

Title 12—DEPARTMENT OF REVENUE
Division 10—Director of Revenue
Chapter 2—Income Tax

Proposed Rule

12 CSR 10-2.076 Allocation and Apportionment (Beginning on or After January 1, 2020)

PURPOSE: This rule interprets sections 143.431 and 143.455, RSMo for purposes of the apportionment and allocation of a corporate taxpayer's income where that taxpayer is taxable in another state.

(1) **Income Derived from Sources Within this State.** On or after January 1, 2020, a corporation's income derived from sources within Missouri is its federal taxable income allocated to Missouri or apportioned to Missouri pursuant to section 143.455, RSMo. section 143.455, RSMo replaces all methods and tests previously used in Missouri to apportion and allocate corporate income, including the 'source of income test' and the Multistate Tax Compact three-factor method.

(2) **Definitions.**

- (A) "Allocation" refers to the assignment of a portion of net income to a particular state. Any taxpayer subject to the taxing jurisdiction of this state shall assign all of its nonapportionable income within or without this state in accordance with sections 143.455.5-143.455.9, RSMo.
- (B) "Apportionment" refers to the division of apportionable income between states by the use of a formula containing one (1) or more apportionment factors.
- (C) "Director" or "Director of Revenue" shall mean the Missouri Director of Revenue or his/her duly authorized agent or designee.
- (D) "Franchise tax," as that term is used in section 143.455.4, RSMo and in this regulation, means a tax, or a portion of a tax, charged for the privilege of doing business in a state.
- (E) "Gross receipts" are the gross amounts realized (the sum of money and the fair market value of other property or services received) on the sale or exchange of property, the performance of services, or the use of property or capital in a transaction which produces apportionable income in which the income or loss is recognized under the Internal Revenue Code, and, where the income of foreign entities is included in apportionable income, amounts which would have been recognized under the Internal Revenue Code if the relevant transactions or entities were in the United States. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold.
- (F) "Net Income," for purposes of section 143.455, RSMo, means the taxpayer's federal taxable income, net of Missouri additions, subtractions and deductions; except, that in section 143.455.10, RSMo the phrase "net income" refers to that portion of the taxpayer's federal taxable income, net of Missouri additions, subtractions, and deductions which also constitutes apportionable income;
- (G) "Petition" or "Petitioning," as those terms are used in section 143.455.13(2)-(3), RSMo, means the filing of written or electronic document(s) with the director at least sixty (60)

days before the end of the tax year to which alternative apportionment is sought to apply, in the manner prescribed, and containing the following information:

1. The name and tax identification number of the taxpayer seeking alternative apportionment;
 2. The name, telephone number, email address, and mailing address of each individual filing the petition on behalf of the taxpayer;
 3. A power of attorney form (Form 2827) signed by an officer of the corporation authorizing the person(s) named in paragraph (2)(G)2 above to serve as an authorized agent with respect to any of the tax years to which the alternative apportionment may apply and all previous tax years that may be discussed in connection with the petition;
 4. A statement describing with particularity the alternative apportionment method sought;
 5. A statement setting forth the facts and arguments from the facts to the conclusion that the ordinary allocation and apportionment provisions of section 143.455, RSMo do not fairly represent the extent of the corporation's income applicable to this state;
 6. A statement setting forth the facts and arguments from the facts to the conclusion that the alternative apportionment method sought by the taxpayer is reasonable;
 7. A Missouri tax return for the first tax year the alternative apportionment method is to be applied, completed using the ordinary apportionment and allocation provisions of section 143.455, RSMo, and prepared using reasonably estimated figures; and
 8. A Missouri tax return for the first tax year the alternative apportionment method is to be applied, completed using the alternative apportionment method sought, and prepared using reasonably estimated figures.
- (H) "Receipts" has the meaning given in section 143.455.3(6), RSMo, with the following clarifications:
1. Receipts from the maturity of a bond or other debt instrument are excluded from the definition of "receipts" used in section 143.455.3(6), RSMo.
 2. Receipts from the sale or exchange of a security are excluded from the definition of "receipts" used in section 143.455.3(6), RSMo, even if the sale or exchange was made as part of a corporation's regular business.
 3. Receipts from the sale or exchange of currency, including foreign currencies or cryptocurrencies, are excluded from the definition of "receipts" used in section 143.455.3(6), RSMo.
- (I) "Receipts Factor" means the fraction stated in section 143.455.10, RSMo, the numerator of which is the total receipts of the corporation in Missouri during the tax period and the denominator of which is the total receipts of the corporation everywhere during the tax period.
- (J) "Securities," means any interest or instrument commonly treated as a security as well as other instruments which are customarily sold in the open market or on a recognized exchange, including, but not limited to, transferable shares of a beneficial interest in any corporation or other entity, bonds, debentures, notes, and other evidences of

