

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2099

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*Yubereca d. Lee*

Date

10-16-03

2003 SENATE FINANCE AND TAXATION

SB 2099

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10-16-03  
Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. 2099

Senate Finance and Taxation Committee

☐ Conference Committee

Hearing Date January 8, 2003

Tape Number	Side A	Side B	Meter #
1	x		573
Committee Clerk Signature <i>[Signature]</i>			

Minutes:

Senator Urlacher-opened the hearing on SB2099 relating to the authority of the Tax

Commissioner to provide for the rounding of dollar amounts on income tax returns, statements, forms or other documents.

State Tax Commissioner Clayburgh(meter #565)-testified in support of SB2099. Rounding is an issue that the Tax Dept. has looked at in the past. Tax forms could not go into rounding for this year. Looking for legislation to support rounding. Software providers work with rounding of numbers.

Joseph Becker, Auditor III with State Tax Department testified in support of SB2099. There is no notable fiscal effect because of the nature of rounding. The Tax Commissioner requests the committee's favorable support of this bill.

Senator Syverson (meter #1010)-is there a conflict between the language between the sections 1 and 3?

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10-16-03  
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Senate Finance and Taxation Committee

Bill/Resolution Number SB2099

Hearing Date January 8, 2003

Becker-language in the bill supports rounding on the state forms.

Senator Syverson-Satisfied with the definition.

Tax Commissioner Rick Clayburgh (meter #1255)-clarify the previous question. ND State Dept.

forms and attachments would require rounding. Supplemental forms from other entities would not require rounding. Our focus is on the ability to provide customer friendly service.

Senator Nichols-Only thing rounded will be the final amount?

Clayburgh-Do have authority to round on all lines except the final line which is the tax line.

COMMITTEE ACTION:

A motion made by Senator Nichols for a "do-pass", second by Senator Seymour. Votes 6 yea,

0 nay, 0 absent or not voting. Bill carrier Senator Urlacher.

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10-16-03  
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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2099

Senate Finance and Taxation Committee

☐ Conference Committee

Hearing Date March 12, 2003

Tape Number	Side A	Side B	Meter #
2	X		4334-4445
Committee Clerk Signature <i>W. King King</i>			

Minutes:

Senator Urlacher opened the discussion on SB2099.

Senator Wardner (mtr #4377) - Moved that we bring back SB2099 to a conference committee due to a do not concur with the House. Second by Senator Seymour.

Voice vote to reconsider and not concur. 5 yea, 0 nay, 1 absent.

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*10-16-03*  
Date

**FISCAL NOTE**  
Requested by Legislative Council  
03/31/2003

Amendment to: SB 2099

**1A. State fiscal effect:** Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.

	2001-2003 Biennium		2003-2005 Biennium		2005-2007 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

**1B. County, city, and school district fiscal effect:** Identify the fiscal effect on the appropriate political subdivision.

2001-2003 Biennium			2003-2005 Biennium			2005-2007 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts

**2. Narrative:** Identify the aspects of the measure which cause fiscal impact and include any comments relevant to your analysis.

SB 2099 with proposed amendments (38183.0102 Title.0300) is expected to have a fiscal impact less than \$5000 for the 2003-05 biennium. Section 1 provides for discretionary rounding of cents on tax returns. Section 2 allows income exempted by new and expanding business exemptions from qualified pass-through entities to be excluded on Form ND-1. Section 3 removes statutory language found unconstitutional by the North Dakota Supreme Court.

**3. State fiscal effect detail:** For information shown under state fiscal effect in 1A, please:

**A. Revenues:** Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.

**B. Expenditures:** Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.

**C. Appropriations:** Explain the appropriation amounts. Provide detail, when appropriate, of the effect on the biennial appropriation for each agency and fund affected and any amounts included in the executive budget. Indicate the relationship between the amounts shown for expenditures and appropriations.

Name:	Kathryn L. Strombeck	Agency:	Tax Department
Phone Number:	328-3402	Date Prepared:	03/31/2003

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Date: \_\_\_\_\_  
Roll Call Vote #: \_\_\_\_\_

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. 2099**

**Senate Finance and Taxation Committee**

☐ Check here for Conference Committee

Legislative Council Amendment Number

Action Taken *Dr. Pass*

Motion Made By Sam. Nichols Seconded By Sam. Seymour

[illegible]

Total (Yes) 6 No 0

Absent

Floor Assignment 2nd Floor

**If the vote is on an amendment, briefly indicate intent:**

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Date \_\_\_\_\_

**REPORT OF STANDING COMMITTEE (410)**  
January 10, 2003 9:35 a.m.

**Module No: SR-02-0422**  
**Carrier: Urlacher**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**SB 2099: Finance and Taxation Committee (Sen. Urlacher, Chairman) recommends DO PASS (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2099 was placed on the Eleventh order on the calendar.**

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Operator's Signature

*10-16-03*  
Date

2003 HOUSE FINANCE AND TAXATION

SB 2099

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Y. Herrera  
Operator's Signature

10-16-03  
Date

2003 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB 2099

House Finance and Taxation Committee

☐ Conference Committee

Hearing Date February 26, 2003

Tape Number	Side A	Side B	Meter #
1	x		13
Committee Clerk Signature <i>Janie Stein</i>			

Minutes:

**REP. WESLEY BELTER, CHAIRMAN** Called the hearing to order.

**RICK CLAYBURGH, STATE TAX COMMISSIONER** Testified in support of the bill.

Gave a background as to why the bill was introduced. The bill actually started a couple of years ago. Currently, they are allowing rounding on all lines of the tax returns, until you get to the point of taxation. We have practitioners who have requested it. The intent of the bill is for a taxpayer to round to the whole dollar. There is a problem with the way the bill was written, it now mandates rounding. If a person doesn't want to round, they can be allowed, under rules prescribed by the tax commissioner, not to round.

**REP. SCHMIDT** Asked whether they will round up and down, so it comes out even?

**RICK CLAYBURGH** That is correct, as the bill stands in front of you, it does have a fiscal impact to it, it came to our attention after the bill left the Senate. If we are mandated to round all of our forms, it will have an affect of about twenty thousand dollars of programming to make

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Operator's Signature

*10-16-03*  
Date

Page 2

House Finance and Taxation Committee

Bill/Resolution Number SB 2099

Hearing Date February 26, 2003

those changes. The amendment being offered has zero fiscal impact. Items over fifty cents will be rounded to the next dollar, and items below fifty cents, the cents are dropped.

**REP. SCHMIDT** Related to his experience with para mutual race tracks, and stated that that is where they make their profit, they never round down.

**RICK CLAYBURGH** Stated, if they were to suggest that, there would be opposition to the bill. You would be surprised the number of people who will spend thirty four cents to mail a letter, to complain about seventeen cents.

