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# OHIO LEGISLATIVE SERVICE COMMISSION

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H.B. 515  
134<sup>th</sup> General Assembly

## Bill Analysis

**Version:** As Introduced

**Primary Sponsors:** Reps. Hoops and Riedel

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### SUMMARY

- Specifies two situations in which income from the sale of an ownership interest in a business is considered business income for Ohio income tax purposes.

### DETAILED ANALYSIS

#### Income tax: sale of an ownership interest in a business

The bill revises the statutory law that governs how the state's income tax applies to the sale of an ownership interest in a business. Such sales include, for example, the sale of an interest in a limited liability company (LLC) or of a stake in a partnership.

#### Current law

Currently, the tax treatment of income from the sale of an ownership interest in a business is affected not only by statute, but also by Supreme Court precedent and Department of Taxation guidance.<sup>1</sup> In general, under this body of law, the sale of an ownership interest is considered nonbusiness income, with possible exceptions discussed below. Under continuing law, whether income is considered "business" or "nonbusiness" income has important implications on when and how it is taxed.

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<sup>1</sup> R.C. 5747.212, not in the bill (apportioning nonresident income from business sales); see *Corrigan v. Testa*, 149 Ohio St.3d 18 (2016), which reversed an attempt to tax a nonresident's income from the sale of an Ohio business under R.C. 5747.212 because the nonresident's connection was only "an indirect one," and insufficient to establish a nexus with Ohio under the Due Process Clause. See also Department of Taxation Information Release IT 2016-01, available [here](#).

The impact of current law's treatment of income from the sale of an ownership interest as "nonbusiness income" depends on whether the seller of the interest is a resident or nonresident of Ohio:

1. **Ohio residents:** If the sale of an ownership interest is considered nonbusiness income, income from the sale is not eligible for the business income deduction (BID) or the flat tax on business income (3%).

Under continuing law, a taxpayer can deduct their first \$250,000 of business income (\$125,000 for spouses filing separate returns.) Any income above that amount is subject to the 3% flat tax. Both apply only to income classified as "business" income.<sup>2</sup>

2. **Nonresidents:** Generally, nonresidents would pay no Ohio tax on income from the sale of their ownership interest if it is considered nonbusiness income, since – under continuing law – nonbusiness income from the sale of intangible property is allocated to the seller's domicile, which would be outside of the state.<sup>3</sup>

There may be exceptions to these general rules depending on the individual taxpayer's circumstances. For example, a taxpayer may structure their sale as a "sale of assets" as part of a business's full or partial liquidation, rather than the sale of their ownership interest. In such a case, income from the sale may be considered business income.<sup>4</sup> However, whether federal law treats a sale as a sale of assets does not necessarily mean that Ohio will treat the sale the same way. In addition, a nonresident may be required to pay Ohio tax on their sale if the nonresident participated in a substantially material way in the business. (Under that circumstance, the income from that sale could be considered business income.<sup>5</sup>) However, the different circumstances in which that situation can occur appear to be rather fact-dependent and elude generalizations.

## The bill

The bill codifies two situations in which the sale of an ownership interest will be considered business income:

1. The sale is treated as a sale of assets for federal income tax purposes.
2. The seller materially participates in the activities of the business during the taxable year in which the interest was sold or during any of the five preceding taxable years. IRS rules for material participation generally consider the number of hours the taxpayer spent

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<sup>2</sup> R.C. 5747.01(A)(28) and R.C. 5747.02(A)(4), not in the bill.

<sup>3</sup> R.C. 5747.20, not in the bill.

<sup>4</sup> R.C. 5747.01(B) (specifying under continuing law that income from the liquidation of a business qualifies as business income).

<sup>5</sup> *Corrigan*, 149 Ohio St.3d at 33 (2016) (recognizing that the sale of ownership interest may be apportioned and taxed by Ohio as business income if the taxpayer is considered to be in unity with the business, i.e., is actively managing the business).

participating in the business, either on their own or in relation to other business participants.<sup>6</sup>

When either of those two conditions exist, income from the sale will be considered business income. In the case on nonresidents, this means that a portion of the income will be taxable in Ohio, based on the proportion of the business' activity that is apportioned to Ohio and subject to constitutional due process considerations.<sup>7</sup> In the case of either residents or nonresidents, the income will be eligible for preferential treatment under the BID and the 3% flat tax.

### **Application**

The bill states that the bill is a remedial measure intended to clarify existing law. The bill's changes apply to any audits, refund applications, petition for reassessments, and appeals pending on or after the bill's 90-day effective date.<sup>8</sup>

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## **HISTORY**

Action	Date
Introduced	12-16-21

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H0515-I-134/ar

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<sup>6</sup> R.C. 5747.01(B).

<sup>7</sup> R.C. 5747.21 and 5747.212, not in the bill.

<sup>8</sup> Section 3.