STATE OF NEW YORK

5041

2019-2020 Regular Sessions

IN ASSEMBLY

February 6, 2019

Introduced by M. of A. CARROLL -- read once and referred to the Committee on Ways and Means

AN ACT to amend the tax law, in relation to establishing the minimum taxable income base for business corporations

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Subdivision 1 of section 210 of the tax law is amended by adding a new paragraph (c) to read as follows:

(c) Minimum taxable income base. (1) For taxable years beginning on or after January first, two thousand twenty-one, the amount prescribed by this paragraph shall be computed at the rate of three percent of the taxpayer's minimum taxable income base. The "taxpayer's minimum taxable income base" shall mean the portion of the taxpayer's minimum taxable income allocated within the state, subject to any modifications required by subparagraphs two and three of this paragraph.

(2) Except as provided in clause (C) of this subparagraph or in subparagraph three of this paragraph, at the election of the taxpayer there shall be deducted from the portion of its entire net income allocated within the state either or both of the items set forth in clauses (A) and (B) of this subparagraph, except that only one of such deductions shall be allowed with respect to any one item of property.

(A) Depreciation with respect to any property as described in clause (C) of this subparagraph, not exceeding twice the depreciation allowed with respect to the same property for federal income tax purposes. Such deduction shall be allowed only upon condition that entire net income be computed without any deduction for the depreciation or amortization of the same property, and the total of all deductions allowed in any taxable year or years with respect to the depreciation of any such property shall not exceed its cost or other basis.

(B) Expenditures paid or incurred during the taxable year for the construction, reconstruction, erection or acquisition of any property

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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such as described in clause (C) of this subparagraph which is used or to be used for purposes of research and development in the experimental or laboratory sense. Such purposes shall not be deemed to include the ordinary testing or inspection of materials or products for quality control, efficiency surveys, management studies, consumer surveys, advertising, promotions or research in connection with literary, historical or similar projects. Such deduction shall be allowed only on condition that entire net income for the taxable year and all succeeding taxable years be computed without the deduction of any such expenditures and without any deduction for depreciation of the same property, except to the extent that its basis may be attributable to factors other than such expenditures, or in case a deduction is allowable pursuant to this clause for only a part of such expenditures, on condition that any deduction allowed for federal income tax purposes on account of such expenditures or on account of depreciation of the same property be proportionately reduced in computing entire net income for the taxable year and all succeeding taxable years. With respect to property which is used or to be used for research and development only in part, or during only part of its useful life, a proportionate part of such expenditures shall be deductible. If all or part of such expenditures with respect to any property shall have been deducted as provided herein, and such property is used for purposes other than research and development to a greater extent than originally reported, the taxpayer shall report such use in its report for the first taxable year during which it occurs, and the department may recompute the tax for the year or years for which such deduction was allowed, and may assess any additional tax resulting from such recomputation regardless of the time limitations set forth in section ten hundred eighty-three of this chapter.

(C) Such deductions shall be allowed only with respect to tangible property which is depreciable pursuant to section one hundred sixty-seven of the internal revenue code, having a situs in this state and used in the taxpayer's trade or business, (i) constructed, reconstructed or erected after December thirty-first, nineteen hundred sixty-three, pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-seven, and at all times thereafter, binding on the taxpayer or, property, the physical construction, reconstruction or erection of which began on or before December thirty-first, nineteen hundred sixty-seven or which began after such date pursuant to an order placed on or before December thirty-first, nineteen hundred sixty-seven, and then only with respect to that portion of the basis thereof or the expenditures relating thereto which is properly attributable to such construction, reconstruction or erection after December thirty-first, nineteen hundred sixty-three, or (ii) acquired after December thirty-first, nineteen hundred sixty-three, pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-seven, and at all times thereafter, binding on the taxpayer or pursuant to an order placed on or before December thirty-first, nineteen hundred sixty-seven, by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, if the original use of such property commenced with the taxpayer, commenced in this state and commenced after December thirty-first, nineteen hundred sixty-three, or (iii) acquired, constructed, reconstructed, or erected subsequent to December thirty-first, nineteen hundred sixty-seven, if such acquisition, construction, reconstruction or erection is pursuant to a plan of the taxpayer which was in existence December thirty-first, nineteen hundred sixty-seven and not thereafter substantially modified, and such acquisition,