**REP. S. KELSH** With this amendment, there won't be any reprogramming requirements?

**RICK CLAYBURGH** As the bill stands in front of you, it requires us to establish rounding on all of the tax forms, that would have an affect. With the amendment we proposed, if we wanted to, as an agency, we could move forward into rounding with our forms. We don't intend to do anything significant or different, we really want to just allow those programs to do rounds and not make it stretch legally.

**JOSEPH BECKER, STATE TAX COMMISSIONER'S OFFICE**, Appeared to explain the bill and the amendment. See written testimony.

**REP. GROSZ** With the amendment, this only relates to the short form and to withholding?

**JOSEPH BECKER** No, this would apply to all income tax returns. It will be particularly important to the individual tax return.

**REP. IVERSON** Is this done in other states also?

**JOSEPH BECKER** It varies from state to state, rounding is a general course for most. The IRS allows it as well.

With no further testimony, the hearing was closed.

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Page 3  
House Finance and Taxation Committee  
Bill/Resolution Number SB 2099  
Hearing Date February 26, 2003

**COMMITTEE ACTION**

**REP. DROVDAL** Made a motion to adopt the amendments presented by the tax department, with the correction to change the word "it" to "if" on page 1, line 10.

**REP. IVERSON** Second the motion. Motion carried by voice vote.

**REP. KLEIN** Made a motion for a **DO PASS AS AMENDED.**

**REP. IVERSON** Second the motion. **MOTION CARRIED.**

12 YES      0 NO      2 ABSENT

**REP. KLEIN** Was given the floor assignment.

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Operator's Signature

10-16-03  
Date

Date: **2-26-03**  
Roll Call Vote #: **1**

2003 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. **SB 2099**

House FINANCE & TAXATION

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken

**Do Pass as Amended**

Motion Made By

**Rep. Klein**

Seconded By

**Rep. Iverson**

Representatives	Yes	No	Representatives	Yes	No
BELTER, CHAIRMAN	✓				
DROVDAL, VICE-CHAIR	✓				
CLARK	✓				
FROELICH	A				
GROSZ	✓				
HEADLAND	✓				
IVERSON	✓				
KELSH	✓				
KLEIN	✓				
NICHOLAS	A				
SCHMIDT	✓				
WEILER	✓				
WIKENHEISER	✓				
WINRICH	✓				

Total (Yes)

**12**

No

**0**

Absent

**2**

Floor Assignment

**Rep. Klein**

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**Yubereca d. Lee**

Date

**10-16-03**

**REPORT OF STANDING COMMITTEE (410)**  
February 26, 2003 4:46 p.m.

Module No: HR-34-3542  
Carrier: F. Klein  
Insert LC: 38183.0101 Title: .0200

**REPORT OF STANDING COMMITTEE**

**SB 2099: Finance and Taxation Committee (Rep. Belter, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends DO PASS (12 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). SB 2099 was placed on the Sixth order on the calendar.**

Page 1, line 8, replace "1. The tax commissioner shall provide, with" with "With"

Page 1, line 10, replace ", that if the amount of the item is other than a whole dollar" with "and for purposes of amounts in tax tables prescribed under subsection 12 of section 57-38-30.3 and subsection 3 of section 57-38-59, the amount may be rounded to the nearest dollar. The cents must be disregarded if the cents amount to less than one-half dollar. If the cents amount to one-half dollar or more, the amount must be increased to the next whole dollar."

Page 1, remove lines 11 through 22

Renumber accordingly

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*10-16-03*  
Date

2003 SENATE FINANCE AND TAXATION

CONFERENCE COMMITTEE

SB 2099

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Date

2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2099

Senate Finance and Taxation Committee

☒ Conference Committee

Hearing Date March 24, 2003

Tape Number	Side A	Side B	Meter #
2	X		1-2135
Committee Clerk Signature <i>[Signature]</i>			

Minutes:

Chairman Tollefson called the conference committee to order. All committee members are present; Senator Tollefson, Senator Seymour, Senator Syverson, Representative Drovdal, Representative Grosz and Representative Schmidt. This bill addresses rounding of numbers on tax returns.

Senator Tollefson (mtr #31) - Senate accedes to the House amendments, but additional amendments have been proposed.

Rick Clayburgh, State Tax Commissioner (mtr #57) - Does support the bill as it came from the House. Distributed a proposed amendment, explained its intent and the impact it would have on the bill. The amendment addresses changes that need to be made to the tax code because of a ruling by the ND Supreme Court on domestic dividends. Explained the court case and referenced a copy of the ruling. (Exhibit A). Due to the court ruling there is language that needs

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10-16-23  
Date

Page 2

Senate Finance and Taxation Committee

Bill/Resolution Number SB2099

Hearing Date March 24, 2003

to be struck from the code. The impact of this amendment is minimal to the taxpayers and the State of North Dakota.

Senator Syverson (mtr #345) - You have no problems with bill as it came from the House?

Mr. Clayburgh (mtr #355) - We amended the bill in the House. Feels the bill is good as it is.

Senator Syverson (mtr #423) - Question regarding the bill as it left the Senate, at that time indicated that only the final amount needed to be rounded, and it was optional to round computations, you are OK with that.

Mr. Clayburgh (mtr #461) - A taxpayer can round every line now, we can accept that, and many are doing it now. Allows taxpayer to do but does not mandate. Puts the rounding in code and allows us to accept rounded returns.

Representative Schmidt (mtr #550) - Asked for clarification of the "retroactive application" on the amendment.

Mr. Clayburgh (mtr #567) - Explained the retroactive portion of the bill. Also proposed another amendment.

Senator Tollefson (mtr #634) - What is the committee's wishes on the first set of amendments that have been proposed.

Representative Drovdal (mtr #643) - This amendments have been proposed to the majority leader?

Mr. Clayburgh (mtr #663) - We have presented these amendments to the Chair's of both Finance and Tax committee's, to Leadership, and also advised the minority leaders. For the most part these are housekeeping amendments, we do need this acted on and moved rather quickly.

Representative Grosz (mtr #740) - Question regarding the net fiscal effect of this amendment.

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10-16-03

Page 3

Senate Finance and Taxation Committee

Bill/Resolution Number SB2099

Hearing Date March 24, 2003

Mr. Clayburgh (mtr #749) - The effect of the DDI decision was approximately 600,000-650,000 per year. Effected the state and the counties. Would call these revenue neutral amendments.

Representative Drovdal (mtr #840) - Clarified the amendment as the correct one.

Senator Syverson (mtr #902) - Moves to accede to the House and further amend SB2099 with amendment 38183.0TX1. Second by Representative Schmidt.

Roll call vote 6 yea, 0 nay, 0 absent. Motion is carried, bill is amended with .0TX1.

Senator Tollefson (mtr #1077) - Acknowledged proposed amendment 38183.0TX3.

Mr. Clayburgh (mtr #1117) - Reviewed this amendment. Supports this amendment. Has no fiscal impact. Fixes a problem existing in current law. Gave example of how this amendment will effect a business taxpayer. Have addressed this with both Chairmen, and both Leaders.