indebtedness, accounts receivable and notes receivable, cash and cash equivalents including foreign currencies, and repurchase and futures contracts.

(K) "Taxpayer" or "Entity" means any individual, corporation, partnership, firm, association, or governmental unit.

(L) "Ultimate beneficiary of the service," as that term is used in section 143.455.12(1)(c), RSMo and except for bartering or similar in-kind transactions, means the entity that receives benefit or value from, but does not also receive monetary or credit-based payment (other than refunds, cashback, or discount-equivalents) in direct connection with, the service at issue. Examples of the ultimate beneficiary of the service include:

1. For entertainment services, the individual(s) viewing, interacting with, experiencing, or otherwise deriving entertainment value from such services;
2. For education services, the individual(s) receiving instruction, teaching, coaching, or lectures from the education provider, regardless of the medium used to transmit such educational content (e.g. telephonically or by internet or mail);
3. For investment advising or investment management services, the location of the ultimate investor, determined by ignoring investment intermediaries such as investment funds; and
4. For advertising services, the entities which have their products, services, or messages advertised through the provider of advertising services.

(3) Apportionable Income. All income is presumed to be apportionable unless it is clearly nonapportionable under the U.S. Constitution or the laws of this state. Sections 143.455.5 through 143.455.9, RSMo provide for the allocation of certain categories of income only if that income is nonapportionable. In general all transactions and activities of the taxpayer which are dependent upon, or contribute to, the operations of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business and will be transactions and activity arising in the regular course of, or will constitute integral parts of, a trade or business. Income from such transactions and activities is apportionable income, although the concept of apportionable income extends to all income of the taxpayer unless nonapportionable.

(4) Accounting Terms and Classification Conventions. The categories and terms to describe income items used in financial or other forms of accounting, or as conventions by any taxpayer or industry, are not conclusive in determining whether any item of income constitutes apportionable or nonapportionable income. The classification of income by the labels occasionally used, such as manufacturing income, compensation for services, sales income, interest, dividends, rents, royalties, gains, operating income, nonoperating income, and the like, is not conclusive in determining whether income is apportionable or nonapportionable income.

(5) Taxable in Another State. For purposes of section 143.455.4(2),RSMo, another state has jurisdiction to subject the taxpayer to a net income tax in the following circumstances. The circumstances provided are non-exclusive and a taxpayer may be subject to a net income tax in another state even if it fails to meet any of the following:

(A) The taxpayer has its commercial domicile in another state; or

(B) The taxpayer derives income from a part of its unitary business in another state, and that taxpayer is not entitled to the protections of the Interstate Income Act of 1959 with respect to that state.

Even if a state cannot impose a tax on a taxpayer's net income by operation of the Interstate Income Act of 1959, a taxpayer is still taxable in that state if the taxpayer is subject to a franchise measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax in that state. A taxpayer is not taxable in another state with respect to a particular trade or business merely because the taxpayer conducts activities in the other state pertaining to the production of nonapportionable income or business activities relating to a separate trade or business not taxable by that state under the U.S. Constitution.

(6) Consistency in Reporting. In filing returns with this state, if the taxpayer departs from or modifies the manner in which the same item of income has been classified as apportionable income or nonapportionable income in returns for prior years, the taxpayer shall disclose in an attachment to the return for the current year the nature and extent of the modification.