construction, reconstruction or erection would qualify under the rules in paragraphs four, five or six of subsection (h) of section forty-eight of the internal revenue code provided all references in such paragraphs four, five and six to the dates October nine, nineteen hundred sixty-six, and October ten, nineteen hundred sixty-six, shall be read as December thirty-first, nineteen hundred sixty-seven. A taxpayer shall be allowed a deduction under items (i), (ii) or (iii) of this clause only if the tangible property shall be delivered or the construction, reconstruction or erection shall be completed on or before December thirty-first, nineteen hundred sixty-nine, except in the case of tangible property which is acquired, constructed, reconstructed or erected pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-seven, and at all times thereafter, binding on the taxpayer. Provided, however, for any taxable year beginning on or after January first, nineteen hundred sixty-eight, a taxpayer shall not be allowed a deduction under this paragraph with respect to tangible personal property leased by it to any other person or corporation. For purposes of the preceding sentence, any contract or agreement to lease or rent or for a license to use such property shall be considered a lease. With respect to property which the taxpayer uses itself for purposes other than leasing for part of a taxable year and leases for a part of a taxable year, the taxpayer shall be allowed a deduction under this paragraph in proportion to the part of the year it uses such property.

(D) If the deductions allowable for any taxable year, pursuant to this subdivision, exceed the portion of the taxpayer's entire net income allocated to this state for such year, the excess may be carried over to the following taxable year or years and may be deducted from the portion of the taxpayer's entire net income allocated to this state for such year or years; provided, however, that in no event shall such excess, insofar as it reflects deductions taken with respect to items set forth in clause (B) of this subparagraph, be carried over to taxable years commencing on or after January first, two thousand twenty-one.

(E) In any taxable year when property is sold or otherwise disposed of, with respect to which a deduction has been allowed pursuant to clause (A) or (B) of this subparagraph, the gain or loss thereon entering into the computation of federal taxable income shall be disregarded in computing entire net income, and there shall be added to or subtracted from the portion of entire net income allocated within the state the gain or loss upon such sale or other disposition. In computing such gain or loss the basis of the property sold or disposed of shall be adjusted to reflect the deduction allowed with respect to such property pursuant to clause (A) or (B) of this subparagraph. Provided, however, that no loss shall be recognized for the purposes of this clause with respect to a sale or other disposition of property to a person whose acquisition thereof is not a purchase as defined in section one hundred seventy-nine (d) of the internal revenue code.

(3) At the election of the taxpayer there shall be deducted from the portion of its entire net income allocated within the state either or both of the items set forth in clause (A) or (B) of this subparagraph, except that only one of such deductions shall be allowed with respect to any one item of property, and except that a deduction of the item set forth in clause (B) may not be taken with respect to taxable years commencing on or after January first, two thousand twenty-one.

(A) Depreciation with respect to any property such as described in clauses (C) and (D) of this subparagraph, not exceeding twice the depreciation allowed with respect to the same property for federal income tax

purposes. Such deduction shall be allowed only upon condition that entire net income be computed without any deduction for the depreciation or amortization of the same property, and the total of all deductions allowed in any taxable year or years with respect to the depreciation of any such property shall not exceed its cost or other basis multiplied by the taxpayer's business allocation percentage determined under this paragraph for the first year it deducts such depreciation under this subparagraph.

(B) Expenditures paid or incurred during the taxable year for the construction, reconstruction, erection or acquisition of any property such as described in clause (C) of this subparagraph which is used or to be used for purposes of research and development in the experimental or laboratory sense. Such purposes shall not be deemed to include the ordinary testing or inspection of materials or products for quality control, efficiency surveys, management studies, consumer surveys, advertising, promotions or research in connection with literary, historical or similar projects. Such deduction shall be allowed only on condition that it does not exceed the amount of the expenditures multiplied by the taxpayer's business allocation percentage determined under this paragraph for the year the expenditures are paid or incurred and that entire net income for the taxable year and all succeeding taxable years be computed without the deduction of any such expenditures and without any deduction for depreciation of the same property, except to the extent that its basis may be attributable to factors other than such expenditures, or in case a deduction is allowable pursuant to this clause for only a part of such expenditures, on condition that any deduction allowed for federal income tax purposes on account of such expenditures or on account of depreciation of the same property be proportionately reduced in computing entire net income for the taxable year and all succeeding taxable years. With respect to property which is used or to be used for research and development only in part, or during only part of its useful life, a proportionate part of such expenditures shall be deductible. If all or part of such expenditures with respect to any property shall have been deducted as provided herein, and such property is used for purposes other than research and development to a greater extent than originally reported, the taxpayer shall report such use in its report for the first taxable year during which it occurs, and the tax commission may recompute the tax for the year or years for which such deduction was allowed, and may assess any additional tax resulting from such recomputation regardless of the time limitations set forth in section ten hundred eighty-three of this chapter.

