

SENATE BILL NO. 2104

Introduced by

Finance and Taxation Committee

(At the request of the Tax Commissioner)

1 A BILL for an Act to create and enact a new section to chapter 57-38 of the North Dakota
2 Century Code, relating to income tax withholding on oil and gas royalty payments to
3 nonresidents; to amend and reenact sections 57-38-31.1 and 57-38-61 of the North Dakota
4 Century Code, relating to composite withholding returns for nonresident members of
5 passthrough entities and the provisions of the income tax chapter applicable to oil and gas
6 royalty payments; and to provide an effective date.

7 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

8 **SECTION 1.** A new section to chapter 57-38 of the North Dakota Century Code is created
9 and enacted as follows:

- 10 1. For purposes of this section:
- 11 a. "Publicly traded partnership" means a publicly traded partnership. As defined in
12 section 7704 of the Internal Revenue Code [26 U.S.C. 7704] that is not treated as
13 a corporation.
- 14 b. "Remitter" means any person who distributes royalty payments to royalty owners.
- 15 c. "Royalty owner" means a person or entity entitled to receive periodic royalty
16 payments for a nonworking interest in the production of oil or gas.
- 17 2. Except as provided in subsection 3, each remitter shall deduct and withhold from the
18 net amount of the royalty payment made to each nonresident individual or business
19 entity who does not have its commercial domicile in this state at the highest marginal
20 rate provided in sections 57-38-30 and 57-38-30.3. The provisions of sections
21 57-38-59 and 57-38-60 apply to the filing of the returns and payment of the tax under
22 this subsection.
- 23 3. This section does not apply to royalty payments made to a royalty owner if the royalty
24 owner is:

- 1 a. The United States or an agency of the federal government, this state or a political
- 2 subdivision of this state, or another state or a political subdivision of another
- 3 state;
- 4 b. A federally recognized Indian tribe with respect to on-reservation oil and gas
- 5 production pursuant to a lease entered under the Indian Mineral Leasing Act of
- 6 1938 [25 U.S.C. 396a through 396g];
- 7 c. The United States as trustee for individual Indians;
- 8 d. A publicly traded partnership;
- 9 e. An organization that is exempt from the tax under this chapter; or
- 10 f. The same person or entity as the remitter.
- 11 4. a. This section does not apply to a remitter that produced less than one hundred
- 12 thousand barrels of oil or less than five hundred million cubic feet of gas in the
- 13 preceding calendar year as certified to the tax commissioner in the manner and
- 14 on forms prescribed by the tax commissioner.
- 15 b. Each remitter that is exempt from withholding under this subsection shall make
- 16 an annual return to report royalty payments that exceed the dollar amounts in
- 17 subsection 6 and must be reported in the same manner as provided in section
- 18 57-38-60.
- 19 5. a. Each year, a publicly traded partnership that is exempt from withholding under
- 20 subsection 3 shall transmit to the tax commissioner, in an electronic format
- 21 approved by the tax commissioner, each partner's United States department of
- 22 the treasury schedule K-1, form 1065, or form 1065-B, as applicable, filed
- 23 electronically for the year with the United States internal revenue service.
- 24 b. A royalty owner that is a publicly traded partnership, or organization exempt from
- 25 taxation under section 57-38-09, shall report to the remitter and tax commissioner
- 26 under oath, on a form prescribed by the tax commissioner, all information
- 27 necessary to establish that the remitter is not required under subsection 2 to
- 28 withhold royalty payments made to the partnership or organization.
- 29 6. If the royalty payment made to a royalty owner under this section is less than six
- 30 hundred dollars for the current withholding period, or is less than one thousand dollars
- 31 if the payment is annualized, the tax commissioner may grant a remitter's request to

1 forgo withholding the tax from the royalty payment made to that royalty owner for the
2 current withholding period or, if applicable, the royalty payments for the annual period.

3 **SECTION 2. AMENDMENT.** Section 57-38-31.1 of the North Dakota Century Code is
4 amended and reenacted as follows:

5 **57-38-31.1. Composite returns.**

6 1. For purposes of this section, unless the context otherwise requires:

