

Reg. IV.17. Sales Factor: Sales Other Than Sales of Tangible Personal Property in This State

4. Sale of a Service.

a. General Rule. The sale of a service is in this state if and to the extent that the service is delivered at a location in this state. In general, the term “delivered” shall be construed to refer to the location of the taxpayer’s market for the service provided and is not to be construed by reference to the location of the property or payroll of the taxpayer as otherwise determined for corporate apportionment purposes pursuant to Article IV(10)-(14) of the Compact. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth at **4.b-d**.

b. In-Person Services.

i. In General. Except as otherwise provided in this subsection **4.b**, in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer’s real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This rule includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services, including medical testing and x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer’s real or tangible personal property. Various professional services, including legal, accounting, financial and consulting services, and other such services as described in **4.d**, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this section, **4.b**.

ii. Assignment of Sales. Except as otherwise provided in this subsection **4.b**, where the service provided by the taxpayer is an in-person service, the delivery of the service is at the location where the service is received. Therefore, the sale is in this state if and to the extent the customer receives the in-person service in this state. In assigning its sales of in-person services, a taxpayer shall first attempt to determine the location where a service is received, as follows:

(A) Where the service is performed with respect to the body of an individual customer in this state (e.g. hair cutting or x-ray services) or in the physical presence of the customer in this state (e.g. live entertainment or athletic performances), the service is received in this state.

- (B) Where the service is performed with respect to the customer's real estate in this state or where the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in this state, the service is received in this state.
- (C) Where the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed in this state or outside this state, the service is received in this state if such property is shipped or delivered to the customer in this state.

In any instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor.

Example 3. Landscape Corp provides the landscaping services to Retail Corp, a corporation with retail locations in several states, and the services are with respect to such locations of Retail Corp that are in this state and in other states. The sale of services provided to Retail Corp is in this state to the extent the services are provided in this state.

Example 6. Teaching Corp provides seminars in this state to individual and business customers. The seminars and the materials used in connection with the seminars are prepared outside the state, the teachers who teach the seminars include teachers that are resident outside the state, and the students who attend the seminars include students that are resident outside the state. Because the seminars are taught in this state the sales of the services are in this state.

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c. Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

- i. In General. Where the service provided by the taxpayer is not an in-person service within the meaning of 4.b or a professional service within the meaning of 4.d, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the sale is in this state if and to the extent that the service is delivered in this state. For purposes of this section, 4.c, a service that is delivered to a customer is a service in which the customer and not a third party is the direct recipient of the service, and a service that is delivered on behalf of a customer is one in which a customer contracts for a service to be delivered to a third party or third parties. Services that are delivered on behalf of a customer include services where the taxpayer's service is the direct or

indirect delivery of advertising to the customer's intended audience. Services that are delivered electronically through a customer are services that are delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient. Except in the instance of services that are delivered through a customer (where the services must be delivered electronically), services are included within the meaning of this section 4.c, irrespective of the method of delivery, e.g., whether such services are delivered by a physical means or through an electronic transmission.

ii. Assignment of Sales. The assignment of a sale to a state or states in the instance of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and the nature of the customer. Separate rules of assignment apply to services delivered by physical means and services delivered by electronic transmission. (For purposes of this section, 4.c, a service delivered by an electronic transmission shall not be considered a delivery by a physical means). In any instance where, applying the rules set forth in this section, 4.c, the rule of assignment depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. In any instance where the state to which the sale is to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in such state, the sale that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's sales factor.

(A) Delivery to or on Behalf of a Customer by Physical Means, Whether to an Individual or Business Customer. Services delivered to a customer or on behalf of a customer through a physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers or other direct mail services; the delivery of advertising or advertising-related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (e.g., where software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of M.G.L. c. 63) where the taxpayer installs the custom software at the customer's site. The rules in this subsection 4.c.ii(A) apply whether the taxpayer's customer is an individual customer or a business customer.

1. Rule of Determination. In assigning the sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where such services are delivered. Where the taxpayer is able to determine the state or states where the service is delivered, it shall assign the sale to such state or states.

2. Rule of Reasonable Approximation. Where the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate such state or states.

Example 2. Ad Corp is a corporation based outside this state that provides advertising and advertising-related services in this state and in neighboring states. Ad Corp enters into a contract with an out of state customer to create billboards to be displayed in this state and to create fliers to be mailed to residents of this state. Ad Corp performs some of the design work internally, but also subcontracts out some of this work; all of the design work is performed and materials produced outside this state. The sale of the services, including the design services, is in this state because the service is physically delivered on behalf of the customer to the customer's intended audience in this state.

Example 5. Software Corp, a software development corporation, enters into a contract with a business customer, Buyer Corp, which is physically located in this state, to develop custom software to be used in Buyer Corp's business. Software Corp develops the custom software outside this state, and then physically installs the software on Buyer Corp's computer hardware located in this state. On these facts, the development and sale of the custom software is properly characterized as a service transaction, and the sale is assigned to this state because the software is physically delivered to the customer in This state. See 830 CMR 63.38.1(9)(d)4.c.ii(A)1.