(C) Such deductions shall be allowed only with respect to tangible property which is depreciable pursuant to section one hundred sixty-seven of the internal revenue code, having a situs in this state and used in the taxpayer's trade or business. The deductions provided for in clause (A) of this subparagraph shall (i) be allowed only with respect to tangible property which is (I) constructed, reconstructed or erected after December thirty-first, nineteen hundred sixty-seven, pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-eight, and at all times thereafter, binding on the taxpayer or, property, the physical construction, reconstruction or erection of which began on or before December thirty-first, nineteen hundred sixty-eight or which began after such date pursuant to an order placed on or before December thirty-first, nineteen hundred sixty-eight, and then only with respect to that portion of the basis thereof or the expenditures relating thereto which is properly attributable to such construction, recon-

struction or erection after December thirty-first, nineteen hundred sixty-three or (II) acquired after December thirty-first, nineteen hundred sixty-seven, pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-eight, and at all times thereafter, binding on the taxpayer or pursuant to an order placed on or before December thirty-first, nineteen hundred sixty-eight, by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, if the original use of such property commenced with the taxpayer, commenced in this state and commenced after December thirty-first, nineteen hundred sixty-seven, or (III) acquired, constructed, reconstructed, or erected subsequent to December thirty-first, nineteen hundred sixty-eight, if such acquisition, construction, reconstruction or erection is pursuant to a plan of the taxpayer which was in existence December thirty-first, nineteen hundred sixty-eight, and not thereafter substantially modified, and such acquisition, construction, reconstruction or erection would qualify under the rules in paragraph four, five or six of subsection (h) of section forty-eight of the internal revenue code provided all references in such paragraphs four, five and six to the dates October nine, nineteen hundred sixty-six, and October ten, nineteen hundred sixty-six, shall be read as December thirty-first, nineteen hundred sixty-eight. A taxpayer shall be allowed a deduction under items (I), (II) or (III) of this clause only if the tangible property shall be delivered or the construction, reconstruction or erection shall be completed on or before December thirty-first, nineteen hundred seventy, except in the case of tangible property which is acquired, constructed, reconstructed or erected pursuant to a contract which was, on or before December thirty-first, nineteen hundred sixty-eight, and at all times thereafter binding on the taxpayer. (ii) The deduction provided for in clause (B) of this subparagraph shall be allowed only with respect to tangible property (I) the construction, reconstruction or erection of which is completed after December thirty-first, nineteen hundred sixty-seven, and then only with respect to that portion of the basis thereof or the expenditures relating thereto which is properly attributable to such construction, reconstruction or erection after December thirty-first, nineteen hundred sixty-three, or (II) acquired after December thirty-first, nineteen hundred sixty-seven by purchase as defined in section one hundred seventy-nine (d) of the internal revenue code, if the original use of such property commenced with the taxpayer, commenced in this state and commenced after December thirty-first, nineteen hundred sixty-three. Provided, however, for any taxable year beginning on or after January first, nineteen hundred sixty-eight, a taxpayer shall not be allowed a deduction under this subparagraph with respect to tangible personal property leased by it to any other person or corporation. For purposes of the preceding sentence, any contract or agreement to lease or rent or for a license to use such property shall be considered a lease. With respect to property which the taxpayer uses itself for purposes other than leasing for part of a taxable year and leases for a part of a taxable year, the taxpayer shall be allowed a deduction under this subparagraph in proportion to the part of the year it uses such property.

(D) A deduction under clause (A) of this subparagraph shall be allowed with respect to tangible property described in clause (C) only if such property is principally used by the taxpayer in the production of goods by manufacturing; processing; assembling; refining; mining; extracting; farming; agriculture; horticulture; floriculture; viticulture; or commercial fishing. For purposes of this clause, manufacturing shall

mean the process of working raw materials into wares suitable for use or which gives new shapes, new qualities or new combinations to matter which already has gone through some artificial process by the use of machinery, tools, appliances and other similar equipment. Property used in the production of goods shall include machinery, equipment or other tangible property which is principally used in the repair and service of other machinery, equipment or other tangible property used principally in the production of goods and shall include all facilities used in the manufacturing operation, including storage of material to be used in manufacturing and of the products that are manufactured.

(E) Subject to the limitation imposed by clauses (A) and (B) of this subparagraph, if the deductions allowable for any taxable year, pursuant to this paragraph, exceed the portion of the taxpayer's entire net income allocated to this state for such year, the excess may be carried over to the following taxable year or years and may be deducted from the portion of the taxpayer's entire net income allocated to this state for such year or years; provided, however, that in no event shall such excess, insofar as it reflects deductions taken with respect to items set forth in clause (B) of this subparagraph, be carried over to taxable years commencing on or after January first, two thousand twenty-one.

