SENATE BILL 361

Q3
SB 288/21 – B&T

By: Senators Pinsky, Smith, Kelley, Lam, Young, Rosapepe, and Washington
Introduced and read first time: January 21, 2022
Assigned to: Budget and Taxation

A BILL ENTITLED

1 AN ACT concerning

2 Income Tax – Carried Interest – Additional Tax

3 FOR the purpose of imposing a certain State income tax on the Maryland taxable income
4 attributable to certain investment management services of an individual or a
5 corporation or the distributive share of a pass-through entity; requiring the
6 Comptroller to provide certain notice to the Department of Legislative Services;
7 providing for the termination of this Act if certain federal legislation is enacted into
8 law; and generally relating to the State income tax and investment management
9 services.

10 BY repealing and reenacting, with amendments,
11 Article – Tax – General
12 Section 10–102.1(a), (b), and (d)
13 Annotated Code of Maryland
14 (2016 Replacement Volume and 2021 Supplement)

15 BY adding to
16 Article – Tax – General
17 Section 10–102.2
18 Annotated Code of Maryland
19 (2016 Replacement Volume and 2021 Supplement)

20 SECTION 1. BE IT ENACTED BY THE GENERAL ASSEMBLY OF MARYLAND,
21 That the Laws of Maryland read as follows:

22 Article – Tax – General

23 10–102.1.

24 (a) (1) In this section the following words have the meanings indicated.

EXPLANATION: CAPITALS INDICATE MATTER ADDED TO EXISTING LAW.
[Brackets] indicate matter deleted from existing law.
(2) “Distributable cash flow” means taxable income reportable by a pass-through entity on its federal income tax return for the taxable year:

(i) adjusted, in the case of an entity using the accrual method of accounting to report federal taxable income, to reflect the amount of taxable income that would have been reported under the cash method of accounting;

(ii) increased by the sum of:

1. cash receipts for the taxable year that are not includable in the gross income of the entity, including capital contributions and loan proceeds;

2. amounts allowable to the entity for the taxable year as deductions for depreciation, amortization, and depletion; and

3. the decrease, if any, in the entity’s liability reserve as of the end of the taxable year; and

(iii) decreased by the sum of:

1. cash expenditures for the taxable year that are not deductible in computing the taxable income of the entity, not including distributions to shareholders, partners, or members; and

2. the increase, if any, in the entity’s liability reserve as of the end of the taxable year.

(3) “INVESTMENT MANAGEMENT SERVICES” MEANS SERVICES PROVIDED BY A PARTNER OR SHAREHOLDER TO A PARTNERSHIP, AN S CORPORATION, OR ANY OTHER ENTITY IF THE SERVICES INCLUDE PROVIDING A SUBSTANTIAL QUANTITY OF:

(I) ADVISING AS TO THE ADVISABILITY OF INVESTING IN, PURCHASING, OR SELLING A SPECIFIED ASSET;

(II) MANAGING, ACQUIRING, OR DISPOSING OF A SPECIFIED ASSET;

(III) ARRANGING FINANCING WITH RESPECT TO ACQUIRING A SPECIFIED ASSET; OR

(IV) ANY ACTIVITY IN SUPPORT OF ANY OF THE SERVICES DESCRIBED IN ITEMS (I) THROUGH (III) OF THIS PARAGRAPH.

(4) “Liability reserve” means accrued unpaid liabilities that are not deductible in computing taxable income.
“Member” means:

(i) a shareholder of an S corporation;

(ii) a general or limited partner of a partnership, limited partnership, or limited liability partnership;

(iii) a member of a limited liability company; or

(iv) a beneficiary of a business trust or statutory trust.

“Nonresident entity” means an entity that is not formed under the laws of the State and is not qualified by or registered with the Department of Assessments and Taxation to do business in the State.

“Nonresident taxable income” means any income described in § 10–210(b)(1) through (4) of this title.

“Pass–through entity” means:

(i) an S corporation;

(ii) a partnership;

(iii) a limited liability company that is not taxed as a corporation under this title; or

(iv) a business trust or statutory trust that is not taxed as a corporation under this title.

“Pass–through entity’s taxable income” means the portion of a pass–through entity’s income under the federal Internal Revenue Code, calculated without regard to any deduction for taxes based on net income that are imposed by any state or political subdivision of a state, that is derived from or reasonably attributable to the trade or business of the pass–through entity in this State.

“Specified asset” means securities, real estate held for rental or investment, interests in partnerships, commodities, or options or derivatives contracts.