(B) Delivery to a Customer by Electronic Transmission. Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following rules apply.

1. Services Delivered By Electronic Transmission to an Individual Customer.

- a. Rule of Determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in this state if and to the extent that the taxpayer's customer receives the service in this state. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states.
- b. Rules of Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states. Where a taxpayer does not have sufficient

information from which it can determine or reasonably approximate the state or states in which the service is received, it shall approximate such state or states using the customer's billing address.

2. Services Delivered By Electronic Transmission to a Business Customer

- a. Rule of Determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in this state if and to the extent that the taxpayer's customer receives the service in this state. If the taxpayer can determine the state or states where the service is received, it shall assign the sale to such state or states. For purposes of this section, 4.c.ii(B)2, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.
- b. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate such state or states.
- c. Secondary Rule of Approximation. In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, such state or states shall be approximated as set forth in this section. In such cases, unless the taxpayer can apply the safe harbor set forth in 4.c.ii(B)2.d the taxpayer shall approximate the state or states in which the service is received as follows: first, by assigning the sale to the state where the contract of sale is principally managed by the customer; second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the sale using the customer's billing address; provided, however, that in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.
- d. Safe Harbor. In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate

under 4.c.ii(B)2.b, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the rule stated at 4.c.ii(B)2.c, apply the safe harbor stated in this section, 4.c.ii(B)2.d. Under this safe harbor, a taxpayer may assign its sales to a particular customer based upon the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than a thousand customers, whether business or individual, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 4.c.ii(B)2, to services delivered by electronic transmission to a business customer, and not otherwise.

(C) Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. Services delivered electronically to third-party recipients "on behalf of" the customer include the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. Services delivered electronically "through" a customer to third-party recipients are services that are delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.

1. Rule of Determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in this state if and to the extent that the end users or other third-party recipients are in this state. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in this state to the extent that the audience for such advertising is in this state. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in this state to the extent that the end users or other third-party recipients receive such services in this state. The rules in this subsection 4.c.ii(C) apply whether the taxpayer's customer is an individual customer or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.

2. Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services

are delivered, it shall reasonably approximate such state or states.

3. Secondary Rules of Approximation.

- i. Where a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate such location, the taxpayer shall approximate the audience in a state for such advertising using the following secondary rules of approximation. Where a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in such area. For a taxpayer with less information about its audience, the taxpayer shall approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in such area.
- ii. Where a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling such service to end users or other third-party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third-party recipients from which it can determine or reasonably approximate such location, the taxpayer shall approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells such services, relative to the total population in such area.

Example 2. Online Corp, a corporation based outside this state, provides web-based services through the means of the Internet to individual customers on a national basis. These customers access Online Corp web services primarily in their states of residence, and sometimes, while traveling, in other states. If Online Corp can determine or reasonably approximate the state or states where its services are received, then it must do so. Assuming that Online Corp cannot determine or reasonably approximate the location where its services are received, Online Corp must assign the sales made to the individual customers using the customers' billing addresses to the extent known. Assume for purposes of this example that Online Corp knows the billing address for each of its customers. In this case, Online Corp's sales made to its individual customers are in this state in any case in which the customer's billing address is in this state.

Example 3. Same facts as Example 2, except that Online Corp knows the billing addresses for a substantial number, but not all of its individual customers. Also assume that Online Corp reasonably believes that the geographic distribution of the sales for which it does not know the billing address generally tracks those for which it does know the billing address. Online Corp must assign the sales of its web-based services as provided to its individual customers using the customers' billing addresses that it does know, and must include sales for which it does not know the customers' billing address in its sales factor in this same proportion.

Example 5. Online Corp, a corporation based outside this state, provides web-based services through the means of the Internet to a business customer, Business Corp, a company with offices in this state and two neighboring states. Assume that Online Corp cannot determine where its services are received but reasonably approximates that Business Corp received its web services 75% in this state and 25% in other states. In such case, 75% of the sale is in this state. Assume alternatively that Online Corp cannot determine or reasonably approximate the location of the receipt of its web services. Under these circumstances, Online Corp must assign the sale to, respectively, the state where the customer principally managed the contract, the state where the customer placed the order for the services, or the state of the customer's billing address. If these assignment rules apply, then assuming Online Corp derives more than 5% of its sales of services from Business Corp, Online Corp has an affirmative duty to identify the state in which its contract of sale is principally managed by Business Corp and must assign the receipts to that state.

Example 6. Cable TV Corp, a corporation that is based outside of this state, has two revenue streams. First, Cable TV Corp sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Cable TV Corp's televised programming. Some of these business customers, though not all of them, have a physical presence in this state. Second, Cable TV Corp sells monthly subscription services and discretionary pay-per-view services to individual customers in this state and in other states. Cable TV Corp's sale of advertising time to its business customers is assigned to this state to the extent that the audience for Cable TV Corp's televised programming during which the advertisements will run is in this state. Cable TV Corp's monthly subscription fees and pay-per-view sales are in this state in any case in which the programming sold is delivered to a customer in this state.