Representative Grosz (mtr #1477) - This language is used in the long form, is in short form?

Mr. Clayburgh (mtr #1515) - Will not cause a significant issue to address this issue.

Senator Syverson moved to accede to the House amendment and to further amend with 38183.0TX3. Second by Representative Drovdal.

Representative Grosz (mtr #1608) - Slight problem, taking something used in the long form and bringing to the short form. Worried about keeping the two forms separate.

Mr. Clayburgh (mtr #1702) - Explained the two different tax codes in ND Century Code.

Roll call vote to amend with .0TX3. 5 yea, 1 nay, 0 absent.

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*10-16-03*  
Date

Page 4  
Senate Finance and Taxation Committee  
Bill/Resolution Number SB2099  
Hearing Date March 24, 2003

Representative Drovdal moves a Do Pass as Amended. Second by Representative Schmidt.

Roll call vote 6 yea, 0 nay, 0 absent. Carriers Senator Tollefson and Representative Drovdal.

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2003 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. SB2099

Senate Finance and Taxation Committee

☐ Conference Committee

Hearing Date March 27, 2003

Tape Number	Side A	Side B	Meter #
1	X		1-420
Committee Clerk Signature <i>Mary Kay Lusk</i>			

Minutes:

Chairman Tollefson called the conference committee to order. Members present are: Senator Tollefson, Senator Syverson, Senator Seymour, Representative Drovdal, Representative Schmidt, Representative Grosz. This meeting is called to reconsider the action on SB2099.

Representative Drovdal moved to reconsider the action of the committee. Second by Representative Schmidt. Voice vote 6 yea, 0 nay, 0 absent. Bill is back in committee.

Representative Drovdal moves that the House recede and amend with amendment 38183.0102. Second by Senator Seymour. Roll call vote to recede and amend 6 yea, 0 nay, 0 absent.

Representative Grosz - Renewed his objection to section two of the bill, regarding long form and short form exemptions.

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*10-16-03*  
Date

Page 2  
Senate Finance and Taxation Committee  
Bill/Resolution Number SB2099  
Hearing Date March 27, 2003

Representative Grosz moved to Do Pass as Amended. Second by Representative Drovdal.

Roll call vote 6 yea, 0 nay, 0 absent. Carrier's are Senator Tollefson and Representative Drovdal.

Meeting is adjourned.

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Operator's Signature

10-16-03  
Date

38183.0tx1  
Title.

Prepared by the Office of State Tax  
Commissioner  
March 24, 2003

PROPOSED AMENDMENTS TO SENATE BILL NO. 2099

That the Senate accede to the House amendments as printed on page 645 of the Senate Journal and page 785 of the House Journal and that Senate Bill 2099 be further amended as follows:

Page 1, line 3, after "documents" insert "; to repeal subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code, relating to the tax deduction for dividends; and to provide for retroactive application."

Page 1, after line 12, insert:

**"SECTION 2. REPEAL.** Subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code are hereby repealed.

**SECTION 3. RETROACTIVE APPLICATION.** Section 2 of this Act applies retroactively to taxable years beginning after December 31, 1999."

Renumber accordingly

Date: 3.24.03  
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 2094

Senate Finance and Taxation Committee

☒ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Decide on House and Amend. Otr

Motion Made By Sen. Syverson Seconded By Rep. Schmidt

Senators	Yes	No	Representatives	Yes	No
Senator Tollefson - Chairman	<input checked="" type="checkbox"/>		Representative Drovdal	<input checked="" type="checkbox"/>	
Senator Seymour	<input checked="" type="checkbox"/>		Representative Grosz	<input checked="" type="checkbox"/>	
Senator Syverson	<input checked="" type="checkbox"/>		Representative Schmidt	<input checked="" type="checkbox"/>	

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature

Date

38183.0TX3  
Title.

Prepared by the Office of State Tax  
Commissioner  
March 24, 2003

PROPOSED AMENDMENTS TO SENATE BILL NO. 2099

That the Senate accede to the House amendments as printed on page 645 of the Senate Journal and page 785 of the House Journal and that Senate Bill 2099 be further amended as follows:

Page 1, line 1, after "57-38" insert "and a new subdivision to subsection 2 of section 57-38-30.3"

Page 1, line 3, after "documents" insert "and an individual income tax deduction for the new and expanding business exemption; and to provide an effective date"

Page 1, after line 12, insert:

"SECTION 2. Subsection 2 of section 57-38-30.3 of the North Dakota Century Code is created and enacted as follows:

Reduced by income from a new and expanding business exempt from state income tax under section 40-57.1-04."

SECTION 3. EFFECTIVE DATE. Section 2 of this Act is effective for taxable years beginning after December 31, 2002."

Renumber accordingly

Date: 5/1/2011  
Roll Call Vote #: 2

**2003 SENATE STANDING COMMITTEE ROLL CALL VOTES**  
**BILL/RESOLUTION NO. SB2099**

Senate	Finance and Taxation	Committee
--------	----------------------	-----------

☒ Check here for Conference Committee

**Legislative Council Amendment Number**

Action Taken Moves to closed to House Armed & Health  
Armed w/ CTX-3

Motion Made By Sen. Syta Seconded By Rep. Davidson

[illegible]

Total (Yes) 5 No 1

Absent

### Floor Assignment

**If the vote is on an amendment, briefly indicate intent:**

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Y. Herrera J. Lopez  
Operator's Signature

10-16-03  
Date

38183.0102  
Title.0300

Adopted by the Conference Committee  
March 24, 2003

*JB*  
3-25-03

PROPOSED AMENDMENTS TO SENATE BILL NO. 2099

That the House recede from its amendments as printed on page 645 of the Senate Journal and page 785 of the House Journal and that Senate Bill No. 2099 be amended as follows:

Page 1, line 1, after "57-38" Insert "and a new subdivision to subsection 2 of section 57-38-30.3"

Page 1, line 3, after "documents" Insert "and an individual income tax deduction for the new and expanding business exemption; to repeal subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code, relating to the tax deduction for dividends; to provide an effective date; and to provide for retroactive application"

Page 1, line 8, replace "1. The tax commissioner shall provide, with" with "With"

Page 1, line 10, replace ", that if the amount of the item is other than a whole dollar" with "and for purposes of amounts in tax tables prescribed under subsection 12 of section 57-38-30.3 and subsection 3 of section 57-38-59, the amount may be rounded to the nearest dollar. The cents must be disregarded if the cents amount to less than one-half dollar. If the cents amount to one-half dollar or more, the amount must be increased to the next whole dollar."

**SECTION 2.** A new subdivision to subsection 2 of section 57-38-30.3 of the North Dakota Century Code is created and enacted as follows:

Reduced by income from a new and expanding business exempt from state income tax under section 40-57.1-04.

