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Stephanie T. Do
Senior Tax Counsel
(202) 484-5228
sdo@cost.org

January 26, 2022

The Honorable Bob Giuda, Chair
The Honorable Lou D’Allesandro, Vice-Chair
Senate Ways and Means Committee

Re: COST’s Support of Eliminating the Double Apportionment of Net Operating Losses, S.B. 435

Dear Chair Giuda; Vice-Chair D’Allesandro; and Members of the Committee:

On behalf of the Council On State Taxation (COST), I am writing in support of eliminating the “double apportionment” of net operating loss deductions (NOLDs) for purposes of the Business Profits Tax. In the year the NOLD is utilized, New Hampshire requires the NOLD to be apportioned twice (*i.e.*, in the year the NOLD was incurred and again in the year the NOLD adjusts gross business profits). This double apportionment requirement artificially reduces the NOLD and raises serious constitutional concerns. COST supports replacing it with a process that apportions an NOLD only once—in the year the NOLD is generated—as provided by S.B. 435.

About COST

COST is a nonprofit trade association based in Washington, DC. COST was formed in 1969 as an advisory committee to the Council of State Chambers of Commerce and today has an independent membership of over 500 major corporations engaged in interstate and international business. COST’s objective is to preserve and promote the equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. Many COST members have operations in New Hampshire.

Eliminating the Discriminatory Treatment of Out-of-State Businesses

NOLDs, like income, should be apportioned in order to determine the amount attributable to New Hampshire. Adding a second apportionment requirement artificially reduces the amount of the NOLD that can be used. Accordingly, the constitutionality of New Hampshire’s double apportionment of NOLDs is in serious doubt because it discriminates against interstate taxpayers. The U.S. Supreme Court held in *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977) that a state tax is impermissibly discriminatory and thereby violates the Commerce Clause, if the state tax treats out-of-state taxpayers differently than in-state taxpayers. Here, in-state businesses are certainly favored over multijurisdictional businesses because in-state businesses are not required to apportion their NOLDs twice, unlike their multijurisdictional counterparts. In-state businesses can fully utilize their NOLDs, while out-of-state businesses may not.

We strongly support the Committee’s favorable consideration of this bill eliminating the double apportionment of NOLDs.

Respectfully,

Stephanie T. Do

cc: COST Board of Directors
Douglas L. Lindholm, COST President & Executive Director