- 7 a. "Member" means ~~an individual who is~~ a shareholder of an S corporation; a
8 partner in a general partnership, a limited partnership, or a limited liability
9 partnership; a member of a limited liability company; settlor of a grantor trust, or
10 a beneficiary of a trust.
- 11 b. "Nonresident" means an individual who is not a resident of or domiciled in the
12 state ~~or, a trust not organized in the state, or a business entity that does not have~~
13 its commercial domicile in the state.
- 14 c. "Passthrough entity" means ~~an entity that for the applicable tax year is treated as~~
15 ~~an S corporation under this chapter or a general partnership, limited partnership,~~
16 ~~limited liability partnership, trust, or limited liability company that for the applicable~~
17 ~~tax year is not taxed as a corporation under this chapter~~ a corporation that for the
18 applicable tax year is treated as an S corporation under the Internal Revenue
19 Code, a limited liability company that for the applicable tax year is not taxed as a
20 corporation for federal income tax purposes, or a general partnership, limited
21 partnership, limited liability partnership, limited liability limited partnership, trust,
22 grantor trust, or similar entity recognized by the laws of this state that is not taxed
23 for federal income tax purposes at the entity level.
- 24 2. a. A passthrough entity may file a composite income tax return on behalf of electing
25 nonresident members reporting and paying income tax, at the highest marginal
26 rate provided in section 57-38-30.3 ~~for individuals~~, on the members' pro rata or
27 distributive shares of income of the passthrough entity from doing business in, or
28 deriving income from sources within, this state.
- 29 b. A nonresident member whose only source of income within the state is from one
30 or more passthrough entities may elect to be included in a composite return filed
31 under this section.

- 1 c. A nonresident member that has been included in a composite return may file an
2 individual income tax return and shall receive credit for tax paid on the member's
3 behalf by the passthrough entity.
- 4 3. a. A passthrough entity shall withhold income tax, at the highest tax rate provided in
5 section 57-38-30.3 ~~for individuals~~, on the share of income of the entity distributed
6 to each nonresident member and pay the withheld amount in the manner
7 prescribed by the tax commissioner. The passthrough entity is liable to the state
8 for the payment of the tax required to be withheld under this section and is not
9 liable to any member for the amount withheld and paid ~~over~~ in compliance with
10 this section. A member of a passthrough entity that is itself a passthrough entity
11 (a lower-tier passthrough entity) is subject to this same requirement to withhold
12 and pay ~~over~~ income tax on the share of income distributed by the lower-tier
13 passthrough entity to each of its nonresident members. The tax commissioner
14 shall apply tax withheld and paid ~~over~~ by a passthrough entity on distributions to
15 a lower-tier passthrough entity to the withholding required of that lower-tier
16 passthrough entity.
- 17 b. At the time of a payment made under this section, a passthrough entity shall
18 deliver to the tax commissioner a return ~~upon~~ upon a form prescribed by the tax
19 commissioner showing the total amounts paid or credited to its nonresident
20 members, the amount withheld in accordance with this section, and any other
21 information the tax commissioner may require. A passthrough entity shall furnish
22 to its nonresident member annually, but not later than the fifteenth day of the third
23 month after the end of its taxable year, a record of the amount of tax withheld on
24 behalf of ~~such~~ the member on a form prescribed by the tax commissioner.
- 25 c. Notwithstanding subdivision a, a passthrough entity is not required to withhold tax
26 for a nonresident member if:
- 27 (1) The member has a pro rata or distributive share of income of the
28 passthrough entity from doing business in, or deriving income from sources
29 within, this state of less than one thousand dollars per annual accounting
30 period;

- 1 (2) The tax commissioner has determined by rule, ruling, or instruction that the
2 member's income is not subject to withholding;
- 3 (3) The member elects to have the tax due paid as part of a composite return
4 filed by the passthrough entity under subsection 2; or
- 5 (4) The entity is a publicly traded partnership as defined by section 7704(b) of
6 the Internal Revenue Code which is treated as a partnership for the
7 purposes of the Internal Revenue Code and which has agreed to file an
8 annual information return reporting the name, address, taxpayer
9 identification number, and other information requested by the tax
10 commissioner of each unitholder with an income in the state in excess of
11 five hundred dollars.
- 12 d. A passthrough entity failing to file a return, or failing to withhold or remit the tax
13 withheld, as required by this section, is subject to the provisions of
14 section 57-38-45.

15 **SECTION 3. AMENDMENT.** Section 57-38-61 of the North Dakota Century Code is
16 amended and reenacted as follows:

17 **57-38-61. Provisions of chapter applicable.**

18 The provisions of sections 57-38-33, 57-38-34, 57-38-38, 57-38-39, 57-38-40, 57-38-44,
19 57-38-45, 57-38-46, 57-38-47, 57-38-53, 57-38-54, 57-38-55, 57-38-56, and 57-38-57 shall,
20 insofar as consistent therewith, govern the administration of section 1 of this Act and sections
21 57-38-59, 57-38-60, and 57-38-60.1, and 57-38-60.2. The ~~term~~terms "remitter" as used in
22 section 1 of this Act and "employer" as used in sections 57-38-59, 57-38-60, and 57-38-60.1,
23 and 57-38-60.2 also ~~means~~mean "taxpayer" as used in this chapter. Sections 57-38-60.1 and
24 57-38-60.2 apply to section 1 of this Act. In addition, the authority of the tax commissioner to
25 adopt rules includes the authority to make such agreements with the United States government
26 or any of its agencies as are necessary to provide for the deducting and withholding of tax from
27 the wages of federal employees in this state.

28 **SECTION 4. EFFECTIVE DATE.** This Act is effective for taxable years beginning after
29 December 31, 2013.