Example 7. Network Corp, a corporation that is based outside of this state, sells advertising time to business customers pursuant to which the customers' advertisements will run as commercials during Network Corp's televised programming. Network Corp's sale of advertising time to its business customers is assigned to this state to the extent that the audience for Network Corp's programming during which the advertisements will run is in this state.

Example 8. Web Corp, a corporation that is based outside the state, provides Internet content to its viewers on an international basis. Web Corp sells advertising space to business customers pursuant to which the customers' advertisements will appear in connection with Web Corp's Internet content. Web Corp receives a fee for running the advertisements that is determined by reference to the number of times the advertisement is viewed or clicked upon by the viewers of its website. Web Corp's sales of advertising space are in this state to the extent that the audience for its web content, as measured by such viewings or clicks or otherwise, is in this state. Sales of advertising to states and international jurisdictions in which Web Corp is not taxable are eliminated from the sales factor denominator and numerator.

d. Professional Services.

- i. In General. Professional services are services that require specialized knowledge and in some cases require a professional certification, license or degree. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending and credit card services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services. Whether the sale of a professional service is in this state is determined pursuant to this section, 4.d, provided, however, that professional services, such as carpentry, medical and dental services or child care services, that significantly involve or require in-person contact are “in-person services” within the meaning of 4.b, and are assigned under the rules of 4.b. Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. However, in such cases, despite this transmission, the assignment rules that apply are those set forth in this section, 4.d, and not those set forth in 4.c, pertaining to services delivered to a customer or through or on behalf of a customer.
- ii. Assignment of Sales. In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, for purposes of consistent application of the market sourcing rule stated in [UDITPA], the Commissioner has concluded that the location of delivery in the case of professional services is not susceptible to a general rule of determination, and must be approximated. The assignment of a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the sale of a professional service, a taxpayer’s customer is the person who contracts for such service, irrespective of whether another person pays for or also benefits from the taxpayer’s services. Except as provided in 4.d.ii(D) (mutual fund sales), in any instance in which the taxpayer is not taxable in the state to which a sale shall be assigned, the sale shall be excluded from the numerator and denominator of the taxpayer’s sales factor.

(A) General Rule. Sales of professional services other than those services described in 4.d.ii(B) (architectural and engineering services), 4.d.ii(C) (services provided by a financial institution) and 4.d. ii(D) (certain services provided to RICs)), are assigned in accordance with this section 4.d.ii(A).

1. Professional Services Delivered to Individual Customers. Except as otherwise provided in this section, 4.d, in any instance in which the service provided is a professional service and the taxpayer’s customer is an individual customer, the state or states in which the service is delivered shall be approximated as set forth in this section, 4.d.ii(A)1. In particular, the taxpayer shall assign the sale to the customer’s state of

primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from an individual customer, the taxpayer is required to identify the customer's state of primary residence and must assign the receipts from the service or services provided to that customer to that state.

2. Professional Services Delivered to Business Customers. Except as otherwise provided in this section, 4.d, in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered shall be approximated as set forth in this section, 4.d.ii(A)2. In particular, unless the taxpayer may use the safe harbor set forth at 4.d.ii(A)3, the taxpayer shall assign the sale as follows: first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if such place of customer management is not reasonably determinable, to the customer's place of order; and third, if such customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its sales of services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

3. Safe Harbor; Large Volume of Transactions. Notwithstanding the rules set forth in 4.d.ii(A)1 and 2, a taxpayer may assign its sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than a thousand customers, whether individual or business, and (2) does not derive more than 5% of its sales of services from such customer. This safe harbor applies only for purposes of 4.d.ii(A), and not otherwise.

(B) Architectural and Engineering Services with respect to Real or Tangible Personal Property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this section, 4.d. However, unlike in the case of the general rule that applies to professional services, (1) the sale of such an architectural service is assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in such state or states; and (2) the sale of such an engineering service is assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in such state or states, including real estate improvements located in, or expected to be located in, such state or states. These rules apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described in this section 4.d.ii(B), the sale of

such services shall be assigned under the general rule for professional services. See 4.d.ii(A).

(C) Services provided by a Financial Institution. The apportionment rules that apply to financial institutions are set forth at [Financial institutions special apportionment regulation or statute]. That [statute] includes specific rules to determine a financial institution's sales factor. However, [the statute] also provides that receipts from sales, other than sales of tangible personal property, including service transactions, that are not otherwise apportioned under [the financial institutions statute], are to be assigned pursuant to [UDITPA]. In any instance in which a financial institution performs services that are to be assigned pursuant to [UDITPA], including, for example, financial custodial services, those services shall be considered professional services within the meaning of this section, 4.d, and shall be assigned according to the general rule for professional service transactions as set forth at 4.d.ii(A).