**SECTION 3. REPEAL.** Subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code are repealed.

**SECTION 4. EFFECTIVE DATE.** Section 2 of this Act is effective for taxable years beginning after December 31, 2002.

**SECTION 5. RETROACTIVE APPLICATION.** Section 3 of this Act applies retroactively to taxable years beginning after December 31, 1999."

Page 1, remove lines 11 through 22

Renumber accordingly

Date: 3.24.03  
Roll Call Vote #: 3

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2099

Senate Finance and Taxation Committee

☒ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do pass as amended

Motion Made By Rep. Drovdal Seconded By Rep. Schmidt

Senators	Yes	No	Representatives	Yes	No
Senator Tollefson - Chairman	<input checked="" type="checkbox"/>		Representative Drovdal	<input checked="" type="checkbox"/>	
Senator Seymour	<input checked="" type="checkbox"/>		Representative Grosz	<input checked="" type="checkbox"/>	
Senator Syverson	<input checked="" type="checkbox"/>		Representative Schmidt	<input checked="" type="checkbox"/>	

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment Sen. Tollefson & Rep. Drovdal

If the vote is on an amendment, briefly indicate intent:

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Yubereka J. Lee 10-16-03  
Operator's Signature Date

**REPORT OF CONFERENCE COMMITTEE**

**SB 2099:** Your conference committee (Sens. Tollefson, Seymour, Syverson and Reps. Drovdal, Grosz, Schmidt) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 645, adopt amendments as follows, and place SB 2099 on the Seventh order:

That the House recede from its amendments as printed on page 645 of the Senate Journal and page 785 of the House Journal and that Senate Bill No. 2099 be amended as follows:

Page 1, line 1, after "57-38" Insert "and a new subdivision to subsection 2 of section 57-38-30.3"

Page 1, line 3, after "documents" insert "and an individual income tax deduction for the new and expanding business exemption; to repeal subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code, relating to the tax deduction for dividends; to provide an effective date; and to provide for retroactive application"

Page 1, line 8, replace "1. The tax commissioner shall provide, with" with "With"

Page 1, line 10, replace ", that if the amount of the item is other than a whole dollar" with "and for purposes of amounts in tax tables prescribed under subsection 12 of section 57-38-30.3 and subsection 3 of section 57-38-59, the amount may be rounded to the nearest dollar. The cents must be disregarded if the cents amount to less than one-half dollar. If the cents amount to one-half dollar or more, the amount must be increased to the next whole dollar."

**SECTION 2.** A new subdivision to subsection 2 of section 57-38-30.3 of the North Dakota Century Code is created and enacted as follows:

Reduced by income from a new and expanding business exempt from state income tax under section 40-57.1-04.

**SECTION 3. REPEAL.** Subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code are repealed.

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**SECTION 5. RETROACTIVE APPLICATION.** Section 3 of this Act applies retroactively to taxable years beginning after December 31, 1999."

Page 1, remove lines 11 through 22

Renumber accordingly

SB 2099 was placed on the Seventh order of business on the calendar.

Date: 3-27-03  
Roll Call Vote #: 1

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB32899

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Moved House to Recede & Amend w/ 0102

Motion Made By Rep. Drovdal Seconded By Sen. Seymour

Senators	Yes	No	Representative	Yes	No
Senator Tollefson - Chairman	<input checked="" type="checkbox"/>		Representative Drovdal	<input checked="" type="checkbox"/>	
Senator Seymour	<input checked="" type="checkbox"/>		Representative Grosz	<input checked="" type="checkbox"/>	
Senator Syverson	<input checked="" type="checkbox"/>		Representative Schmidt	<input checked="" type="checkbox"/>	

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment \_\_\_\_\_

If the vote is on an amendment, briefly indicate intent:

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Yvonne J. Lee 10-16-03  
Operator's Signature Date

Date: 3.27.03  
Roll Call Vote #: 2

2003 SENATE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. SB 2099

Senate Finance and Taxation Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number \_\_\_\_\_

Action Taken Do pass as amended

Motion Made By Rep. Govey Seconded By Rep. Drovdal

Senators	Yes	No	Representative	Yes	No
Senator Tollefson - Chairman	<input checked="" type="checkbox"/>		Representative Drovdal	<input checked="" type="checkbox"/>	
Senator Seymour	<input checked="" type="checkbox"/>		Representative Grosz	<input checked="" type="checkbox"/>	
Senator Syverson	<input checked="" type="checkbox"/>		Representative Schmidt	<input checked="" type="checkbox"/>	

Total (Yes) 6 No 0

Absent \_\_\_\_\_

Floor Assignment Senator Tollefson & Rep. Drovdal

If the vote is on an amendment, briefly indicate intent:

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Operator's Signature

Date

10-16-03

**REPORT OF CONFERENCE COMMITTEE**

**SB 2099, as engrossed:** Your conference committee (Sens. Tollefson, Syverson, Seymour and Reps. Drovdal, Schmidt, Grosz) recommends that the **HOUSE RECEDE** from the House amendments on SJ page 645, adopt amendments as follows, and place SB 2099 on the Seventh order:

That the House recede from its amendments as printed on page 645 of the Senate Journal and page 785 of the House Journal and that Senate Bill No. 2099 be amended as follows:

Page 1, line 1, after "57-38" Insert "and a new subdivision to subsection 2 of section 57-38-30.3"

Page 1, line 3, after "documents" Insert "and an individual income tax deduction for the new and expanding business exemption; to repeal subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code, relating to the tax deduction for dividends; to provide an effective date; and to provide for retroactive application"

Page 1, line 8, replace "1. The tax commissioner shall provide, with" with "With"

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**SECTION 2.** A new subdivision to subsection 2 of section 57-38-30.3 of the North Dakota Century Code is created and enacted as follows:

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**SECTION 3. REPEAL.** Subdivision b of subsection 2 of section 57-35.3-02, subdivision l of subsection 1 of section 57-38-01.2, and subdivision g of subsection 1 of section 57-38-01.3 of the North Dakota Century Code are repealed.

**SECTION 4. EFFECTIVE DATE.** Section 2 of this Act is effective for taxable years beginning after December 31, 2002.

**SECTION 5. RETROACTIVE APPLICATION.** Section 3 of this Act applies retroactively to taxable years beginning after December 31, 1999."

Page 1, remove lines 11 through 22

Renumber accordingly

Engrossed SB 2099 was placed on the Seventh order of business on the calendar.

2003 TESTIMONY

SB 2099

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Y. Theresa J. Lee  
Operator's Signature

10-16-03  
Date

## Testimony before the Senate Finance and Taxation Committee Senate Bill 2099

January 8, 2003

Prepared by Joseph Becker, Auditor III/Research Specialist  
North Dakota Office of State Tax Commissioner  
Phone: 328-3451  
E-mail: jjbecker@state.nd.us

Good morning, Chairman Urlacher, Members of the Committee:

### Introduction

My name is Joseph Becker, and I'm here representing the North Dakota Office of State Tax Commissioner (Tax Department). Senate Bill 2099, which is introduced at the Tax Commissioner's request, provides for the rounding of numbers reported on returns and other documents required to be filed for income tax purposes.

