



MULTISTATE TAX COMMISSION

Uniformity Standing Subcommittee

Meeting – June 16, 2022 – 3:30 P.M. Eastern

(Held via video conference)

Directive from the Uniformity Committee

- Conduct a review of the MTC model market-based sourcing and special industry receipts sourcing rules and make general recommendations about updates, revisions, or additional rules.

Context – 10,000 Feet

Review of the history of the development of MTC model apportionment regulations.

Background

Models available on the MTC website – here:
<https://www.mtc.gov/Uniformity/Adopted-Uniformity-Recommendations>

Projects Involving Apportionment-Related Model/Uniform Statutes and Regulations	Date	Action
Model General Allocation and Apportionment Regulations	1973	Adopted
Special Rule: Construction Contractors	1980	Adopted
Special Rule: Railroads	1981	Adopted
Special Rule: Airlines	1983	Adopted
Special Rule: Trucking Companies	1986	Adopted
Model General Allocation and Apportionment Regulations	1988	Amended
Special Rule: Television and Radio Broadcasting	1989	Adopted
Special Rule: Trucking Companies	1989	Amended
Special Rule: Publishing	1993	Adopted
Formula for Apportionment and Allocation of Net Income of Financial Institutions	1994	Adopted
Special Rule: Television and Radio Broadcasting	1996	Amended
Model General Allocation and Apportionment Regulations (Amendments)	1997	Amended
Model General Allocation and Apportionment Regulations (Amendments)	2001	Amended
Model General Allocation and Apportionment Regulations (Amendments)	2003	Amended
Model General Allocation and Apportionment Regulations (Amendments)	2004	Amended
Model General Allocation and Apportionment Regulations (Amendments)	2007	Amended
Special Rule: Telecommunications and Ancillary Service Providers	2008	Adopted
Model General Allocation and Apportionment Regulations (Amendments)	2010	Amended
Updating Model Allocation and Apportionment Regulations - "Subject to Tax" Definition	2012	Tabled
UDITPA Article IV - Sections 1 - 17 (Amendments)	2014	Amended
Formula for Apportionment and Allocation of Net Income of Financial Institutions	2015	Amended
UDITPA Article IV - Section 18 (Amendments)	2015	Amended
Model General Allocation and Apportionment Regulations (Amendments)	2017	Amended
Special Rule: Receipts Factor - Bank Holding Companies and Subsidiaries	2018	Adopted

State Formulary Apportionment & Related Matters

Pre-MTC Era

Pre-1950s –

State tax systems began to move from specific geographic assignment of income & expense to formulary apportionment.

1957 –

UDITPA is proposed as uniform law with a three-factor apportionment formula (the “Massachusetts model”) which was already being used by some states.

1959 –

Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450 ruled states could tax apportioned income of out-of-state sellers.

1964-65 –

Willis Committee recommended federal law requiring states to use an uniform property and payroll-based formula administered by the U.S. Treasury Dept.

1959 –

Congress passed P.L. 86-272 to restrict state tax jurisdiction and set up a federal study committee (“Willis Committee”).

1967 –

Multistate Tax Compact went into effect incorporating UDITPA.

State Formulary Apportionment & Related Matters

Early Years – *US Steel*

1972 –

U.S. Steel litigation began – challenging the audit powers under the Multistate Tax Compact.

1973 –

Last hearing on Willis Committee related legislation requiring uniform apportionment.

1978 –

Supreme Court ruled in favor of states in *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

1971 –

MTC issued first draft general allocation and apportionment regulations for hearing and incorporated feedback from taxpayers into the draft.

1973 –

Model general allocation and apportionment regulations issued.

1978 –

MTC began drafting special industry regulations.

State Formulary Apportionment & Related Matters

Constitutional Challenges to Apportionment

1978 –

Constitutional challenges to apportionment began.

1979 –

Mobil argued at U.S. Supreme Court. Taxpayer was represented by Jerome Hellerstein. MTC general counsel participated in oral argument as amicus.

