

VIRGINIA ACTS OF ASSEMBLY -- 2023 SESSION

CHAPTER 686

An Act to amend and reenact §§ 58.1-390.1 and 58.1-390.3 of the Code of Virginia, relating to income tax; pass-through entities.

[H 1456]

Approved March 27, 2023

Be it enacted by the General Assembly of Virginia:

1. That §§ 58.1-390.1 and 58.1-390.3 of the Code of Virginia are amended and reenacted as follows:

§ 58.1-390.1. Definitions.

The following words and terms, when used in this article, shall have the following meanings unless the context clearly indicates otherwise:

"Eligible owner" means a direct owner of a pass-through entity who is a natural person subject to the tax imposed by Article 2 (§ 58.1-320 et seq.) or an estate or trust subject to the tax imposed by Article 6 (§ 58.1-360 et seq.).

"Owner" means any individual or entity who is treated as a partner, member, or shareholder of a pass-through entity for federal income tax purposes.

"Pass-through entity" means any entity, including a limited partnership, a limited liability partnership, a general partnership, a limited liability company, a professional limited liability company, a business trust, or a Subchapter S corporation, that is recognized as a separate entity for federal income tax purposes, in which the partners, members, or shareholders report their share of the income, gains, losses, deductions, and credits from the entity on their federal income tax returns or make the election and pay the tax levied pursuant to § 58.1-390.3.

"Qualifying pass-through entity" means a pass-through entity that is 100 percent owned by natural persons or, in the case of a Subchapter S corporation, 100 percent owned by natural persons or other persons eligible to be shareholders in an S corporation.

§ 58.1-390.3. Elective income tax on pass-through entities.

A. 1. For taxable years beginning on and after January 1, 2021, but before January 1, 2022, a ~~qualifying~~ pass-through entity may make an election, in a format and according to such requirements and procedures to be established by the Department, to pay the tax levied by this section at the entity level for the taxable year. Such election shall be made on or before a date to be determined by the Department, which shall be set no earlier than one year after the extended due date for filing the applicable return. Notwithstanding §§ 58.1-1812 and 58.1-1833, no interest shall accrue on underpayments or overpayments solely attributable to such election.

2. For taxable years beginning on and after January 1, 2022, but before January 1, 2026, a ~~qualifying~~ pass-through entity may make an annual election, on its timely filed return pursuant to § 58.1-392, to pay the tax levied by this section at the entity level for the taxable period covered by such return. Such election shall be made on or before the due date for filing the applicable return, including any extensions that have been granted.

B. A tax at the rate of 5.75 percent is hereby annually imposed on the Virginia taxable income, as calculated pursuant to § 58.1-391 *but taking into account only the pro rata or distributive share of each item of income, gain, loss, or deduction attributable to eligible owners*, for each taxable year of every ~~qualifying~~ pass-through entity that makes the election provided under subsection A.

C. *In computing the tax imposed by this section, the pro rata or distributive share of the Virginia taxable income of each nonresident eligible owner shall be limited to income that is attributable to Virginia sources and shall be subject to the modifications to income as described in §§ 58.1-322.01 through 58.1-322.04.*

D. A ~~qualifying~~ pass-through entity that elects to pay the tax levied by subsection B shall be eligible for all credits, deductions, or other adjustments to taxable income under § 58.1-391, provided that a ~~qualifying~~ pass-through entity's taxable income shall be adjusted to eliminate any federal deduction for state and local income taxes.

~~D.~~ E. Any person that is subject to the tax imposed under § 58.1-320 or 58.1-360 and is an *eligible* owner of a ~~qualifying~~ pass-through entity making the election pursuant to this section shall be entitled to a credit against the tax imposed, provided that taxable income has been adjusted to add back any deduction for state and local income taxes paid by the ~~qualifying~~ pass-through entity. Such credit shall be in an amount equal to such person's pro rata share of the tax paid under this section by any ~~qualifying~~ pass-through entity of which such person is an owner. If the amount of the credit allowed pursuant to this subsection exceeds such person's tax liability for the tax imposed under § 58.1-320 or 58.1-360, as applicable, such excess shall be treated as an overpayment and refundable pursuant to

§ 58.1-499.

~~E.~~ *F.* If any ~~qualifying~~ pass-through entity makes an election pursuant to this section, the Department shall assess and collect tax, interest, and penalties as if such tax is a corporate income tax imposed pursuant to the provisions of Article 10 (§ 58.1-400 et seq.).

~~F.~~ *G.* The Department shall develop and make publicly available guidelines implementing the provisions of this section and the credit authorized by subdivision C 2 of § 58.1-332.

2. That the provisions of this act shall apply only to taxable years beginning on and after January 1, 2021.