

Proposed Special Apportionment Regulation Latest Discussion Draft

(Updated 2/21/17):

Where the taxpayer's receipts, as defined by [Compact Article IV.1.g] are less than 3.33% of the taxpayer's gross receipts [as defined by Model Allocation and Apportionment Regulation IV.2.(a)(5),] the rules set forth herein shall be applied in calculating the taxpayer's receipts factor. These rules for calculating the receipts factor may also apply, in the discretion of the tax commissioner, in other circumstances in which the apportionment formula does not fairly represent the extent of the taxpayer's business activity in the state.

1) In the case of any taxpayer with gross receipts consisting of dividends from related parties, interest, investment income, or proceeds from the disposition of a business or business segment, those gross receipts, to the extent included in apportionable income, shall be assigned as follows:

(a) Dividends paid by a related party [as defined in Sec. 17 or other state law], shall be included in the receipts factor denominator and shall be included in the receipts factor numerator of this state (i) where it can be reasonably determined that the dividends were paid from earnings generated by the dividend payor in particular years, by using the dividend payor's apportionment factors for those years; (ii) where the years in which the earnings were generated by the dividend payor cannot be reasonably determined, by using the average of the apportionment factors of the dividend payor for the current and preceding year; and (iii) where the dividend income was generated from earnings of one or more related parties to the dividend payor, by using the apportionment factors of those related parties in the years in which those earnings were generated;

(b) Capital gains (but not capital losses) deriving from the disposition of the stock or other intangible property rights representing at least a 20% ownership interest in a business entity which is or was functionally connected to the taxpayer's unitary business activities shall be included in the receipts factor denominator and shall be included in the receipts factor numerator in [this state] to the same extent as that business entity's average apportionment factors were assigned to this state in the year preceding the disposition. Capital gains (but not capital losses) deriving from the disposition of the assets of a business or business segment shall be included in the denominator and shall be included in the numerator in [this state] to the same extent as that business's apportionment factors were in this state in the year preceding the disposition.

Comment [BJF1]: Still undecided...

(c) Receipts arising from those activities described in Sections 3(d) through 3(j) of the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015) [or this state's financial institution receipts factor rules] shall be included the receipts factor denominator and shall be included in the receipts factor numerator for this state to the extent those receipts would be assigned to this state under [this state's financial institution receipts factor rules] or [under the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015)];

- (d) Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer, to the extent they cannot be assigned under Subsection (c), shall be included in the denominator of the receipts factor and shall be included in the numerator of the receipts factor for this state to the extent those amounts are collected from borrowers in this state;
- (e) The net amount [but not less than zero] of receipts not assigned under Sections (b-d) arising from investment activities, including the holding of or the maturity, redemption, sale, exchange or other disposition of [marketable securities or cash, shall be included in the denominator and shall be numerator of the receipts factor for this state to the extent the investment activities would be assigned to this state under [this state's financial institution receipts factor rules] or [under the MTC's Formula for the Apportionment and Allocation of the Net Income of Financial Institutions Model Statute (as adopted July 29, 2015), Section 3(n), if this state has not adopted a special apportionment rule or statute for financial institutions]; all other receipts from investment activities shall be assigned to the state in which such investments are managed.
- 2) If the taxpayer has gross receipts that are not included in the receipts factor pursuant to Section (1), and the state requires the use of multiple factor apportionment formulas, those gross receipts shall be included in the denominator of the receipts factor and included in the numerator of the receipts factor of this state by using the remaining apportionment factors and percentages applicable to that taxpayer where those factors are *non-de minimis*.
- (a) If the taxpayer has gross receipts that are not apportioned pursuant to Sections (1) and (2), those gross receipts shall be included in the denominator of the receipts factor and shall be included in the numerator of the receipts factor of this state in the same ratio as the receipts factor of the remainder of the combined or consolidated group if the taxpayer's income and factors are included on a combined or consolidated report or return filed in this state; or
- (b) If the taxpayer is filing as a separate entity in this state, by taking the ratio of the federal taxable income of nexus entities apportioned to this state versus the income of the federal consolidated group of which the taxpayer is a member which was apportioned to this state.
- 3) [NEW MATERIAL] Receipts which are or would be assigned under this regulation to a jurisdiction in which taxpayer is not taxable [as defined in Article IV, Section 3] in the current tax year shall be eliminated from the receipts factor numerator and denominator.
- 4) To the extent application of the preceding subsections fails to result in an equitable apportionment of the taxpayer's gross receipts, the taxpayer may petition for, or the tax commissioner may require an alternative calculation of its receipts factor to more clearly reflect the extent of the taxpayer's business activity in this state as provided for in Article IV, Section 18.