1980 –

U.S. Supreme Court ruled in favor of the states in *Mobil*.

1980's –

Taxpayers began challenging worldwide apportionment.

1983 –

U.S. Supreme Court ruled worldwide apportionment was constitutional in *Container Corp.*

1983 –

Complaints by foreign governments led Pres. Reagan to establish committee, headed by Treas. Sec. Regan ("Regan committee"), to study worldwide apportionment.

1984 –

Regan committee issued statement that Congress should preempt states from using worldwide apportionment unless they agreed to stop.

1980–1986 –

MTC continued to issue special industry regulations for four major industries using sales-factor sourcing rules that are generally consistent with market-based sourcing.

State Formulary Apportionment & Related Matters

Jurisdictional Challenges

1992 –

U.S. Supreme Court issues ruling in *Quill* establishing a physical presence nexus standard for sales and use taxes.

1994 –

U.S. Supreme Court ruled in *Barclays Bank v. Franchise Tax Bd. of California*, 512 U.S. 298 (1994) that worldwide apportionment was not barred by “Executive Branch communications that express federal policy but lack the force of law.”

2003 –

ALEC helped draft the Business Activity Tax Simplification Act which would expand P.L. 86-272 and it was introduced in Congress.



1988–2010

MTC issued series of amendments to general allocation and apportionment regulations and new and amended industry regulations including for the financial industry.

1986 –

MTC issued first Statement on P.L. 86-272.

1993 –

MTC amended its Statement on P.L. 86-272.

2001 –

MTC amended its Statement on P.L. 86-272.

2002 –

MTC issued its model factor presence nexus standard.

State Formulary Apportionment & Related Matters Later Years - *Gillette* and Revising UDITPA

2006 –

Gillette and other taxpayers began challenging states' amendment of UDITPA without withdrawing from the Compact.

2016 –

Litigation around the country challenging the Compact states ability to amend UDITPA was ultimately resolved in favor of the states

2021 –

OECD proposal to address base erosion caused by income shifting under the international transfer-pricing and geographic assignment tax system would adopt formulary apportionment of certain income using a sales factor and market sourcing and a factor presence jurisdiction standard.

2006 –

MTC began considering revisions to UDITPA including market-based sourcing.

2009 –

MTC made formal proposal to ULC that the organizations work together to revise UDITPA and address market-based sourcing. But the ULC declined. Opponents argued that the states would not adopt a uniform approach.

2014 & 2015 –

MTC formally approved changes to UDITPA to adopt market-based sourcing. By that time a number of states had adopted different approaches for this purpose.

2017 –

MTC formally adopted model regulations to implement market-based sourcing.

Context – 1,000 Feet

Survey of both general and special industry sourcing rules.

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(a) Receipts, other than receipts described in Section 16, are in this State if the taxpayer's **market for the sales is in this state**. The taxpayer's market for sales is in this state:

...

(3) in the case of sale of a service, if and to the extent the service is **delivered to a location in this state**; and

Market-Based Sourcing and Industry Regulations

General – MTC Model Section 17:

(a) . . . (4) in the case of intangible property,

(i) that is **rented, leased, or licensed**, if
and **to the extent the property is used in this state**,
provided that intangible property utilized in marketing a good
or service to a consumer is “used in this state” **if that good or
service is purchased by a consumer who is in this state**; and

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(a) . . . (4) in the case of **intangible property**, . . .

(ii) that is **sold, if and to the extent the property is used in this state**, provided that:

(A) a contract right, government license, or similar intangible property **that authorizes the holder to conduct a business activity in a specific geographic area is “used in this state” if the geographic area includes all or part of this state;**

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(a) . . . (4) in the case of **intangible property**, . . .

(ii) that is **sold, if and to the extent the property is used in this state**, provided that:

(A) a contract right, government license, or similar intangible property **that authorizes the holder to conduct a business activity in a specific geographic area is “used in this state” if the geographic area includes all or part of this state;**

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(a) . . . (4) in the case of **intangible property**, . . .

