830 CMR 63.38.1(9)(d) Apportionment of Income

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3. Specific Income-Producing Activities.

a. Income-producing activity includes the rendering of personal services or the use of tangible or intangible property in rendering a service. Where personal services relating to an item of gross receipts are rendered partly within and partly without Massachusetts, the gross receipts for the performance of such services shall be attributed to Massachusetts if, based upon costs of performance, a greater proportion of the services was rendered in Massachusetts than in any other one state.

…

c. In the case of the licensing of intangible property, the income-producing activity is deemed to be performed in the commonwealth to the extent that the intangible property is used by the licensee in the commonwealth. Intangible property generally includes copyrights, patents, trademarks, trade names, trade secrets, contract rights including broadcast rights, and similar intangibles where the use of the property may be transferred separately from ownership, provided that intangible property licensed as part of the sale of tangible property is treated as the sale of tangible property, and sales of good will and other intangible property are governed by 830 CMR 63.38.1(9)(d)3.d. A sale of intangible property that resembles a license, such as a contingent payment sale (a sale in which the receipts from the sale of the intangible property are contingent upon the use, productivity or disposition of property by the purchaser), will be treated as a license under this 830 CMR 63.38.1(9)(d)3.c.

i. Sourcing of separately identifiable items of income. For purposes of the provisions of 830 CMR 63.38.1(9)(d)3.c., each use of intangible property by a licensee that results in a separately identifiable item of income for the taxpayer is considered a separate use of the intangible property. For example, in the case of licenses or similar arrangements compensated by a percentage of the licensee's sales, each sale by the licensee that results in a payment to the licensor whether separate from or combined with other payments is a separate use. Except as otherwise stated herein, use of intangible property by a sublicensee does not constitute use for purposes of 830 CMR 63.38.1(9)(d)3.c., provided however that the Commissioner may take into account use by and activities of sublicensees in the case of licensing, sublicensing, or similar relationships among affiliated taxpayers.

ii. Attributing sales to place of use.

(A) License of marketing intangibles. Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items (i.e., a marketing intangible), the royalties or other licensing fees paid by the licensee for such right are attributable to the commonwealth to the extent that the fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by Massachusetts customers. In the absence of actual evidence of the licensee's receipts derived from Massachusetts customers, the licensing fee will be attributed to the commonwealth based upon the percentage of the Massachusetts population in the geographic area in which the licensee is permitted to use the intangible property to market its goods, services or other items. Examples

of a license of a marketing intangible include the license of a service mark, trademark, or trade name. Where the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the licensing fee will be attributed to the commonwealth based upon the percentage of the Massachusetts population in the U.S. geographic area in which the licensee's goods, services, or other items are ultimately marketed using the intangible property.

(B) License of non-marketing intangibles. Where a license is granted for the right to use intangible property other than in connection with the sale, lease, license, or other marketing of goods, services, or other items (i.e., a non-marketing intangible), the licensing fees paid by the licensee for such right are attributable to the commonwealth to the extent that the use for which the fees are paid takes place in Massachusetts. In such cases, it shall be presumed that the use takes place in the state of the licensee's commercial domicile unless the taxpayer or the Commissioner can reasonably establish the location(s) of actual use. Where the Commissioner can reasonably establish that the actual use of intangible property pursuant to a license of a non-marketing intangible takes place in part in Massachusetts, it shall be presumed that the entire use is in Massachusetts except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Massachusetts. Examples of a license of a non-marketing intangible include the license of a patent, a copyright, or trade secrets to be used in a manufacturing process, where the value of the intangible lies predominately in its use in such process.

(C) License of mixed intangibles. Where a license of intangible property includes both a license of a marketing intangible and a license of a non-marketing intangible and the fees to be paid in each instance are separately stated in the licensing contract, the Commissioner will accept such separate statement for purposes of this section if it is reasonable. Where a license of intangible property includes both a license of a marketing intangible and a license of a non-marketing intangible and the fees to be paid in each instance are not separately stated in the contract, it shall be presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the Commissioner can reasonably establish otherwise.

The following examples illustrate the provisions of 830 CMR 63.38.1(9)(d)3.c.i-iv.

Example 1. Crayon Corp. and Dealer Co. enter into a license contract whereby Dealer Co. as licensee is permitted to use trademarks that are owned by Crayon Corp. in connection with Dealer Co.'s sale of certain products to retail customers. Under the contract, Dealer Co. is required to pay Crayon Corp. a licensing fee that is a fixed percentage of the total volume of monthly sales made by Dealer Co. of products using the Crayon Corp. trademarks. Under the contract, Dealer Co. is permitted to sell the products at multiple store locations, including store locations that are both within and without Massachusetts. Further, the licensing fees that are paid by Dealer Co. are broken out on a per-store basis. Under 830 CMR 63.38.1(9)(d)3.c.i-ii., the licensing fees paid to Crayon Corp. by Dealer Co. represent fees from the license of a marketing intangible and the fees that derive from the individual sales at Massachusetts stores are separately identifiable items of income of Crayon Corp. that constitute Massachusetts sales.

