation, association or organization falsely certifies to the taxpayer making the donation that the donation has been spent and tax paid in the manner required by this subdivision (b)(2)(P), the qualified nonprofit corporation, association or organization shall be liable for the tax imposed by chapter 6 of this title, including applicable penalties and interest, as if the donation had been spent on items subject to the tax;

(Q) In the case of a corporation that has elected S corporation status under 26 U.S.C. §§ 1361-1363, any loss that is not included in net earnings or loss and that is attributable to an election under 26 U.S.C. § 338(h)(10); and

(R) Any amount in excess of reasonable rent that is received or accrued for the rental, leasing, or comparable use of industrial and commercial property rented, leased, or otherwise provided to an affiliate; provided, however, that this subdivision (b)(2)(R) shall only apply to the extent the corresponding expense has been added to the net earnings or net losses of the affiliate in accordance with subdivision (b)(1)(N). For purposes of this subdivision (b)(2)(R), "industrial and commercial property" and "reasonable rent" shall have the same meaning as in subdivision (b)(1)(N).

(c) A taxpayer's net earnings, or net loss, shall be determined under subsections (a) and (b) and shall be subject to further adjustments provided by this subsection (c). Taxpayers doing business both in and outside of Tennessee so as to be entitled to apportionment shall apportion such net

earnings or net loss using the appropriate apportionment formula provided in this part. The taxpayer shall then deduct any loss carryovers, computed in accordance with this subsection (c), from its net earnings so determined.

(1) In the case of taxpayers that were subject to the excise tax under prior law, any net qualified operating loss incurred for fiscal years ending on or after January 15, 1984, may be deducted. In the case of all other taxpayers, any net operating loss incurred for fiscal years ending on or after July 1, 1999, may be deducted. For this purpose, "net operating loss" is defined as the excess of allowable deductions over total income allocable to this state for the year of the loss. Qualified net operating losses may be carried forward and deducted in the next succeeding tax year or years in which the taxpayer has net income until fully utilized, but in no case for more than fifteen (15) years after the taxable year in which the net operating loss occurs. For fiscal years ending on or after July 15, 1990, in the case of a unitary business, as defined in § 67-4-2004 the net operating loss incurred in the current year shall be determined on a combined basis as specified in subdivision (a)(3). For tax years ending prior to July 15, 1990, any net operating loss incurred by a member of the unitary group that has been apportioned to Tennessee in a year prior to filing a combined return shall be allowed to the unitary group in succeeding tax years until fully utilized, but in no case more than seven (7) years after the taxable year in which the net operating loss occurs.

(2) Except for unitary groups of financial institutions, each taxpayer is considered a separate entity; therefore, in the case of mergers, consolidations, and like transactions, no loss carryovers incurred by the predecessor taxpayer shall be allowed as a deduction from net earnings on the excise tax return filed by the successor taxpayer. With the exception set forth in subdivision (c)(3), a loss carryforward may be taken only by the taxpayer that generated it.

(3) Notwithstanding the provisions contained in subdivision (c)(2), when a taxpayer merges out of existence and into a successor taxpayer that has no income, expenses, assets, liabilities, equity or net worth, any qualified Tennessee loss carryover of the predecessor that merged out of existence shall be available for carryover and deduction from the net earnings of the surviving successor in accordance with this subsection (c).

(4) A unitary group of financial institutions may take any qualified Tennessee loss carryforward that was generated by any group member that is in existence as a member of the group at the end of the group's tax year; provided, that such loss carryover has not previously been taken by the member itself before it joined the group or by another unitary group of financial institutions at the time the financial institution generating the loss was a member of that group; and provided, that the loss carryover shall be subject to the limitations set forth in this subsection (c).

(5) There shall be added to the net loss as determined for excise tax purposes, all nonbusiness earnings, interest and dividends, excluded from net earnings pursuant to this section, and any other income excluded from net earnings pursuant to this section.