Examples:

Comment [BJF2]: Holly's suggestion...

1. Taxpayer CB Holdings, Inc. is a **Kansas** corporation with one employee and one office in Dodge City, Kansas. During the tax year it earned 100% of its gross income from dividends paid from CB REIT, Inc., which was engaged exclusively in leasing retail stores, directly and indirectly, to Crazy Bob Auto Parts, Inc. CB REIT, Inc. has one employee and one office, also in Dodge City, Kansas. All three corporations are related parties. 20% of CB REIT's leased stores are in this state, with the remainder of the store leases equally distributed in States A, B, C, and D. Although all of the taxpayer's dividend income is derived from CB REIT, under Section 1(a)(iii), 20% of the taxpayer's receipts are assigned to this state.

1a. Same facts, except that taxpayer CB Holdings, Inc. is not taxable in the four other states in which CB REIT indirectly leases property. Under Section 3, those receipts are eliminated from the receipts factor numerator and denominator, resulting in 100% of all remaining receipts factor attributable to CB Holdings, Inc.'s leasing activities being assigned to this state.

Comment [BJF3]: Editing suggestion from Phil S.

1.b. In the following year, CB Holdings, Inc. decides lend its excess capital to Crazy Bob Auto Parts, Inc., located in State Y. As a result of that loan, CB Holdings, Inc. reports \$40 million of interest income in addition to \$160 million of lease income. Although CB Holdings, Inc. does not meet this state's definition of a financial institution, the receipts from lending activity (\$40 million) will be included in the receipts factor pursuant to 1(c) and assigned to State Y as the location of the borrower. Because CB Holdings, Inc. is not taxable in four of the five states in which it receives a dividend attributable to CB REIT's leasing activity, \$128 million of the dividend income is eliminated from the receipts factor denominator, with the remaining \$32 million included in the receipts factor numerator and denominator for this state. The \$40 million of loan income will also be included in the receipts factor denominator of CB Holdings, Inc., resulting in a receipts factor in this state of 32/72, and 40/72 in State Y.

1c. CB Holdings, Inc. is only taxable in this state as its loans to Crazy Bob Auto Parts Inc. in State Y are insufficient to establish a taxable nexus in that state; therefore those receipts are eliminated from the receipts factor numerator and denominator. CB Holdings, Inc.'s remaining receipts factor are all apportioned 100% to this state (\$32 million/\$32 million.)

Comment [BJF4]: Additional editorial suggestion from Phil S..

2. Taxpayer Quick Sale Co. is a **Maryland** corporation formed exclusively to facilitate the disposition of three similar power plants in three separate states, which formerly belonged to Ten States Nuclear Corp. The sale generated a capital gain of \$100 million on the plant located in this state and a capital loss of \$25 million on each the two plants located elsewhere.

In the year preceding the sale, 10% of Ten States Nuclear Corp's apportionment factors were in this state. One day after its formation, the taxpayer's stock is sold to Risky Investments for \$500 million in cash. Quick Sale Corp. did not exist in the year preceding the sale.

Comment [BJF5]: Currently, the capital gain apportionment provisions reflect the taxpayer's apportionment factor in the year preceding the sale. But special purpose entities may not have existed in the prior year, so it was necessary to bridge the gap to the previous entity's apportionment factors.

In order to more clearly reflect the taxpayer's business activity in this state, an alternative apportionment methodology must be used pursuant to Section 3 of this regulation and Compact Article IV, Section 18. Using the apportionment percentages for Ten States Nuclear Corp would be a reasonable means of apportioning Quick Sale Corp's gross receipts, since those gross receipts derived from the disposition of assets previously held by Ten State Nuclear Corp. Because 10% of Ten State Nuclear Corp's apportionment factors in the year preceding the sale were in this state, 10% of Quick Sale's capital gain (\$50 million) is assigned to this state.