(ii) that is **sold, if and to the extent the property is used in this state**, provided that:

. . .

(B) receipts from intangible property sales that are **contingent on the productivity, use, or disposition** of the intangible property shall be **treated as receipts from the rental, lease or licensing** of such intangible property under subsection (a)(4)(i); and;

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(a) . . . (4) in the case of **intangible property**, . . .

(ii) that is **sold, if and to the extent the property is used in this state**, provided that:

. . .

(C) **all other receipts** from a sale of intangible property shall be **excluded** from the numerator and denominator of the receipts factor;

Market-Based Sourcing – MTC Model Sec. 17

General – MTC Model Section 17:

(b) If the state or states of assignment under subsection (a) cannot be determined, the state or states of assignment shall be **reasonably approximated**.

(c) **If the taxpayer is not taxable in a state to which a receipt is assigned** under subsection (a) or (b), **or if the state of assignment cannot be determined** under subsection (a) **or reasonably approximated** under subsection (b), such receipt shall be **excluded** from the denominator of the receipts factor.

Market-Based Sourcing – General Regulations

Reg. IV.17.

General Rules

- (1) Market-Based Sourcing
- (2) Outline of Topics
- (3) Definitions
- (4) General Principles of Application; **Contemporaneous Records**
- (5) Rules of **Reasonable Approximation**
- (6) Rules with respect to Exclusion of Receipts from the Receipts Factor
- (7) **Changes in Methodology**; [tax administrator]
- (8) Further Guidance

Market-Based Sourcing – General Regulations

Reg. IV.17.

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(d) Sale of a Service

(1) General Rule

(2) In-Person Services

(3) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer

(4) Professional Services

Market-Based Sourcing – General Regulations

Reg. IV.17.

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(e) License or Lease of Intangible Property

(1) General Rules

(2) License of a Marketing Intangible

(3) License of a Production Intangible

(4) License of a Mixed Intangible

(5) License of Intangible Property where Substance of the Transaction Resembles a Sale of Goods or Services

Market-Based Sourcing – General Regulations

Reg. IV.17.

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(f) Sale of Intangible Property

(1) Assignment of Receipts

(g) Special Rules

(1) Software Transactions

(2) Sales or Licenses of Digital Goods and Services

Special Industry Rules

Apportionment-Related Model/Uniform Statutes and Regulations	Date	Action
Special Rule: Construction Contractors	1980	Adopted
Special Rule: Railroads	1981	Adopted
Special Rule: Airlines	1983	Adopted
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Special Rule: Telecommunications and Ancillary Service Providers	2008	Adopted
Formula for Apportionment and Allocation of Net Income of Financial Institutions (Amendments)	2015	Amended
Special Rule: Receipts Factor - Bank Holding Companies and Subsidiaries	2018	Adopted

From the General Regulations

Reg.IV.18.(a)

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula may not set forth appropriate procedures for determining the apportionment factors. **Nothing in Article IV.18. or in this Regulation IV.18. shall preclude [the tax administrator] from establishing appropriate procedures under Article IV.10. to 17. for determining the apportionment factors for each such industry,** but such procedures shall be applied uniformly.

Model – Construction Contractors (1980)

Reg.IV.18.(d)

(vi) Sales Factor. In general, the numerator and denominator of the sales factor shall be **determined as set forth in Article IV.15-.17, inclusive, and Reg. IV.15-.17, inclusive.** However, the following special rules are also applicable:

(A) Gross receipts derived from the **performance of a contract** are attributable to this state **if the construction project is located in this state. If the construction project is located partly within and partly without this state,** the gross receipts attributable to this state are **based upon the ratio which construction costs for the project in this state** incurred during the income year bear to the total of construction costs for the entire project during the income year, or upon **any other method,** such as engineering cost estimates, which will provide a **reasonable apportionment.**

[Regulations also provide rules for percentage of completion and completed contract methods of tax reporting.]

From the General Regulations

Reg. IV.17.(d)

(2) In-Person Services.

