

UDITPA SECTION 17

- Sales, other than sales of tangible personal property, are in this state if:
- A. the income-producing activity is performed in this state; or
- B. the income-producing activity is performed both in and outside the state and a greater proportion of the income producing activity is performed in this state than in any other state, based on cost of performance.

Income Producing Activity: Defined.

- (1) The term “income producing activity” applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its obtaining gains or profit. *Such activity does not include transactions and activities performed on behalf of a taxpayer such as those conducted on its behalf by an independent contractor.*

(Activities Include):

- (a) the rendering of personal services by employees or the utilization of tangible or intangible property by the taxpayer in performing a service;
- (b) the sale, rental, leasing, licensing or other use of real property;
- (c) the rental, leasing, licensing or other use of tangible personal property; or
- (d) the sale, licensing or other use of intangible personal property.
- (2) **The mere holding of intangible personal property is not, of itself, an income producing activity.**

- **Costs of Performance: Defined.** The term “costs of performance” means direct cost determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

Special Rules—Services

- Usually, where services are performed partly within and partly without this state the service performed in each state will constitute a separate income producing activity;
- Personal service not directly connected with the performance of the contract or other obligation, for example, time expended in negotiating the contract, is excluded from the computation.

Special Rules—Income Producing Activities for Intangibles

- Nada....
- Nothing...
- Zip....

3.5.19.8 - SPECIAL RULES - IN GENERAL

- A. Section 7-4-19 NMSA 1978 provides that if the allocation and apportionment provisions of Sections 7-4-2 to 7-4-18 NMSA 1978 do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (1) Separate accounting;
- (2) The exclusion of any one or more of the factors;
- (3) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

- Article IV.18. permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases. Article IV.18 may be invoked only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the apportionment and allocation provisions contained in Article IV

3.5.19.11 - SPECIAL RULES - SALES FACTOR

- A. The following special rules are established in respect to the sales factor of the apportionment formula:

- (1) Where substantial amounts of gross receipts arise from an incidental or occasional sale of a fixed asset used in the regular course of the taxpayer's trade or business, such gross receipts shall be excluded from the sales factor. For example, gross receipts from the sale of a factory or plant will be excluded.

The “Say What?” Rule

- (3) Where the income producing activity in respect to business income from intangible personal property can be readily identified, such income is included in the denominator of the sales factor and, if the income producing activity occurs in this state, in the numerator of the sales factor as well. **For example, usually the income producing activity can be readily identified in respect to interest income received on deferred payments on sales of tangible property and income from the sale, licensing or other use of intangible personal property.**

New Mexico's Rule for Working Capital Sourcing

- (4) Where the taxpayer realizes gains from the sale or other disposition of intangible property held as part of the taxpayer's short term investments of working capital, only the net gain from such sales reported as taxable income shall be included in the taxpayer's sales factor.

THE "IF YOU'RE CONFUSED, THROW IT OUT" RULE:

- Where business income from intangible property cannot be readily attributed to any particular income-producing activity of the taxpayer, such income cannot be assigned to the numerator of the sales factor for any state and shall be excluded from the denominator. For example, where business income in the form of dividends received on stock, royalties received on patents or copyrights, or interest received on bonds results from the mere holding of the intangible...


EQUITABLE APPORTIONMENT

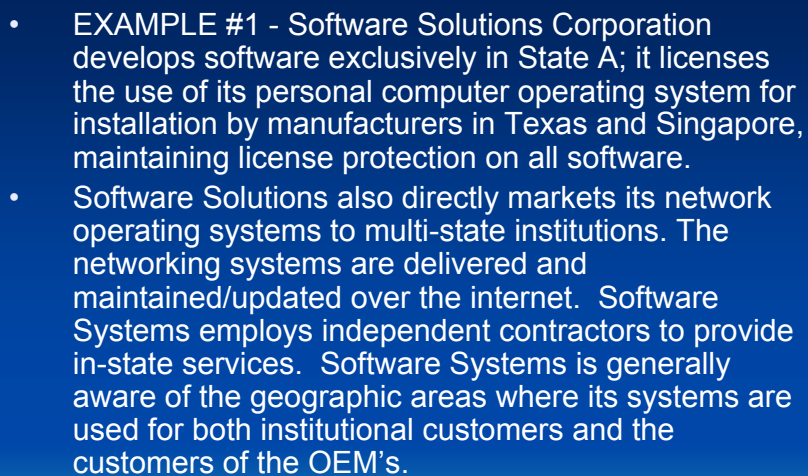
- Union Pac. Corp v. Idaho State Tax Comm'n Docket No. 29219, 2004 Opinion No. 2, SUPREME COURT OF IDAHO, 83 P.3d 116; 2004 Ida. LEXIS 2, January 4, 2004, Filed, Released for Publication January 27, 2004.
- E.I. Du Pont de Nemours & Co. v. State Tax Assessor, Decision 7608, 675 A.2d 82, 1995, Argued, April 9, 1996
- American Tel. & Tel. Co. v. State Tax Appeal Bd., Supreme Court, 241 Mont. 440; 787 P.2d 754
- Crocker Equip. Leasing v. Dep't of Revenue, 838 P.2d 552
- Atlantic Richfield Co. v. Department of Revenue, SC No. S30995, SUPREME COURT OF OREGON, 300 Ore. 637; 717 P.2d 613; 1986 Ore. LEXIS 1131, March 5, 1985, For the sake of uniformity with other states, intangible drilling and development costs were included in the property factor.
- Twentieth Century-Fox Film Corp. v. Department of Revenue, 700 P.2d 1035
- Pennzoil Company and Subsidiaries, Appellants, v. Department of Revenue, 22 P.3d 314