(7) Taxable In Another State — Reporting. Any taxpayer which asserts that it is subject to one (1) of the taxes generally described in section 143.455.4, RSMo in another state shall furnish to the director, upon his/her request, evidence to support the assertion. The director may request proof the taxpayer has filed the requisite tax return in the other state and has paid any taxes imposed under the law of the other state. The taxpayer's failure to produce proof may be taken into account in determining whether the taxpayer in fact is subject to tax in another state. If the taxpayer pays a minimal fee for qualification, organization, or for the privilege of doing business in the state, but does not actually engage in business activity in that state, or does actually engage in some business activity, not sufficient for income tax, franchise tax, or stock tax nexus, and the minimum tax bears no relation to the taxpayer's business activity within that state, the taxpayer is not subject to tax in another state for purposes of section 143.455.4, RSMo.

(A) Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return and pays the fifty-dollar (\$50) minimum tax, although it carries on no business activity in State A. Corporation X is not taxable in State A.

(8) Taxability. The concept of taxability in another state is based upon the premise that every state in which the taxpayer is engaged in business activity may impose an income, franchise, or stock tax even though every state does not do so. In states which do not impose such taxes, other types of taxes, fees, or even penalties may be imposed as a substitute for an income, franchise, or stock tax. Therefore, only those taxes generally described in section 143.455.4, RSMo which are essentially revenue raising, rather than penalties or occupational/business licenses that are not essentially revenue raising, shall be considered in determining whether the taxpayer is subject to one of the taxes generally described in section 143.455.4, RSMo in another state. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of P.L. 86-272, 15 USCA sections 381-385 and is further prohibited by federal law from imposing a franchise tax measured by net income or for the privilege of doing business, or a corporate stock tax.

(A) Example: State A requires all nonresident corporations which qualify or register in State A to pay to the secretary of state an annual license fee or tax for the privilege of doing

business in the state regardless of whether the privilege is in fact exercised. The amount paid is determined according to the total authorized capital stock of the corporation, and the rates are progressively higher by bracketed amounts. The statute sets a minimum fee of fifty dollars (\$50) and a maximum fee of five hundred dollars (\$500). Failure to pay the tax bars a corporation from utilizing the state courts for enforcement of its rights. State A also imposes a corporation income tax. Nonresident Corporation X is qualified in State A and pays the required fee to the secretary of state but does not carry on any business activity in State A (although it may utilize the courts of State A). Corporation X is not taxable in State A.

- (B) Example: Same facts as in the previous subsection except that Corporation X is subject to and pays the corporation income tax. Payment is prima facie evidence that Corporation X is subject to the net income tax of State A and is taxable in State A.
- (C) Example: State B requires all nonresident corporations qualified or registered in State B to pay to the secretary of state an annual permit fee or tax for doing business in the state. The base of the fee or tax is the sum of outstanding capital stock, surplus, and undivided profits. The fee or tax base attributable to State B is determined by a three (3)-factor apportionment formula. Nonresident Corporation X which operates a plant in State B pays the required fee or tax to the secretary of state. Corporation X is taxable in State B.
- (D) Example: State A has a corporation franchise tax measured by net income for the privilege of doing business in that state. Corporation X files a return based upon its business activity in the state but the amount of computed liability is less than the minimum tax. Corporation X pays the minimum tax. Corporation X is subject to State A's corporation franchise tax.