(A) In General.

Except as otherwise provided in this Reg. IV.17.(d).(2), 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; Various professional services, including legal, accounting, financial and consulting services, and other similar services as described in Reg. IV.17.(d).(4), although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this Reg.

From the General Regulations

Reg. IV.17.(d)

(4) Professional Services.

(C) Assignment of Receipts.

2. 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 Reg. IV.17.(d)(4). However, unlike in the case of the general rule that applies to professional services, (1) **the receipts from a sale of an architectural service are 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 the state or states;** and (2) the receipts from a sale of an engineering service are assigned to a state or states if and **to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the 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 Reg. IV.17(d)(4)(C)2, the receipts from a sale of these services must be assigned under the general rule for professional services. See Reg. IV.17.(d).(4)(C)1

Model – Railroads (1981)

Reg. IV.18.(f)

(iv) The Sales (Revenue) Factor.

A. . . .revenue derived from transactions and activities in the regular course of the trade or business . . . other than revenue from hauling freight, passengers, mail and express, shall be attributable to this state in accordance with Article IV.15.-.17. and Regulation IV.15.-.17.

B. Numerator of Sales (Revenue) Factor From **Freight**, Mail and Express. . . .

1. All receipts from shipments which both originate and terminate within this state; and

2. That portion of the receipts from each movement or shipment passing through, into, or out of this state is determined by the **ratio which the miles traveled by such movement or shipment** in this state.

C. Numerator of Sales (Revenue) Factor from **Passengers**. The numerator of the sales (revenue) factor shall include:

[Same as freight.]

Model – Airlines (1983)

Reg. IV.18.(e)

(2)(i) General Definitions. . . .

J. "Transportation revenue" means revenue earned by transporting passengers, freight and mail as well as revenue earned from liquor sales, pet crate rentals, etc.

. . .

(iv) Sales (Transportation Revenue) Factor.

The transportation revenue . . . and miscellaneous sales of merchandise, etc., are included in the denominator of the revenue factor. (See Article IV.1. and Regulation IV.1.) **Passive income items such as interest, rental income, dividends, etc., will not be included in the denominator nor will the proceeds or net gains or losses from the sale of aircraft be included.** The numerator of the revenue factor is the total revenue of the taxpayer in this state during the income year. The total revenue of the taxpayer in this state during the income year is the result of the following calculation: **The ratio of departures of aircraft in this state weighted as to the cost and value of aircraft by type, as compared to total departures similarly weighted multiplied by the total transportation revenue.** The product of this calculation is to be added to any non-flight revenues directly attributable to this state.

Model – Trucking (1986 Amended 1989)

Reg. IV.18.(g)

(iv) The Sales (Revenue) Factor

A. In General. All revenue derived from transactions and activities in the regular course of the taxpayer's trade or business which produce business income shall be included in the denominator of the revenue factor. (See Article IV.1 and Regulation IV.1.) . . . The total state revenue of the taxpayer, other than revenue from hauling freight, mail, and express, shall be attributable to this state in accordance with Article IV.15 through .17 and Regulation IV.15 through .17.

B. Numerator of the Sales (Revenue) Factor From Freight, Mail, and Express. . . .

1. Intrastate: All receipts from any shipment **which both originates and terminates within this state**; and,

2. Interstate: That portion of the receipts from movements or shipments passing through, into, or out of this state as determined by the ratio which the mobile property **miles traveled by such movements or shipments in this state bear to the total mobile property miles traveled by movements or shipments from points of origin to destination.**

Question Raised as to Delivery Services

New Mexico Public Decision No. 19-27

In The Matter of the Protest of United Parcel Service Inc. (Ohio) & Affiliates to Assessment Issued Under Letter Id No. L1388538320 v. New Mexico Taxation and Revenue Department

H. **Taxpayer established by clear and cogent evidence that the application of the special rules for apportionment of trucking companies resulted in gross distortion,** in violation of the external consistency requirement for fair apportionment, and that application of the special rules for apportionment of trucking companies did not fairly represent the true extent of Taxpayer's New Mexico business activities, thereby entitling Taxpayer to an equitable adjustment to the apportionment method under Section 7-4-19.