(6)

(A) Notwithstanding subdivision (c)(1) to the contrary, a taxpayer that qualifies for the job tax credit provided in § 67-4-2109(b)(2)(B)(i) in connection with a required capital investment in excess of one billion dollars ($1,000,000,000) shall be allowed to carry forward and deduct any qualified net operating loss until the loss is fully utilized, and shall not be limited to a carryforward period of fifteen (15) years; provided, that the commissioner of revenue and the commissioner of economic and community development determine that extending the period during which the loss may be utilized is in the best interests of the state. For purposes of this subdivision (c)(6), "best interests of the state" includes, but is not limited to, a determination that the taxpayer made the required capital investment as a result of such action.

(B) Subdivision (c)(6)(A) shall apply only to applications received and approved by the commissioner of revenue and the commissioner of economic and community development on or before January 1, 2011.

(7)

(A) Notwithstanding subdivision (c)(1) to the contrary, a taxpayer that qualifies for the job tax credit provided in § 67-4-2109(b)(2)(B)(ii), (b)(2)(B)(iii) or (b)(2)(B)(iv) in connection with a required capital investment in excess of one hundred million dollars ($100,000,000) shall be allowed to carry net operating losses forward beyond the initial fifteen-year period authorized under subdivision (c)(1), if the commissioner of revenue and the commissioner of economic and community development determine that extending the period during which the loss may be carried forward is in the best interest of the state. For purposes of this subdivision (c)(7), "best interests of the state" includes, but is not limited to, a determination that the taxpayer made the required capital investment as a result of such action. The commissioner of revenue and the commissioner of economic and community development shall determine the period during which net operating loss carryforward shall be allowed beyond the initial fifteen-year period.

(B) Subdivision (c)(7)(A) shall apply only to applications received and approved by the commissioner of revenue and the commissioner of economic and community development on or before January 1, 2011.

(8) (A) (i) There shall be added to the net loss as determined for excise tax purposes the amount excluded from federal gross income under 26 U.S.C. § 108(a)(1)(A), (B), or (C) for the taxable year of the discharge.

(ii) There shall be added to any qualified net operating loss as determined for excise tax purposes and carried forward to the year of the discharge the amount excluded from federal gross income under 26 U.S.C. § 108(a)(1)(A), (B), or (C) allocable or apportionable to this state for the taxable year of the discharge.

(B) The adjustments described in subdivision (c)(8)(A) shall be made first in the loss for the taxable year of the discharge and then in the carryforwards to such taxable year in the order of the taxable years from which each such carryforward arose.

(d)

(1) Any taxpayer that pays, accrues, or incurs intangible expenses as a result of a transaction with one (1) or more affiliates shall disclose the intangible expenses on the form as prescribed by the commissioner.

(2) Any taxpayer that pays, accrues, or incurs intangible expenses as a result of a transaction with one (1) or more affiliates and either fails to disclose the intangible expenses or fails to add the expenses to net earnings or net losses in accordance with subdivision (b)(1)(K) shall be subject to a negligence penalty as set forth in § 67-1-804(b)(2).

(e)

(1) Any financial institution that receives dividends, directly or indirectly, from one (1) or more captive REITs must disclose the dividends on a form prescribed by the commissioner. If a financial institution fails to make the required disclosure, the deduction allowed under subdivision (b)(2)(A) with respect to any direct or indirect dividends from the captive REIT or REITs shall be disallowed, the taxpayer's net earnings under this section shall be adjusted accordingly, and the taxpayer shall be subject to a negligence penalty as set forth in § 67-1-804(b)(2). If the taxpayer wishes to contest the adjustment, the taxpayer shall have the remedies set forth in chapter 1, part 18 of this title.

(2) For purposes of this subsection (e), "captive REIT" means an entity with an election in effect under § 856(c)(1) of the Internal Revenue Code, codified in 26 U.S.C. § 856(c)(1), in which the financial institution, directly or indirectly, has at least eighty percent (80%) ownership interest by value determined in accordance with generally accepted accounting principles and whose shares are not traded on a national stock exchange.

(f) The amount computed under subsections (a)-(e) shall be the taxpayer's net earnings for purposes of the Tennessee excise tax base to which the tax rate is applied as provided in § 67-4-2007.