(F) In any taxable year when property is sold or otherwise disposed of, with respect to which a deduction has been allowed pursuant to clause (A) or (B) of this subparagraph, the gain or loss thereon entering into the computation of federal taxable income shall be disregarded in computing entire net income, and there shall be added to or subtracted from the portion of entire net income allocated within the state the gain or loss upon such sale or other disposition. In computing such gain or loss the basis of the property sold or disposed of shall be adjusted to reflect the deduction allowed with respect to such property pursuant to clause (A) or (B) of this subparagraph. Provided, however, that no loss shall be recognized for the purposes of this clause with respect to a sale or other disposition of property to a person whose acquisition thereof is not a purchase as defined in section one hundred seventy-nine (d) of the internal revenue code.

§ 2. Section 208 of the tax law is amended by adding a new subdivision 8-B to read as follows:

8-B. (a) The term "minimum taxable income" shall mean the entire net income of the taxpayer for the taxable year:

(1) increased by the amount of the federal items of tax preference set forth in section fifty-seven of the internal revenue code (with the modifications set forth in paragraph (b) of this subdivision), which items of tax preference shall have the same meaning and be computed in the same manner as under section fifty-seven of the internal revenue code;

(2) determined with the federal adjustments described in paragraph (c) of this subdivision, which adjustments shall have the same meaning and be computed in the same manner as under sections fifty-six and fifty-eight of the internal revenue code;

(3) increased by the net operating loss deduction; and

(4) reduced, for taxable years beginning after two thousand twenty-one, by the alternative net operating loss deduction, as defined in paragraph (d) of this subdivision.

(b) The federal items of tax preference referred to hereinabove shall be modified by deducting "tax-exempt interest" and "accelerated depreciation or amortization on certain property placed in service before Janu-

ary 1, 1987", as determined under paragraphs five and seven of subsection (a) of section fifty-seven of the internal revenue code.

(c) The adjustments referred to hereinabove shall be:

(1) "Depreciation" as determined under paragraph one of subsection (a) of section fifty-six of the internal revenue code. For purposes of this subparagraph, the depreciation item of adjustment provided for here shall not include any amount attributable to property for which the tax benefits of the accelerated cost recovery system are not available under this article by reason of subparagraph ten of paragraph (b) of subdivision nine of this section;

(2) "Mining exploration and development costs" as determined under paragraph two of subsection (a) of section fifty-six of the internal revenue code;

(3) "Treatment of certain long-term contracts" as determined under paragraph three of subsection (a) of section fifty-six of the internal revenue code;

(4) "Installment sales of certain property" as determined under paragraph six of subsection (a) of section fifty-six of the internal revenue code;

(5) "Circulation expenditures of personal holding companies" as determined under subparagraph (C) of paragraph two of subsection (b) of section fifty-six of the internal revenue code;

(6) "Merchant marine capital construction funds" as determined under paragraph two of subsection (c) of section fifty-six of the internal revenue code;

(7) "Disallowance of passive activity loss" as determined under subsection (b) of section fifty-eight of the internal revenue code; and

(8) "Adjusted basis", as it appears in paragraph seven of subsection (a) of section fifty-six of the internal revenue code, but without taking into account the references therein to paragraph five of subsection (a) of section fifty-six of the internal revenue code.

(d) The term "alternative net operating loss deduction" means the net operating loss deduction allowed for the taxable year, except as provided herein.

(1)(A) The net operating loss for any year beginning after nineteen hundred eighty-nine which is included in determining such deduction shall be determined with the adjustments provided in subparagraph two of paragraph (a) of this subdivision, and shall be reduced by the items of tax preference determined under subparagraph one of paragraph (a) of this subdivision, attributable to such year. An item of tax preference shall be taken into account only to the extent such item increased the amount of the net operating loss for the taxable year.

(B) In the case of loss years beginning before two thousand twenty-two, the amount of the net operating loss which may be carried over to taxable years beginning after two thousand twenty-one shall be equal to an amount which may be carried from the loss year to the first taxable year of the taxpayer beginning after two thousand twenty-one.

(2) In determining the amount of such deduction, loss carryforwards and carrybacks shall be computed in the manner set forth in paragraph two of subsection (b) of section one hundred seventy-two of the internal revenue code, except that, for the reference therein to taxable income, there shall be substituted the phrase "ninety percent of minimum taxable income determined without regard to the alternative net operating loss deduction".

(3) The amount of such deduction shall not exceed ninety percent of minimum taxable income determined without regard to such deduction,

provided, however, the term "ninety percent" shall be read as "forty-five percent" with respect to taxable years beginning in two thousand twenty-one.

(e) The department may, whenever necessary in order to properly reflect the minimum taxable income of any taxpayer, determine the year or period in which any item of income or deduction shall be included, without regard to the method of accounting employed by the taxpayer.

(f) If the period covered by a report under this article is other than the period covered by the report to the United States treasury department, the minimum taxable income shall be appropriately modified pursuant to regulations promulgated by the United States treasury department.

§ 3. This act shall take effect January 1, 2021 and shall apply to taxable years commencing on or after such date.