### Purpose of bill

The purposes of this bill are to simplify the tax return for individual taxpayers and to help the Tax Department work more easily with tax software developers and tax professionals. The Department would like to remove the cents column from the income tax return by requiring all taxpayers to round all numbers on the return to the whole dollar. Rounding of the numbers on the tax return is preferred by tax software vendors, tax professionals, and most individuals. Toward these ends, the Tax Commissioner determined it was necessary to change the law to set out the authority to round numbers and to prescribe the manner of rounding.

### Bill's provisions

This bill will create a new section in the income tax provisions of the Code.

**Subsection 1** of the new section (*see lines 8 through 15 of the bill*) requires the Tax Commissioner to provide for the rounding of numbers, and it sets out the method that must be used. If any amount required to be shown on a return or other document does not calculate out to a whole number, the cents portion of the amount must be ignored if less than \$0.50. However, if the cents portion is \$0.50 or more, the calculated amount must be increased to the next whole dollar amount.

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Y. Urlacher  
Operator's Signature

10-16-03  
Date

Subsection 2 of the new section (*see lines 16 through 18 of the bill*) provides the Tax Commissioner flexibility in administering the rounding provisions to address any taxpayer concerns that may arise. It allows the Commissioner to prescribe a rule to provide for an alternative method of rounding numbers that may be used in lieu of the method prescribed in subsection 1.

Subsection 3 of the new section (*see lines 19 through 22 of the bill*) provides that the rounding requirement only applies to the final numbers entered on the tax return or other required document, not to any numbers in taxpayers' records that are used to calculate the final number.

### Closing

The Tax Department did not prepare a fiscal note for this bill because no request for one was received from Legislative Council. However, it is the Department's opinion that there is no notable fiscal effect because of the nature of rounding.

The Tax Commissioner requests the committee's favorable consideration of this bill.

If the committee has any questions, Mr. Chairman, I would be happy to respond to them at this time.

## Testimony before the House Finance and Taxation Committee Senate Bill 2099

February 26, 2003

Prepared by Joseph Becker, Auditor III/Research Specialist  
North Dakota Office of State Tax Commissioner  
Phone: 328-3451  
E-mail: jjbecker@state.nd.us

Good morning, Chairman Belter and Members of the Committee:

### Introduction

For the record, my name is Joseph Becker, and I'm here on behalf of the North Dakota Office of State Tax Commissioner (Tax Department).

Senate Bill 2099, which was introduced at the Tax Commissioner's request, provides for the rounding of numbers for income tax purposes.

My testimony that immediately follows covers the bill (as introduced) that is now before you. However, later in my testimony I will comment on proposed amendments that the Tax Commissioner wishes to offer for the Committee's consideration.

### Purpose of bill

The central purpose of this bill is to statutorily provide for the rounding of numbers to the whole dollar on all income tax returns and their related schedules and forms. This bill is of particular importance for individual income tax purposes because, as a matter of law, the overhaul of the individual income tax system by the 2001 Legislative Assembly created tax rate brackets that require the tax to be calculated in dollars and cents. Rounding to the whole dollar is preferred by tax software vendors, tax professionals, and most individuals.

### Bill's provisions

This bill will create a new section in the income tax provisions of the Code.

Subsection 1 of the new section (*starting on line 8 of the bill*) requires the tax commissioner to provide for the rounding of numbers and sets out the method that must be used. The use of rounding would be required. If an amount does not calculate out to a whole number,

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*Yubereca d. Lee*  
Operator's Signature

10-16-03  
Date

the cents portion of the amount must be ignored if less than \$0.50. However, if the cents portion is \$0.50 or more, the calculated amount must be increased to the next whole dollar amount.

Subsection 2 of the new section (*starting on line 16 of the bill*) provides that the tax commissioner may prescribe a rule to provide for an alternative to the rounding requirement, giving the commissioner some flexibility in dealing with any taxpayer concerns that may arise with respect to the rounding requirement.

Subsection 3 of the new section (*starting on line 19 of the bill*) provides that rounding would only apply to the final numbers entered on the tax return and any related schedules and forms. This only includes officially-published documents provided by the Tax Department to taxpayers. The requirement does not apply to a taxpayer's own records, nor to any supporting document of the taxpayer's own making that is attached to the tax return, regardless of whether or not the supporting document is required by the Tax Department.

#### Proposed amendments

The Tax Commissioner finds it necessary to offer amendments to the bill for the Committee's consideration.

The proposed amendments to the bill would still provide the necessary statutory authority to round to the whole dollar, but would make rounding an option rather than a requirement. In addition, they would clarify that rounding also applies to the amounts in tax tables that the tax commissioner may prescribe for use by individuals as well as employers (for withholding tax purposes).

I've attached to my testimony an additional page showing how Senate Bill 2099 would read after incorporating the proposed amendments.

#### Closing

The Tax Commissioner requests the Committee's adoption of the proposed amendments, and its recommendation of a "Do Pass, As Amended." If the committee has any questions, Mr. Chairman, I would be happy to respond to them at this time.

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Operator's signature

Date

10-16-03

If the proposed amendments are adopted, Senate Bill 2099 (as engrossed) would read as follows:

**Rounding.**

With respect to any amount required to be shown on any return, form, statement, or other document required to be filed with the tax commissioner, and for purposes of amounts in tax tables prescribed under subsection 12 of section 57-38-30.3 and subsection 3 of 57-38-59, the amount may be rounded to the nearest dollar. If the cents amount to less than one-half dollar, disregard the cents. If the cents amount to one-half dollar or more, increase the amount to the next whole dollar.

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Yubereca d. Lee  
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10-16-03  
Date

EXHIBIT 14

FILED BY CLERK  
SUPREME COURT MAR 6 2003

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

2003 ND 32

D.D.I., Inc., Danov Corporation,  
and Estuary Corporation, Florida  
corporations,

Plaintiffs and Appellees

v.

State of North Dakota, by and  
through its Tax Commissioner,  
Rick Clayburgh,

Defendant and Appellant

No. 20020241

Appeal from the District Court of Burleigh County, South Central Judicial  
District, the Honorable Robert O. Wefald, Judge.

AFFIRMED.

Opinion of the Court by Kapsner, Justice.

William P. Pearce (appeared), Pearce & Durick, P.O. Box 400, Bismarck, N.D.  
58502-0400, Richard A. Hussein (argued), Geoffrey Schultz (appeared), James  
Edward Maloney (on brief), Maryanne Lyons (on brief), Baker Botts L.L.P., One  
Shell Plaza, 910 Louisiana Street, Houston, TX 77002-4995, Gerard Desrochers (on  
brief), 3771 Westerman, Houston, TX 77005, for plaintiffs and appellees.