2b. Same facts as above, but Quick Sale Corp. is only taxable in this state and State Y in the tax year when the gain from the disposition was recognized, despite the fact that Ten States Nuclear Corp. conducted business in all ten states in the year prior to the disposition. 20% of Ten States Nuclear Corp's apportionment factors (as measured under this state's apportionment formula) were in this state in the year preceding the disposition. 33.3% of Quick Sale Corp's gross receipts are assigned to this state and 66.6% are assigned to State Y.

2a. Same facts, but the sale is structured as a IRC Sec. 338(h)(10) election and is deemed to be a sale of assets, not stock, under this state's income tax conformity rules. Quick Sale Corp. is taxable in all ten states because it owned assets in all ten states in the year of the sale. Because Quick Sale Corp did not exist in the year preceding the sale, an alternative apportionment methodology must be used pursuant to Section 3 of this regulation and Compact Article IV, Section 18. The taxpayer's receipts (\$50 million) could be assigned to all ten states in which it is taxable, based on the taxpayer's apportionment factors in the year of the sale, if reasonable, or using the apportionment factors of Ten States Nuclear Corp in the year preceding the sale, if reasonable.

3. Taxpayer Loan Participation Services, Inc. is a Delaware corporation formed by a related financial institution for the exclusive purpose of holding securitized loan portfolios in trust for unrelated parties in multiple countries. The taxpayer has no employees or property. The securitized loan portfolios consist of mortgage loans; 10% of those mortgage interests can be traced to real property in this state. Even though Loan Participation Services, Inc. would not be considered a financial institution under this state's laws, 10% of the portfolio's receipts derived from items including interest payments, late fees and origination fees are assignable to this state if this state has adopted the Multistate Tax Commission's model formula for the apportionment of financial institution income, or if the loan portfolio income would be assigned to this state under this state's apportionment formula for financial institutions.

4. Taxpayer IH Factoring, Inc. is a Delaware corporation with all twenty of its employees in Dover, Delaware. It exclusively purchases installment agreements (accounts receivable) from its parent corporation, Iron Horse Motorcycles, Inc., and re-sells those agreements (as securitized instruments) to institutional investors. IH Factoring would not be considered a financial institution under this state's laws. Iron Horse Motorcycles has a 10% apportionment factor in this state, but 25% of its dealers' purchase agreements sold to IH Factoring derive from loans to motorcycle customers in this state. 25% of IH Factoring Inc.'s receipts are assigned to this state.

New Material:

Alternative Apportionment Example for 3(a):

Taxpayer Windfall, Inc. is an indirectly wholly-owned subsidiary of ABC Manufacturing Company and its income is included on the water's edge unitary combined report filed by ABC Manufacturing Inc. and Combined Subsidiaries in this state; the numerator of the receipts factor for that group in this state is 3%. Windfall, Inc. has no property, payroll or receipts from transactions and activities undertaken in the regular course of its business. Windfall, Inc. receives \$1 billion in settlement of ABC Manufacturing's long-standing patent infringement suit against a business competitor. Under Section 3(a) of this regulation, Windfall, Inc.'s receipts factor is 3%.

~~Same facts, except ABC Manufacturing Company and some of its subsidiaries file separate entity returns in this state. Windfall, Inc. is 100% owned by Intermediary Corp., a corporation with equal activities in three other states. Intermediary Corp. in turn is owned 100% by ABC Manufacturing Company. Under Section 3(b) of this regulation, Windfall, Inc.'s has a receipts factor of \$1 billion assigned to those three states. While Windfall, Inc.'s numerator in this state would be zero under 3(b), because Intermediary Corp. does not have a receipts factor in this state, under (5) the tax commissioner may assign, and the taxpayer could petition for, some portion of Windfall, Inc. receipts to this state in order to fairly represent the extent of the taxpayer's business activity in this state.~~