

# Legislation

## *House of Representatives*

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128TH GENERAL ASSEMBLY  
SECOND SESSION — 1976

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### *House Bill No. 834*

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As Amended By

### *House Amendment No. 1*

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#### AN ACT TO AMEND TITLE 8, DELAWARE CODE, RELATING TO THE CORPORATION FRANCHISE TAX.

*Be It Enacted by the General Assembly of the State of Delaware:*

Section 1. Amend Subsection (c), § 502, Chapter 5, Title 8, Delaware Code, by striking the words "fix the amount of the annual franchise tax as determined" appearing in the first sentence thereof and substituting in lieu thereof the words "fix the amount of the franchise tax as determined".

Section 2. Amend Subsection (d), § 502, Chapter 5, Title 8, Delaware Code, by striking the words "report, together with the franchise tax due," as they appear in the first sentence thereof and substituting in lieu thereof the words "report and the franchise tax due".

Section 3. Amend Subsection (e), § 502, Chapter 5, Title 8, Delaware Code, by striking said subsection in its entirety and substituting in lieu thereof the following:

"(e) Upon the failure, neglect or refusal of a corporation to file the annual franchise tax report and the franchise tax due as required by the chapter, the Secretary of State may, in his discretion, investigate the reasons therefor and, if he believes such action is warranted, refer the matter to the Attorney General for proceedings under § 283 of this title."

Section 4. Amend Subsection (c), § 504, Chapter 5, Title 8, Delaware Code, by striking it in its entirety and substituting in lieu thereof the following:

“(c) If the tax of any corporation remains unpaid after the due dates established by this section, the tax shall bear interest at the rate of 1 percent for each month or portion thereof until fully paid.”

Section 5. Amend Subsection (a), § 504, Chapter 5, Title 8, Delaware Code, by striking it in its entirety and substituting in lieu thereof the following:

“(a) The Franchise Tax shall be due and payable on the first day of March following the close of the calendar year, except that with respect to a corporation whose Franchise Tax liability for the current Calendar Year is estimated to exceed \$5,000, a tentative return and tax shall be due and payable as follows:

- (1) 25% of the estimated tax on the first day of June of the current year;
- (2) 25% of the estimated tax on the first day of September of the current year;
- (3) 25% of the estimated tax on the first day of December of the current year, and
- (4) the remainder of the tax as finally determined together with the annual Franchise Tax Report on the first day of March following the close of the calendar year.”

Section 6. Amend § 504, Chapter 5, Title 8, Delaware Code, by adding thereto subsections (e) and (f) to read as follows:

“(e) The tentative return and tax paid thereon under subsection (a) of this section shall be based on the annual franchise tax of the preceding year.

(f) The penalties for nonpayment of the tentative franchise tax as set forth in subsection (a) of this section shall be the same as those applied for any nonpayment of franchise tax in this title.”

Section 7. The effective date of this Act shall be May 1, 1976.

On April 8, 1976, House Bill 834 was signed into law by Delaware's Governor, Sherman W. Tribbitt and after much debate, political maneuvering, and constitutional arguments, its effect on the corporate atmosphere and stability is still unknown.

The bill, sponsored by Representative James D. McGinnis, a Democrat from Dover, basically changes the payment of the corporate franchise tax from an annual basis to that of a quarterly basis. The bill was marred by political division with the Republican minority arguing not against the spirit of the bill, but instead against the possible effect it would have on the corporation's view of Delaware as an area of tax and legal stability. The Democratic majority rebutted this proposition by statements reflect-

ing the need for the State to have a more evenly controlled cash flow, and that the possible saving to the State would be \$900,000 in interest cost.<sup>1</sup>

The law in effect amends section 504 of Title 8 of the Delaware Code entitled "collection and disposition of tax" referring, of course, to the Delaware corporate franchise tax.<sup>2</sup> It would change the date when the tax was due and payable from the first day of March to the collection of an estimated tax of twenty-five per cent on the first day of June, September, and December, with the remainder due on the first day of March of the following year. The bill's effect is limited only to corporations whose franchise tax liability is estimated to exceed \$5,000, such estimate being based on the annual franchise tax of the preceding year.<sup>3</sup> The act sets forth the penalties for non-payment of this "tentative" tax, including an interest penalty of one percent for each month the tax remains unpaid.<sup>4</sup>

Due to this \$5,000 limitation, the new method of collection will have an effect on only about 1,630 of the over 70,000 corporations now incorporated in Delaware. This figure is misleading, however, when you consider that roughly \$40 million of the \$54 million expected revenue from the franchise tax for the fiscal year 1976 will come from these few companies.<sup>5</sup>

Before House debate on House Bill 834, a controversy arose in House Revenue and Finance Committee as to the vote requirement for passage of this amendment to Title 8 of the Delaware Code.<sup>6</sup> The bill was origi-

1. Delaware State News, Feb. 29, 1976.

2. 8 DEL. C. § 504. Collection and disposition of tax; penalty interest; investigation of annual franchise tax report; notice of additional tax due.