Example 2. Formula, Inc. and Appliance Co. enter into a license contract whereby Appliance Co. is permitted to use a patent owned by Formula, Inc. to manufacture and sell appliances at stores owned by Appliance Co. within a certain geographic region. The license contract specifies that Appliance Co. is to pay Formula, Inc. a royalty that is a fixed percentage of the gross receipts from the products sold. The contract does not specify any other fees. The appliances are manufactured and sold in Massachusetts and several other states. Given the facts, it is presumed that the licensing fees are paid for the license of a manufacturing intangible. In such cases, where the Commissioner can reasonably establish that the actual use of the intangible property takes place in part in Massachusetts, it is presumed that the entire use is in Massachusetts except to the extent that the taxpayer can demonstrate that the actual location of some or all of the use takes place outside Massachusetts. Assuming that Formula, Inc. can demonstrate the percentage of manufacturing that takes place in Massachusetts using the patent, that percentage of the total licensing fee paid to Formula, Inc. under the contract will constitute Formula, Inc.'s Massachusetts sales.

Example 3. Team Corp. operates a professional wrestling team and licenses the annual rights to broadcast the team's games to a national television network, TV Co., a regional cable TV company, Cable Co., and a local radio station, Radio Co. TV Co., Cable Co. and Radio Co. send personnel to the site of Team Corp.'s games, both within and without Massachusetts, and broadcast these games on their respective media outlets. In each case the licensing fee paid by the media company to Team Corp. is paid upfront in a lump sum. Each of the three licensing contracts constitutes the license of a marketing intangible. The component of the three licensing streams that constitute the Massachusetts sales of Team Corp. is determined by multiplying in

each case the amount of the income stream by the percentage of the Massachusetts audience of the respective licensee that is in Massachusetts.

Example 4. Axel Corp. enters into a two-year license agreement with Biker Co. in which Biker Co. is granted the right to produce motor scooters using patented technology owned by Axel Corp., and also to sell such scooters by marketing the fact that the scooters were manufactured using the special technology. The scooters are manufactured outside Massachusetts, but the taxpayer is granted the right to sell the scooters in a geographic region in which the Massachusetts population constitutes 25% of the total population during the period in question. The licensing contract requires an upfront licensing fee to be paid by Biker Co. to Axel Corp. and does not specify what percentage of the fee derives from Biker Co.'s right to use Axel Corp.'s patented technology. Unless either the taxpayer or the Commissioner reasonably establishes otherwise, it is presumed that the licensing fees are paid entirely for the license of a marketing intangible. In such cases, the Commissioner will presume that 25% of the licensing fee constitutes Massachusetts sales.

Example 5. Same facts as Example 4, except that the license contract specifies separate fees to be paid for the right to produce the motor scooters and for the right to sell the scooters by marketing the fact that the scooters were manufactured using the special technology. The licensing contract constitutes both the license of a marketing intangible and the license of a non-marketing intangible. Assuming that the separately stated fees are reasonable, the Commissioner will: (1) attribute no part of the licensing fee paid for the non-marketing intangible to Massachusetts, and (2) attribute 25% of the licensing fee paid for the marketing intangible to Massachusetts.

Example 6. Moniker Corp. enters into a license contract with Whole Co. Pursuant to the contract Whole Co. is granted the right to use trademarks owned by Moniker Corp. to brand sports equipment that is to be manufactured by Whole Co. or an unrelated entity, and to sell the manufactured product to unrelated companies that make retail sales in a specified geographic region. Although the trademarks in question will be affixed to property to be manufactured, the license agreement confers a license of a marketing intangible. The component of the licensing fee that constitutes the Massachusetts sales of Moniker Corp. is determined by multiplying the amount of the fee by the percentage of the Massachusetts population in the specified geographic region in which the retail sales are made.

Example 7. Better Burger Corp., which is based outside Massachusetts, enters into franchise contracts with individuals who agree to operate Better Burger restaurants as franchisees in various states. Several of the Better Burger franchises are in Massachusetts. In each case, the franchise contract between the individual and Better Burger provides that the franchisee is to pay Better Burger Corp. an upfront fee for the receipt of the franchise and monthly franchise fees, which cover, among other things, the right to use the Better Burger name and service marks, patented food processes and cooking know-how, as well as fees for management services and advertising. The upfront fees for the receipt of the Massachusetts franchises constitute fees paid for the licensing of a marketing intangible. These fees constitute Massachusetts sales because the franchises are for the right to make Massachusetts sales. The monthly franchise fees paid by Massachusetts franchisees constitute fees paid for (1) the license of marketing intangibles, (2) the license of non-marketing intangibles and (3) personal services. The fees paid for the license of the marketing intangibles and the non-marketing intangibles constitute Massachusetts sales

because in each case the use of the intangibles is to take place in Massachusetts. The fees paid for the personal services may or may not be Massachusetts services depending upon the location of the income producing activity. See 830 CMR 63.38.1(9)(d)3.a. If the fees for the personal services are not separately stated, it shall be presumed that these fees constitute Massachusetts sales, like the fees paid for the marketing and non-marketing intangibles. If the fees for the personal services are separately stated and this separate statement is reasonable, the taxpayer has the burden of proving the location of the income producing activity. In the latter case, if the taxpayer cannot establish the location of the income producing activity, the Commissioner will assume that the income producing activity took place both within and without Massachusetts and that the greater proposition of the costs of performance was in Massachusetts. See id