MTC/California SPECIAL APPORTIONMENT INDUSTRY RULES (Better late than never)

- i. Transportation
- ii. Financials
- iii. Partnerships
- iv. Telecommunications
- v. Movie and Television
- vi. Stockbrokers
- vii. Mutual Funds
- viii. Franchisors
- ix. Contractors
- x. Publishing

Application of Alternative Sourcing Rules - Examples



- EXAMPLE #1 - Software Solutions Corporation develops software exclusively in State A; it licenses the use of its personal computer operating system for installation by manufacturers in Texas and Singapore, maintaining license protection on all software.
 - Software Solutions also directly markets its network operating systems to multi-state institutions. The networking systems are delivered and maintained/updated over the internet. Software Systems employs independent contractors to provide in-state services. Software Systems is generally aware of the geographic areas where its systems are used for both institutional customers and the customers of the OEM's.
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- EXAMPLE #2 –
- Dailtone Corporation sells telephone service to customers in nine Eastern states. The corporate headquarters for Dailtone is in State A, as is the plurality of its computerized switching equipment, computer equipment and engineering staff.
- In addition to basic local telephone service, Dailtone charges a separate fee for providing the following services: (a) access to interstate communications carriers; (b) caller ID; (c) call-waiting; and (d) emergency 911 services.

- Dailtone's detailed cost of performance records for each state indicate that a plurality of the cost of performance for these additional services, including the location of key computer equipment and general and administrative overhead, is in state A. For rate-making purposes, these expenses are apportioned according to the percentage of revenues from each state.

- EXAMPLE #3 - Dailtone Corporation has a separate subsidiary that publishes “white pages” and “yellow pages” telephone directories for free distribution in all nine states.
- Dailtone Directories employs independent salesmen in each state on a commission basis for new accounts, but also employs telephone solicitors in state A who service existing accounts.
- The listing information and advertising for the directories is compiled in state A, but physically published by a subsidiary of Dailtone Directories in State B.

- The directories are distributed in the nine service-area states by independent contractors. Most of Dailtone Directories’ cost of performance (excluding independent contractors) is in state A; the largest single expense is the payment to the publishing subsidiary in state B. Including the activities of independent salesmen and distributors, the majority of the cost of performance for each separate directory is in the market state for that directory.

- **EXAMPLE #4** - ABC Utility employs 6,000 people, owns ten coal power plants and sells electricity in four states. In addition to regulated retail electric sales, ABC has a twenty-person trading department in State A which buys and sells options for electrical power, coal futures, gas contracts, and engages in other hedging transactions. The energy trading transactions complement the regulated utility business by allowing a means to dispose of excess capacity and ensuring consistent electrical prices as commodity prices vary.

- **EXAMPLE #5** - Bigbox Holding Company is a Delaware intangible holding company with five employees and minimal tangible property. It owns the trademarks of its parent corporation BigBox and licenses the use of those marks to BigBox, Inc. The royalty payments received from BigBox are then loaned back to the parent, generating interest income. BigBox Holding Company mostly engages in accounting and bookkeeping functions; most functions related to the protection of the marks are subcontracted to BigBox, Inc.

- **EXAMPLE #6** - Megarail Corporation operates a freight railroad business in six states. In order to accelerate cash flow, Megarail factors its accounts receivable from all sales. Megarail has included the amount of the sales of the accounts receivable in the “everywhere” sales factor, together with the amounts charged for the original service component, and sourced the sales of commercial paper to its commercial domicile.

- **EXAMPLE #7** - Eastern Publishing Company maintains a computer database of financial information from its commercial headquarters in Maryland and provides some market analysis. Eastern charges its customers a monthly fee to access the database, which may include information stored on computers across the world. Eastern knows the location of its customers. Eastern has nexus in approximately one half of the market states.