I. **Taxpayer's use of the state-to-state volume method for purposes of apportioning sales in New Mexico was reasonable.** See *Mont. Dep't of Revenue v. United Parcel Serv.*, 252 Mont. 476 (1992).

Model – Publishing (1993)

Reg.IV.18.(j)

(iii) B. Sales Factor Numerator.

The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within this state, including, but not limited to, the following:

1. Gross receipts derived from the sale of tangible personal property, including printed materials, **delivered or shipped to a purchaser or a subscriber** in this state.

2. Except as provided in subparagraph (3)(iii)B.3., gross receipts derived from advertising and the sale, rental or other use of the taxpayer's customer lists or any portion thereof shall be attributed to this state as determined by the taxpayer's "circulation factor" . . . **The circulation factor shall be determined . . . shall be equal to the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere. . . .**

3. When specific items of advertisements can be shown, upon clear and convincing evidence, to have been distributed **solely to a limited regional or local geographic area** in which this state is located, the taxpayer may petition, or the [Tax Administrator] may require, that a portion of such receipts be attributed to the sales factor numerator of this state **on the basis of a regional or local geographic area circulation factor**

Publishing - Issue

Reg.IV.18.(j)

(1) In General. Except as specifically modified by this regulation, when a person in the business of publishing, selling, licensing or distributing newspapers, magazines, periodicals, trade journals **or other printed material** has income from sources both within and without this state, the amount of business income from sources within this state from such business activity shall be determined pursuant to [Article IV. of the Multistate Tax Compact and the regulations adopted thereunder].

(2) Definitions . . .

(ii) "Print or printed material" includes, without limitation, **the physical embodiment or printed version** of any thought or expression including, without limitation, a play, story, article, column or other literary, commercial, educational, artistic or other written or printed work. The determination of whether an item is or consists of print or printed material shall be made without regard to its content. Printed material may take the form of a book, newspaper, magazine, periodical, trade journal or any other form of printed matter **and may be contained on any medium or property.**

Publishing - Issue

Reg. IV.17.(d)(3) Services Delivered to the Customer or on Behalf of the Customer, or Delivered Electronically Through the Customer.

(A) In General.

If the service provided by the taxpayer is not an in-person service . . . or a professional service . . . and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in [state] if and to the extent that the service is delivered in [state]. . . . A service that is delivered “on behalf of” a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, **such as fulfillment services, or the direct or indirect delivery of advertising to the customer’s intended audience** (see Reg. IV.17.(d).(3)(B)1 and Example (iv) under (d).(3)(B)1.c.). A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. . . .

3. Services Delivered Electronically Through or on Behalf of an Individual or Business Customer. A service delivered electronically “on behalf of” the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, **such as the direct or indirect delivery of advertising on behalf of a customer to the customer’s intended audience**. . . .

Model – Broadcasting (1990 Amended 1996)

Reg.IV.18(h)

(1) In General. When a person in the business of broadcasting film or radio programming, whether **through the public airwaves, by cable, direct or indirect satellite transmission or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated or independent television or radio broadcasting station,** has income from sources both within and without this state, the amount of business income from sources within this state shall be determined pursuant to Article IV. of the Multistate Tax Compact and the regulations issued thereunder by this state, except as modified by this regulation.

(4)(iv)B. Sales Factor Numerator. . . .

1. Gross receipts, including advertising revenue, from television film or radio programming **in release to or by television and radio stations located in this state.**

Model – Broadcasting (1990 Amended 1996)

Continued . . .

2. Gross receipts, **including advertising revenue, from television film or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to this state in the ratio (hereafter "audience factor")** that the audience for such station (or owned and affiliated stations in the case of networks) located in this state bears to the total audience for such station (or owned and affiliated stations in the case of networks).

The audience factor for television or radio programming **shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience.** Such audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for such purpose and fairly represents the taxpayer's activity in the state.