Subject to paragraph (2) of this subsection, in addition to any other tax imposed under this title, a tax is imposed on each pass–through entity:

Each pass–through entity:
(i) shall pay the tax imposed under paragraph (1) of this subsection with respect to the distributive shares or pro rata shares of the nonresident and nonresident entity members of the pass–through entity; [or] AND

(ii) may elect to pay the tax imposed under paragraph (1) of this subsection with respect to the distributive shares or pro rata shares of all members of the pass–through entity.

(d) (1) [With] EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, WITH respect to a pass–through entity that pays the tax imposed under subsection (b)(1) of this section in accordance with subsection (b)(2)(i) of this section, the tax imposed is the sum of:

(i) a rate equal to the sum of the rate of the tax imposed under § 10–106.1 of this subtitle and the top marginal State tax rate for individuals under § 10–105(a) of this subtitle applied to the sum of each nonresident individual member's distributive share or pro rata share of the pass–through entity's nonresident taxable income; and

(ii) the rate of the tax for a corporation under § 10–105(b) of this subtitle applied to the sum of each nonresident entity member’s distributive share or pro rata share of the pass–through entity’s nonresident taxable income.

(2) [With] EXCEPT AS PROVIDED IN PARAGRAPH (3) OF THIS SUBSECTION, WITH respect to a pass–through entity that pays the tax imposed under subsection (b)(1) of this section in accordance with subsection (b)(2)(ii) of this section, the tax imposed is the sum of:

(i) a rate equal to the sum of the rate of the tax imposed under § 10–106.1 of this subtitle and the top marginal State tax rate for individuals under § 10–105(a) of this subtitle applied to the sum of each individual member’s distributive share or pro rata share of the pass–through entity’s taxable income; and

(ii) the rate of the tax for a corporation under § 10–105(b) of this subtitle applied to the sum of each entity member’s distributive share or pro rata share of the pass–through entity’s taxable income.

(3) (I) IN ADDITION TO THE TAX IMPOSED UNDER SUBSECTION (B) OF THIS SECTION, A STATE TAX IS IMPOSED THAT IS EQUAL TO:

1. WITH RESPECT TO A PASS–THROUGH ENTITY THAT PAYS THE TAX IMPOSED UNDER SUBSECTION (B)(1) OF THIS SECTION IN ACCORDANCE WITH SUBSECTION (B)(2)(I) OF THIS SECTION, 17% OF THE DISTRIBUTIVE SHARE OR PRO RATA SHARE OF A PASS–THROUGH ENTITY’S NONRESIDENT TAXABLE INCOME THAT IS ATTRIBUTABLE TO INVESTMENT MANAGEMENT SERVICES PROVIDED IN THE STATE; AND
2. WITH RESPECT TO A PASS–THROUGH ENTITY THAT PAYS THE TAX IMPOSED UNDER SUBSECTION (B)(1) OF THIS SECTION IN ACCORDANCE WITH SUBSECTION (B)(2)(II) OF THIS SECTION, 17% OF THE DISTRIBUTIVE SHARE OR PRO RATA SHARE OF A PASS–THROUGH ENTITY’S TAXABLE INCOME THAT IS ATTRIBUTABLE TO INVESTMENT MANAGEMENT SERVICES PROVIDED IN THE STATE.

   (II) THE TAX IMPOSED UNDER THIS PARAGRAPH:

   1. IS CALCULATED BY REFERENCE TO THE PERFORMANCE OF THE INVESTMENT PORTFOLIO FUNDS AND NOT FROM THE INVESTMENT ITSELF; AND

   2. IS NOT IMPOSED ON FEES CALCULATED BY REFERENCE TO THE TOTAL ASSETS UNDER MANAGEMENT OF A PASS–THROUGH ENTITY ENGAGED IN INVESTMENT MANAGEMENT SERVICES.

   (III) THE TAX IMPOSED UNDER THIS PARAGRAPH DOES NOT APPLY TO THE DISTRIBUTIVE SHARE OR PRO RATA SHARE OF A PASS–THROUGH ENTITY’S NONRESIDENT TAXABLE INCOME THAT IS ATTRIBUTABLE TO INVESTMENT MANAGEMENT SERVICES PROVIDED IN THE STATE IF, DURING THE TAXABLE YEAR, AT LEAST 80% OF THE AVERAGE FAIR MARKET VALUE OF THE SPECIFIED ASSETS OF THE PASS–THROUGH ENTITY CONSISTS OF REAL ESTATE.