Donnita A. Wald (argued), Special Assistant Attorney General and Robert W.  
Wirtz (appeared), Special Assistant Attorney General, Tax Department, 600 East  
Boulevard Avenue, Bismarck, N.D. 58505-0599, for defendant and appellant.

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Yubereen J. Lee  
Operator's Signature

10-16-03  
Date

D.D.I., Inc. v. State Tax Commissioner

No. 20020241

Kapsner, Justice.

[¶1] The State of North Dakota, by and through its Tax Commissioner ("Commissioner"), appealed from a judgment declaring the dividends received deduction in N.D.C.C. § 57-38-01.3(1)(g) unconstitutional and enjoining collection of the Commissioner's assessments of corporate income tax against D.D.I., Inc., Danov Corporation, and Estuary Corporation (collectively referred to as "taxpayers").<sup>1</sup> We hold the dividends received deduction is not a valid compensatory tax and violates the Commerce Clause. We affirm.

I

[¶2] The taxpayers are Florida corporations engaged in managing assets, including oil and gas properties in North Dakota, and they pay North Dakota corporate income taxes on their net income from business done by them in North Dakota. The taxpayers also receive dividend income from other corporations conducting business either wholly or primarily outside of North Dakota. D.D.I. and Estuary initially excluded the dividends received from those other corporations in the calculation of their North Dakota corporate income tax for tax years 1989 through 1997, and Danov excluded those dividends for tax years 1989 through 1995. The Commissioner determined those dividends were business income subject to apportionment, and to the extent the Commissioner determined the dividends were includable in the taxpayers' North Dakota apportioned income, the Commissioner applied the dividends received deduction under N.D.C.C. § 57-38-01.3(1)(g), which authorizes adjustments to a corporation's taxable income and provides:

---

<sup>1</sup>The Commissioner has not separately raised or argued the appropriateness of the injunctive relief granted by the district court. We, therefore, do not address the issue.

1. The taxable income of a corporation as computed pursuant to the provisions of the Internal Revenue Code of 1954, as amended, must be:

....

- g. Reduced by dividends or income received by any person from stock or interest in any corporation, the income of which has been assessed and paid by a corporation under this chapter or sections 57-35.3-01 through 57-35.3-12, received by the taxpayer and included in the gross income within the income year if such corporation has reported the name and address of each person owning stock and the amount of dividends or income paid each such person during the year, but when only part of the income of any corporation has been assessed and income tax paid under this chapter or sections 57-35.3-01 through 57-35.3-12, only a corresponding part of the dividends or income received therefrom may be deducted.

[¶3] The taxpayers brought this declaratory judgment action against the Commissioner, claiming the dividends received deduction violated the Commerce Clause. The trial court concluded the dividends received deduction violated the "negative" or "dormant" aspect of the Commerce Clause because the deduction was similar to a North Carolina "intangibles tax" held unconstitutional in Fulton Corp. v. Faulkner, 516 U.S. 325 (1996). The Commissioner appealed.

## II

[¶4] The Commerce Clause, U.S. Const. art. I, § 8, cl. 3, grants Congress the power "[t]o regulate commerce . . . among the several States." Although the Commerce Clause is phrased as a grant of power to Congress, it has long been understood to have a "negative" or "dormant" aspect that denies states the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce. Fulton, 516 U.S. at 330; Oregon Waste Sys., Inc. v. Department of Envtl. Quality, 511 U.S. 93, 98 (1994). The Commerce Clause grants Congress plenary authority over

interstate commerce to avoid the economic balkanization that had plagued relations among the colonies and later among the states under the Articles of Confederation. Oregon Waste, at 98. The "negative" or "dormant" aspect of the Commerce Clause prohibits economic protectionism designed to benefit in-state economic interests by burdening out-of-state competitors. Fulton, at 330.

[¶5] In Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 288-89 (1977), the United States Supreme Court rejected a formalistic approach to Commerce Clause challenges to state taxes. See generally 1 Jerome R. Hellerstein and Walter Hellerstein, State Taxation ¶ 4.11[1] (3rd ed. 2001). The Court recognized that entities engaged in interstate commerce were not immune from state taxation and said "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938)." Complete Auto, at 288 (quoting Colonial Pipeline Co. v. Traigle, 421 U.S. 100, 108 (1975)). The Court articulated a four-part test under which a state tax would be sustained against a Commerce Clause challenge if (1) the tax was applied to an activity with a substantial nexus with the taxing state, (2) the tax was fairly apportioned, (3) the tax did not discriminate against interstate commerce, and (4) the tax was fairly related to the services provided by the state. Complete Auto, at 279, 287.

[¶6] Here, the dispositive issue under that four-part test is whether the dividends received deduction discriminates against interstate commerce. In Oregon Waste, 511 U.S. at 99, the Court defined "discrimination" to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." See also Fulton, 516 U.S. at 331 (quoting Chemical Waste Mgmt., Inc. v. Hunt, 504 U.S. 334, 342 (1992) for principle that statute is discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State"). State laws that facially discriminate against

interstate commerce are subject to the "strictest scrutiny" and are "virtually *per se* invalid." Fulton, at 331, 344; Oregon Waste, at 99-101.

[¶7] The Commissioner concedes the dividends received deduction facially discriminates against interstate commerce. A facially discriminatory tax may survive Commerce Clause scrutiny if the tax is a "compensatory" or "complementary" tax that requires interstate commerce bear a burden already born by intrastate commerce. Fulton, 516 U.S. at 331-33. The compensatory or complementary tax doctrine assures that "[w]hen the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates. The one pays upon one activity or incident, and the other upon another, but the sum is the same when the reckoning is closed." Fulton, at 332 (quoting Henneford v. Silas Mason Co., 300 U.S. 577, 584 (1937)). In Fulton, at 332-33, the Court enunciated three requirements for a valid compensatory tax:

First, "a State must, as a threshold matter, 'identif[y] . . . the [intrastate tax] burden for which the State is attempting to compensate.'" Oregon Waste, *supra*, at 103 (quoting Maryland v. Louisiana, 451 U.S. 725, 758 (1981)). Second, "the tax on interstate commerce must be shown roughly to approximate — but not exceed — the amount of the tax on intrastate commerce." Oregon Waste, 511 U.S., at 103. "Finally, the events on which the interstate and intrastate taxes are imposed must be 'substantially equivalent'; that is, they must be sufficiently similar in substance to serve as mutually exclusive 'prox[ies]' for each other." *Ibid.* (quoting Armco Inc. v. Hardesty, *supra*, at 643).