3. Gross receipts from film programming in release to or by a cable television system shall be attributed to this state in the ratio (hereafter **"audience factor"**) **that the subscribers for such cable television system located in this state bears to the total subscribers of such cable television system.** . . .

From the General Regulations

Reg. IV.17(a)(3) . . .

(E)“Intangible property” generally means property that is not physical or whose representation by physical means is merely incidental and includes, without limitation, copyrights; patents; trademarks; trade names; brand names; franchises; licenses; trade secrets; trade dress; information; know-how; methods; programs; procedures; systems; formulae; processes; technical data; designs; licenses; literary, **musical, or artistic compositions**; information; ideas; contract rights **including broadcast rights**; agreements not to compete; goodwill and going concern value; securities; and, except as otherwise provided in Reg. IV.17, computer software. . . .

Reg. IV.17(f)(1)(E) . . .[sourcing of intangibles]

Example (v). Sports League Corp, a corporation that is based outside [state], sells the rights to broadcast the sporting events played by the teams in its league in all 50 U.S. states to Network Corp. Although the games played by Sports League Corp will be broadcast in all 50 states, the games are of greater interest in the northeast region of the country, including [state]. Because the intangible property sold is a contract right that authorizes the holder to conduct a business activity in a specified geographic area, Sports League Corp must **attempt to reasonably approximate the extent to which the intangible property is used in or may be used in [state]. For purposes of making this reasonable approximation, Sports League Corp may rely upon audience measurement information that identifies the percentage of the audience for its sporting events in [state] and the other states. See Reg. IV.17.(f).(1)(A).**

From the General Regulations

Reg. IV.17(d)(3)B.3.d . . . [**Services** Delivered Electronically Through or on Behalf of an Individual or Business Customer.]

Example (i). Cable TV Corp, a corporation that is based outside of [state], has two revenue streams. First, Cable TV Corp **sells advertising time to business customers pursuant to which the business 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 [state]. Second, Cable TV Corp **sells monthly subscriptions to individual customers in [state] and in other states**. The receipts from Cable TV Corp's sale of advertising time to its business customers are assigned to [state] **to the extent that the audience for Cable TV Corp's televised programming during which the advertisements run is in [state]**. . . . If Cable TV Corp is unable to determine the actual location of its audience for the programming, and lacks sufficient information regarding audience location to reasonably approximate the location, Cable TV Corp must approximate its [state] audience using the percentage that reflects the ratio of its [state] subscribers in the geographic area in which Cable TV Corp's televised programming featuring the advertisements is delivered relative to its total number of subscribers in that area. . . . [or alternative means of **reasonable approximation**] **monthly subscriptions are assigned to [state] where its customer's billing address is in [state]**. . . .

See also – Example (ii)

From the General Regulations

Reg. IV.17.(e)(5) **License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services. . . .**

(2) **License of a Marketing Intangible.** 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) to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible **are assigned to [state] to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased** or otherwise acquired by consumers or other ultimate customers in [state]. **Examples** of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or trade name; certain copyrights; **the license of a film, television or multimedia production or event for commercial distribution**; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales. . . .

From the General Regulations

Reg. IV.17.(e)(5) **License of Intangible Property where Substance of Transaction Resembles a Sale of Goods or Services. . . .**

Example (ii). Program Corp, a corporation that is based outside [state], **licenses programming that it owns to licensees, such as cable networks, that in turn will offer the programming to their customers on television or other media outlets** in [state] and in all other U.S. states. Each of these licensing contracts constitutes the **license of a marketing intangible**. For each licensee, assuming that Program Corp lacks evidence of the actual number of viewers of the programming in [state], the component of the licensing fee paid to Program Corp by the licensee that constitutes Program Corp's [state] receipts is determined by multiplying the amount of the licensing fee by **a percentage that reflects the ratio of the [state] audience of the licensee for the programming relative to the licensee's total U.S. audience** for the programming. See Reg. IV.17.(e).(5). If Program Corp is not taxable in any state in which the licensee's audience is located, the receipts are excluded from the denominator of Program Corp's receipts factor. See Article IV.17(c) and Reg. IV.17.(a).(6)(D). Note that the analysis and result as to the state or states to which receipts are properly assigned would be the same to the extent that the substance of Program Corp's licensing transactions may be determined to resemble a sale of goods or services, instead of the license of a marketing intangible. See Reg. IV.17.(e).(5).