(a) The franchise tax shall become due and payable on the 1st day of March.  
(b) The Department of State shall receive the franchise tax and pay over all taxes collected to the Department of Finance, except as provided in § 506 of this title.  
(c) If the tax of any corporation remains unpaid after the 1st day of March, the tax shall bear interest at the rate of 1 percent for each month or portion thereof until fully paid.  
(d) The Secretary of State has power to inquire into the truth or falsity or accuracy of every report required to be filed to carry out the provisions of this chapter. He may require the production of the books of any corporation referred to in this chapter and may swear or affirm and examine witnesses in relation thereto. Where the Secretary of State shall determine the amount of franchise tax which has been paid is less than the franchise tax due, he shall notify the taxpayer of the additional tax and any interest thereon which is due. Such additional tax and interest thereon shall be paid, or a petition for review thereof shall be filed, within 60 days after the notification to the taxpayer. (21 Del. Laws, c. 166, § 5; 22 Del. Laws, c. 15, § 5; 22 Del. Laws, c. 16, § 3; 22 Del. Laws, c. 260, § 1; 27 Del. Laws, c. 21, § 1; Code 1915, § 106; 35 Del. Laws, c. 5, § 5; 36 Del. Laws, c. 6, § 4; Code 1935, § 99; 8 Del. C. 1953, § 504; 55 Del. Laws, c. 90, § 1; 57 Del. Laws, c. 421, §§ 16, 17; 58 Del. Laws, c. 450, § 3.)

3. Delaware State News, Feb. 23, 1976.

4. 8 DEL. C. § 504(c). "If the tax of any corporation remains unpaid after the 1st day of March, the tax shall bear interest at the rate of 1 percent for each month or portion thereof until fully paid."

5. Morning News, Wilmington, Del., Apr. 1, 1976, at 1.

6. See footnote 2.

nally submitted with a requirement of two-thirds vote in its voting clause because of the constitutional provision in Article XI, Section 1, providing that any changes in the incorporation law under the revenue section require a two-thirds majority vote for passage.<sup>7</sup>

House Majority Leader, James McGinnis, introduced an amendment to change the two-thirds voting requirement to a simple majority, since House Bill 834 merely changes the date for payment of the franchise tax rather than alter any rates of such taxation. It should be noted that any amendment to the Delaware Code only requires a majority vote.<sup>8</sup> McGinnis cited legislative precedents for the requirement of only a majority vote on bills of similar nature which designated changes in the date of payments for corporate franchise taxes. In 1970, U.S. Representative Pierre DuPont IV, then a member of the Delaware House of Representatives, sponsored similar legislation to move forward the franchise tax payments and in 1972, Representative John G. S. Billingsley sponsored legislation to have the franchise tax cash flow moved up in order to help provide the necessary cash for personal income tax returns by requiring corporations to pay their entire franchise tax by March 1, three months earlier than the statutory date of June 1.<sup>9</sup> The McGinnis amendment was passed by a voice vote which in essence provided a clear pathway for ultimate passage.<sup>10</sup>

There are several economic consequences that will develop from the passage of this bill. First of all, the corporation will lose the use of monies that were available to it over the previous tax period. In the past, even though this "tax money" would probably be earmarked and designated as due and payable, in reality the money was still available for its use, convenience, and at a minimum, available to collect interest. Because of the passage of this bill, the corporations will not be forced to pay to the State

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7. § 1. Creation, amendment, renewal or revival by general law; exceptions; revocation or forfeitures of charters; requisites for enactment of corporation laws.

Section 1. No corporation shall hereafter be created, amended, renewed or revived by special act, but only by or under general law, nor shall any existing corporate charter be amended, renewed, or revived by special act, but only by or under general law; but the foregoing provisions shall not apply to municipal corporations, banks or corporations for charitable, penal, reformatory, or educational purposes, sustained in whole or in part by the State. The General Assembly shall, by general law, provide for the revocation or forfeiture of the charters of all corporations for the abuse, misuse, or non-use of their corporate powers, privileges or franchises. Any proceeding for such revocation or forfeiture, shall be taken by the Attorney General, as may be provided by law. No general incorporation law, nor any special act of incorporation, shall be enacted without the concurrence of two-thirds of all the members elected to each House of the General Assembly.

(Delaware Constitution, Art. IX.)

8. DELAWARE CONST. art. II, § 10, entitled "Journals; publications; entry of yeas and nays; passage of bills and resolutions." Also, see *State ex rel. Morford v. Emerson*, 40 Del. 328, 10 A.2d 515 (Super. Ct. 1939), *aff'd*, 40 Del. 496, 14 A.2d 378 (1940).

9. Evening Journal, Wilmington, Del., Mar. 12, 1976, at 2.

10. Delaware State News, Mar. 19, 1976, at 5.

of Delaware a twenty-five percent estimated tax at four different periods, of which they will lose all availability and use thereof during that period.

Another economic consequence, which was the subject of much debate on the floor of the General Assembly, will be the requirement to make two franchise tax payments during the present fiscal year. On March 1, 1976, the past year's franchise tax became due and payable under the provisions of the former statutory requirements. The passage of this bill now means that an additional twenty-five percent of the tax will be due on June 1, 1976, less than three months later. This has been criticized as giving the corporations insufficient time to rearrange their accounting procedures to meet the new requirements. It was also said that this was merely a means for the present administration to balance its budget.<sup>11</sup>

The only foreseeable legal consequence was expounded upon by the minority party during debate on the House floor. The Republicans anticipated that the bill could possibly become subject to later legal challenges concerning the majority vote requirement upon which passage was accomplished. According to a Delaware constitutional requirement, any changes to be made to the incorporation law require a two-thirds majority vote.<sup>12</sup> However, as was previously argued, this bill did not change the corporate franchise tax rates but merely changed the dates of payment.

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11. Authors were present during General Assembly debate on H.B. 834 on Apr. 1, 1976, at Dover, Del.

12. See footnote 7.

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