[¶8] The Commissioner argues the dividends received deduction must be presumed constitutional because statutes enjoy a strong presumption of constitutionality in North Dakota, see MCI Telecomms. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994), and the taxpayers have failed to prove beyond a reasonable doubt the dividends received deduction is unconstitutional. Although there is a presumption that statutes are constitutional, facially discriminatory restrictions on interstate commerce are subject to the strictest scrutiny and are virtually *per se* invalid, and the State must

establish the requirements for a valid compensatory tax. Fulton, 516 U.S. at 332, 344; Oregon Waste, 511 U.S. at 99-101.

[¶9] The Commissioner argues the dividends received deduction is a valid compensatory tax. The Commissioner argues the "intangibles tax" found unconstitutional in Fulton and the dividends received deduction in this case are not similar. We reject the Commissioner's arguments.

[¶10] In Fulton, 516 U.S. at 328, the Supreme Court described North Carolina's "intangibles tax" on the fair market value of corporate stock owned by North Carolina residents:

[A] corporation doing all of its business within the State would pay corporate income tax on 100% of its income, and the taxable percentage deduction allowed to resident owners of that corporation's stock under the intangibles tax would likewise be 100%. Stock in a corporation doing no business in North Carolina, on the other hand, would be taxable on 100% of its value. For the intermediate cases, holders of stock were able to look up the taxable percentage for a large number of corporations as determined and published annually by the North Carolina Secretary of Revenue (Secretary). In 1990, for example, the Secretary determined the appropriate taxable percentage of IBM stock to be 95%, meaning that IBM did 5% of its business in North Carolina, with its stock held by North Carolina residents being taxable on 95% of its value.

[¶11] In Fulton, 516 U.S. at 334-36, North Carolina argued the "intangibles tax," with its taxable percentage deduction, compensated for the burden of the general corporate income tax paid by corporations doing business in North Carolina. Because North Carolina had no general sovereign interest in taxing income earned out of state, however, North Carolina was required to identify some in-state activity or benefit to justify the compensatory levy. Id. at 334. The Supreme Court rejected North Carolina's argument that it could impose a compensatory tax on foreign corporations because they availed themselves of North Carolina's capital markets. Id. at 335-36. The Court said "[p]ermitting discriminatory taxes on interstate commerce to compensate for charges purportedly included in general forms of

intrastate taxation would allow a state to tax interstate commerce more heavily than in-state commerce anytime the entities involved in interstate commerce happened to use facilities supported by general tax funds.” Id. at 335 (quoting Oregon Waste, 511 U.S. at 105 n.8). North Carolina failed to show the corporate income tax supported the maintenance of the capital market; it therefore failed to justify the use of the intangibles tax as replacement support for the market. Fulton, at 336.

[¶12] The Supreme Court rejected North Carolina’s claim that its intangibles tax was roughly approximate to, but did not exceed, the intrastate corporate income tax. Fulton, 516 U.S. at 336-38. The Court said the quantitative assessments necessary for the compensatory tax doctrine were difficult to apply to general forms of taxation:

When a corporation doing business in a State pays its general corporate income tax, it pays for a wide range of things: construction and maintenance of a transportation network, institutions that educate the work force, local police and fire protection, and so on. The Secretary’s justification for the intangibles tax, however, rests on only one of the many services funded by the corporate income tax, the maintenance of a capital market for the shares of both foreign and domestic corporations. To the extent that corporations do their business outside North Carolina, after all, they get little else from the State. Even, then, if we suppressed our suspicion that North Carolina actually funds its capital market through its blue sky fees, not its general corporate taxation, the relevant comparison for our analysis has to be between the size of the intangibles tax and that of the corporate income taxes component that purportedly funds the capital market.

Id. at 337-38.

[¶13] The Supreme Court also rejected North Carolina’s claim that its intangibles tax and its general corporate income tax fell on substantially equivalent events. Fulton, 516 U.S. at 338-44. The Court said it had found that equivalence only in the sales/use tax combination at issue in Silas Mason, but recent cases had demonstrated an extreme reluctance to recognize new compensatory categories. Fulton, at 338. The Court said the intangibles tax and general corporate income tax were different in a number of respects, including the parties ostensibly taxed, and those taxes did not

satisfy the objective of the equivalent-event requirement to enable in-state and out-of-state businesses to compete on an equal footing. *Id.* at 340.

[¶14] Here, N.D.C.C. § 57-38-01.3(1)(g) authorizes a dividends received deduction to a dividend recipient to the extent the dividend payor's income was subject to North Dakota corporate income tax, but does not grant a dividends received deduction to a dividend recipient if the dividend payor's income was not subject to North Dakota corporate income tax. The Commissioner argues the intrastate tax burden for which the dividends received deduction attempts to compensate is the North Dakota corporate income tax paid by a North Dakota corporation that distributes the already taxed corporate profits as a dividend. The Commissioner argues the dividends received deduction compensates for the tax already paid on North Dakota income by the North Dakota corporation paying that dividend. The Commissioner argues "[o]nly one level of North Dakota income tax should be imposed on North Dakota income. The [dividends received deduction] insures that, in the end, there is only one level of North Dakota income tax on North Dakota income. Interstate commerce, i.e., the dividend from [an out-of-state corporation] to [taxpayers] bears the same burden . . . already borne by intrastate commerce, i.e., the dividend from [a North Dakota corporation] to [taxpayers]." The Commissioner offers the following comparative tax hypothetical, with a ten percent tax rate on North Dakota corporate income and on dividends:

	<u>North Dakota Corporation</u>	<u>Out-of-State Corporation</u>
Dividend Received by Taxpayers	\$100	\$100
North Dakota Corporate Income Tax on Profits out of which Dividend is Paid	\$10	\$0
Dividends Received Deduction	\$100	\$0
Taxable Dividend	\$0	\$100

North Dakota Corporate Income Tax on Receipt of Dividend	\$0	\$10
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Total North Dakota Tax Paid By Dividend Payor Corporation and by Taxpayers	\$10	\$10
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[¶15] Although avoiding double taxation of North Dakota income is a permissible goal, the Commissioner has not identified any specific in-state activity or benefit received by the taxpayers to justify the compensatory levy on their dividends received from out-of-state corporations. The State of North Dakota does not have a general sovereign interest in taxing income earned out-of-state and must identify some specific in-state activity or benefit to justify a compensatory levy. Fulton, 516 U.S. at 334. The Commissioner has failed to establish such an in-state benefit to the taxpayers.