Model – Financial Institutions (1994 Amended 2015)

Section 3. Receipts Factor. [Specifically addresses:]

- (d) Interest, fees and penalties imposed in connection with loans secured by real property.
- (e) Interest, fees, and penalties imposed in connection with loans not secured by real property
- (f) Net gains from the sale of loans.
- (g) Receipts from fees, interest, and penalties charged to card holders
- (h) Net gains from the sale of credit card receivables.
- (i) Card issuer's reimbursement fees.
- (j) Receipts from merchant discount.
- (k) Receipts from ATM fees.
- (l) Loan servicing fees.
- (m) Receipts from services.
- (n) Receipts from the financial institution's investment assets and activity and trading assets and activity.

Model – Telecommunications (2008)

Reg. IV.18.(i). . . .

(ii) Sales Factor: Sales of telecommunications and ancillary services in this state.

A. Gross receipts from the sale of telecommunications services, other than those defined in subsections C through G, which are sold on a call-by-call basis are in this state **when (a) the call originates and terminates in this state or (b) the call either originates or terminates and the service address is also located in this state.**

B. Gross receipts from the sale of telecommunications services, other than those defined in subsections C through G, which are **sold on other than a call-by-call basis, are in this state when the customer's place of primary use is in this state.**

C. Gross receipts from the sale of **mobile** telecommunications services, other than air-to-ground radiotelephone service and prepaid calling service, are in this state when the customer's **place of primary use is in this state pursuant to the Mobile Telecommunications Sourcing Act.**

D. Gross receipts from the sale of pre-paid calling service, prepaid wireless calling service and post-paid calling service are in this state **when the origination point of the telecommunications signal is first identified in this state by either (1) the seller's telecommunications system, or (2) information received by the seller from its service provider**, where the system used to transport such signals is not that of the seller.

Model – Telecommunications (2008)

Reg. IV.18.(i). . . .

(ii) Sales Factor: (cont'd)

E. Gross receipts from the **sale of a private communication service** are in this state:

[Sourcing **based on “channel points”**]

H. Gross receipts attributable to the sale of a telecommunication or ancillary service sold as part of a **bundled transaction** are in this state when such gross receipts would be this state in accordance with the provisions of sections ii.A. through G. **[With instructions for how to unbundle the charges.]**

Model – Reg. IV.18(c)

(2) This Reg. IV.18.(c) applies to the determination of the receipts factor if the taxpayer's receipts are less than 3.33 percent of the taxpayer's gross receipts.

(3) The following gross receipts are included in the receipts factor denominator and are assigned to the receipts factor numerator in this state as follows:

(A) Dividends paid by a related party . . .

(B) Gains . . .

(C) Gross receipts from lending activities . . .

(E) Gross receipts derived from accounts receivable previously sold to or otherwise transferred to the taxpayer . . .

(F) The net amount, but not less than zero, of gross receipts not otherwise assigned under this paragraph (3) arising from investment activities . . .

Proposed Approach

1. Continue approach of referencing the general rules in the special industry rules.
2. Identify basic conforming changes in special industry regulations.
3. Identify potential conflicts and ambiguities in and between special industry and general regulations and categorize –
 - a) Clarifications or updates
 - b) True conflicts
4. Determine resolution of true conflicts – whether changes or drafters' notes, etc.
5. Identify issues that have been raised with respect to regulations.
6. Identify and describe other clarifications that may be necessary based on review.
7. Discuss expansion or additional regulations and whether to continue the practice of special industry regulations.

Questions - Discussion