(4) The tax required to be paid for any taxable year by a pass–through entity may not exceed:

   (i) with respect to a pass–through entity that pays the tax imposed under subsection (b)(1) of this section in accordance with subsection (b)(2)(i) of this section, the sum of all of the nonresident and nonresident entity members’ shares of the pass–through entity’s distributable cash flow; and

   (ii) with respect to a pass–through entity that pays the tax imposed under subsection (b)(1) of this section in accordance with subsection (b)(2)(ii) of this section, the sum of all of the members’ shares of the pass–through entity’s distributable cash flow.

10–102.2.

(A) (1) IN THIS SECTION THE FOLLOWING WORDS HAVE THE MEANINGS INDICATED.

   (2) “INVESTMENT MANAGEMENT SERVICES” MEANS SERVICES PROVIDED BY A PARTNER OR SHAREHOLDER TO A PARTNERSHIP, AN S
CORPORATION, OR ANY OTHER ENTITY IF THE SERVICES INCLUDE PROVIDING A
SUBSTANTIAL QUANTITY OF THE FOLLOWING:

(I) ADVISING AS TO THE ADVISABILITY OF INVESTING IN,
PURCHASING, OR SELLING A SPECIFIED ASSET;

(II) MANAGING, ACQUIRING, OR DISPOSING OF A SPECIFIED
ASSET;

(III) ARRANGING FINANCING WITH RESPECT TO ACQUIRING A
SPECIFIED ASSET; OR

(IV) ANY ACTIVITY IN SUPPORT OF ANY OF THE SERVICES
DESCRIBED IN ITEMS (I) THROUGH (III) OF THIS PARAGRAPH.

(3) “SPECIFIED ASSET” MEANS SECURITIES, REAL ESTATE HELD FOR
RENTAL OR INVESTMENT, INTERESTS IN PARTNERSHIPS, COMMODITIES, OR
OPTIONS OR DERIVATIVES CONTRACTS.

(B) (1) IN ADDITION TO ANY OTHER TAX IMPOSED UNDER THIS TITLE, A
STATE TAX IS IMPOSED ON THE MARYLAND TAXABLE INCOME OF A CORPORATION
OR AN INDIVIDUAL, INCLUDING SPOUSES FILING A JOINT RETURN OR A SURVIVING
SPOUSE OR HEAD OF HOUSEHOLD AS DEFINED IN § 2 OF THE INTERNAL REVENUE
CODE, THAT IS ATTRIBUTABLE TO INVESTMENT MANAGEMENT SERVICES.

(2) THE TAX IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION
FOR A CORPORATION OR AN INDIVIDUAL, INCLUDING SPOUSES FILING A JOINT
RETURN OR A SURVIVING SPOUSE OR HEAD OF HOUSEHOLD AS DEFINED IN § 2 OF
THE INTERNAL REVENUE CODE, IS EQUAL TO 17% OF THE MARYLAND TAXABLE
INCOME THAT IS ATTRIBUTABLE TO INVESTMENT MANAGEMENT SERVICES.

(3) THE TAX IMPOSED UNDER PARAGRAPH (1) OF THIS SUBSECTION:

(I) IS CALCULATED BY REFERENCE TO THE PERFORMANCE OF
THE INVESTMENT PORTFOLIO FUNDS AND NOT FROM THE INVESTMENT ITSELF; AND

(II) IS NOT IMPOSED ON FEES CALCULATED BY REFERENCE TO
THE TOTAL ASSETS UNDER MANAGEMENT OF A PASS–THROUGH ENTITY ENGAGED IN
INVESTMENT MANAGEMENT SERVICES.

(4) A PARTNER OR SHAREHOLDER IS NOT SUBJECT TO THE TAX
UNDER THIS SUBSECTION IF, DURING THE TAXABLE YEAR, AT LEAST 80% OF THE
AVERAGE FAIR MARKET VALUE OF THE SPECIFIED ASSETS OF THE PARTNERSHIP, S
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CORPORATION, OR OTHER ENTITY CONSISTS OF REAL ESTATE.

SECTION 2. AND BE IT FURTHER ENACTED, That the Comptroller shall notify the Department of Legislative Services within 5 days after determining that the United States Congress has passed and the President of the United States has signed legislation having an identical effect to this Act applicable to income attributable to investment management services earned in all of the states and territories.

SECTION 3. AND BE IT FURTHER ENACTED, That this Act shall take effect July 1, 2022, and shall be applicable to all taxable years beginning after December 31, 2021. It shall remain effective until 30 days after the day on which the Department of Legislative Services receives notice under Section 2 of this Act, and, at the end of the 30th day, this Act, with no further action required by the General Assembly, shall be abrogated and of no further force and effect.