[¶16] The Commissioner's comparative tax hypothetical ignores the corporate income tax that an out-of-state corporation's state might impose on the out-of-state corporation's profits, which effectively imposes a double layer of tax on the out-of-state income but not on the in-state income. The risk of multiple taxation may be considered in assessing a Commerce Clause claim, see Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 434, 444 (1980); 1 Hellerstein and Hellerstein, ¶ 4.08[1][a], and in considering whether a tax is discriminatory, the United States Supreme Court has applied the "internal consistency" doctrine. Armco Inc. v. Hardesty, 467 U.S. 638, 644 (1984). See American Trucking Ass'ns, Inc. v. Scheiner, 483 U.S. 266, 283 (1987); Tyler Pipe Indust. Inc. v. Washington State Dep't of Rev., 483 U.S. 232, 241 (1987). See generally 1 Hellerstein and Hellerstein, ¶ 4.15[1]. The internal consistency doctrine requires that the imposition of a tax identical to a challenged tax in every state would add no burden to interstate commerce that intrastate commerce did not also bear, and looks at the structure of the challenged tax to see whether its identical application by every state would place interstate commerce at a disadvantage against intrastate commerce. Oklahoma Tax

Comm'n v. Jefferson Lines, Inc., 514 U.S. 175, 185 (1995). The internal consistency test does not require other states to actually impose a similar tax to place a burden on interstate commerce; rather, a tax that exposes a taxpayer to a risk of multiple taxation is invalid under the Commerce Clause. See Scheiner, at 285; Tyler Pipe, at 241; Armco, at 644-45. See also 1 Hellerstein and Hellerstein, at ¶ 4.15[1] [a].

[¶17] Here, when the effect of the corporate income tax that an out-of-state corporation's state might impose on the out-of-state corporation's profits is considered, the dividends received deduction does not avoid double taxation for out-of-state corporate income and does not roughly approximate the tax on intrastate commerce under the Commissioner's comparative tax hypothetical. We conclude the dividends received deduction does not satisfy the first two elements of the compensatory tax doctrine, and we need not address whether the interstate and intrastate taxes are imposed on substantially equivalent events. See Fulton, 516 U.S. at 340 (stating general corporate income tax and intangibles tax are different in a number of obvious aspects, including the parties ostensibly taxed). We conclude the dividends received deduction is not a valid compensatory tax.

### III

[¶18] Relying on Oregon Waste, 511 U.S. at 100-01 and New Energy Co. v. Limbach, 486 U.S. 269, 278 (1988), the Commissioner nevertheless argues the dividends received deduction is valid because it serves a legitimate local purpose of preventing double taxation which cannot be served by reasonable nondiscriminatory alternatives.

[¶19] However, Oregon Waste does not apply an alternative commerce clause test for compensatory tax cases. In Oregon Waste, 511 U.S. at 100-01 (quoting Limbach, 486 U.S. at 278), the Court said if a state regulation discriminates against interstate commerce, the regulation is analyzed under the "virtually per se rule of invalidity," and the regulation must be invalidated unless the State can "sho[w] that it advances a legitimate local purpose that cannot be adequately served by reasonable

nondiscriminatory alternatives.” The Court said justifications for discriminatory restrictions on commerce must pass the “strictest scrutiny”, the State’s burden of justification is so heavy that facial discrimination by itself may be a fatal defect, and the compensatory tax doctrine “is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means.” Oregon Waste, 511 U.S. at 100-02. Under Oregon Waste, the compensatory tax doctrine was the test applied for analyzing justification of a facially discriminatory tax. Moreover, although avoiding double taxation of North Dakota income is a legitimate legislative goal, “the purpose of, or justification for, a law has no bearing on whether it is facially discriminatory.” Oregon Waste, at 100. We have concluded the method employed by the State of North Dakota impermissibly discriminates against interstate commerce. Taxpayers have asserted and the Commissioner does not dispute there are nondiscriminatory means to accomplish the goal of avoiding double taxation on North Dakota corporate income.

#### IV

[¶20] We conclude the dividends received deduction is not a valid compensatory tax and impermissibly discriminates against interstate commerce; therefore, N.D.C.C. § 57-38-01.3(1)(g) violates the Commerce Clause of the United States Constitution and is invalid.<sup>2</sup> We affirm the district court judgment.

[¶21]

*David R. Hennings*  
*William A. Hennings*  
*William A. Hennings*  
*Walter Muehlen Muehlen*  
*Donald W. Van der Kolk, Jr.*

<sup>2</sup>Having declared subsection (g) unconstitutional has no effect on the remainder of the statute. See N.D.C.C. § 1-02-20. See also Montana-Dakota Utils. Co. v. Johanneson, 153 N.W.2d 414, 424-25 (N.D. 1967).

apportioned to this state under the provisions of that chapter is not included in any adjustment made pursuant to the preceding subdivisions.

- g. Reduced by dividends or income received by any person from stock or interest in any corporation, the income of which has been assessed and paid by a corporation under this chapter or sections 57-35.3-01 through 57-35.3-12, received by the taxpayer and included in the gross income within the income year if such corporation has reported the name and address of each person owning stock and the amount of dividends or income paid each such person during the year, but when only part of the income of any corporation has been assessed and income tax paid under this chapter or sections 57-35.3-01 through 57-35.3-12, only a corresponding part of the dividends or income received therefrom may be deducted.
- h. Repealed by S.L. 1999, ch. 487, § 3.
- i. Increased by the amount of any special deductions and net operating loss deductions to the extent that these items were deducted in determining federal taxable income.
- j. Reduced by dividends paid, as defined in section 561 of the Internal Revenue Code of 1986, as amended, by a regulated investment company or a fund of a regulated investment company as defined in section 851(a) or 851(g) of the Internal Revenue Code of 1986, as amended, except that the deduction for dividends paid is not allowed with respect to dividends attributable to any income that is not subject to taxation under this chapter when earned by the regulated investment company. Sections 852(b)(7) and 855 of the Internal Revenue Code of 1986, as amended, apply for computing the deduction for dividends paid. A regulated investment company is not allowed a deduction for dividends received as defined in sections 243 through 245 of the Internal Revenue Code of 1986, as amended.

Provided, however, that each adjustment in the above subdivisions authorized under law is allowed only to the extent that the adjustment is allocated and apportioned to North Dakota income.

2. The tax commissioner is hereby authorized to prescribe rules and regulations to prevent requiring income that had been previously taxed under this chapter from being taxed again because of the provisions of this chapter and to prescribe rules and regulations to prevent any income from becoming exempt from taxation because of the provisions of this chapter if it would otherwise have been subject to taxation under the provisions of this chapter.
3. The sum calculated pursuant to subsection 1 must be reduced by the amount of any net operating loss that is attributable to North Dakota sources. If the net operating loss that is attributable to North Dakota sources exceeds the sum calculated pursuant to subsection 1, the excess may be carried back or carried forward for the same time period that an identical federal net operating loss may be carried back or carried forward. If a corporation uses an apportionment formula to determine the amount of income that is attributable to North Dakota, the corporation must use the same formula to determine the amount of net operating loss that is attributable to North Dakota. In addition, no deduction may be taken for a carryback or carryforward when determining the amount of net operating loss that is attributable to North Dakota sources.

Source: S.L.  
466, § 2; 1971  
§ 1; 1979, ch.  
1987, ch. 141,  
ch. 693, § 2; 1  
670, § 2; 1991  
§ 14; 1997, ch.  
2001, ch. 523.

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Source: S.L. 11  
592, § 1; 2001, ch