(9) Receipts Factor. Generally, all gross receipts of a taxpayer that are received from transactions and activity in the regular course of the taxpayer's trade or business are considered receipts for purposes of the receipts factor. Where a taxpayer's entire activity in the regular course of trade or business is composed of hedging transactions or the disposition of cash or securities, such that the denominator of the receipts factor would be zero, the total receipts factor shall be one hundred percent (100%); in such instances, taxpayers are invited to apply for alternative apportionment pursuant to section 143.455.13, RSMo. Exclusion of an item from the definition of "receipts" is not determinative of its character as apportionable or nonapportionable income. The following are additional rules for determining "receipts" in various situations:

- (A) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "receipts" includes all gross receipts from the sales of such goods or products (or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the tax period) held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business. Gross receipts for this purpose means gross sales less returns and allowances;
- (B) When property being shipped by a seller from the state of origin to a consignee in another state is diverted while en route to a purchaser in this state, the sales are in this state.
 - 1. Example: The taxpayer, a produce grower in State A, begins shipment of perishable produce to the purchaser's place of business in State B. While en route, the produce is diverted to the purchaser's place of business in this state in which state the taxpayer is subject to tax. Receipts from this sale by the taxpayer are attributed to this state;

- (C) In the case of cost plus fixed fee contracts, such as the operation of a government-owned plant for a fee, “receipts” includes the entire reimbursed cost plus the fee;
- (D) In the case of a taxpayer engaged in providing services, such as the performance of equipment service contracts or research and development contracts, "receipts" includes the gross receipts from the performance of such services, including fees, commissions, and similar items;
- (E) In the case of a taxpayer engaged in the sale of equipment used in the taxpayer’s trade or business, where the taxpayer disposes of the equipment under a regular replacement program, “receipts” includes the gross receipts from the sale of this equipment. For example, a truck-based delivery company that owns a fleet of trucks and sells its trucks under a regular replacement program the gross receipts from the sale of the trucks would be included in “receipts” ; and
- (F) For purposes of determining the receipts factor, receipts are presumed not to include: 1) damages and other amounts received as the result of litigation; 2) where the taxpayer is an agent of another, property acquired by that agent on behalf of another; 3) tax refunds and other tax benefit recoveries; 4) contributions to capital; 5) income from forgiveness of indebtedness; 6) amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code; or 7) amounts realized as a result of factoring accounts receivable recorded on an accrual basis; and 8) repayment of loan principal.

(10) Ultimate Beneficiary Approximation. In the event that the ultimate beneficiary is a corporation or other entity that owns, or operates in, locations in multiple states, and the extent to which the ultimate beneficiary is located in Missouri is not reasonably determinable—

- (A) The extent to which the ultimate beneficiary is located in Missouri may be reasonably approximated as the ratio of the ultimate beneficiary’s locations in Missouri to the number of its locations throughout the United States;
- (B) If the ratio in subsection (A) above is not reasonably determinable, the extent to which that ultimate beneficiary is located in Missouri may be approximated as the ratio of one to the number of states in which the ultimate beneficiary operates; and
- (C) If the ratio in subsection (B) is not reasonably determinable, the extent to which the ultimate beneficiary is located in Missouri may be approximated as fifty percent (50%). A taxpayer shall not be subject to an addition to tax for negligence in relying upon this approximation.

(11) Alternative Apportionment by the Director. Consistent with section 143.455.13, RSMo, the director may adjust a taxpayer’s return to utilize, or if no return was filed the director may utilize in estimating Missouri taxable income, an alternative apportionment method in order to equitably allocate and apportion the corporation’s income. In this event, a taxpayer adversely affected by this determination challenges such a determination by raising it as an issue in the taxpayer’s protest of a notice of deficiency under section 143.631, RSMo, or refund denial under section 143.841, RSMo. Whether the director has proven the requirements of section 143.455.13(3)(a)-(b), RSMo by a preponderance of the evidence is a determination within the director’s discretion.

(12) Petition for Alternative Apportionment by the Taxpayer. A taxpayer may seek alternative apportionment under section 143.455.13(2), RSMo by filing a petition in the manner prescribed on the director’s website or latest corporate income tax return instructions. A petition is subject to

denial if it fails to comport with the definition of petition set forth in this regulation. A denial by the director may be appealed to the Administrative Hearing Commission consistent with section 621.050, RSMo.

(13) Transactions and Activity in the Regular Course of the Taxpayer's Trade or Business. For a transaction or activity to be in the regular course of the taxpayer's trade or business, the transaction or activity need not be one that frequently occurs in the trade or business. Most, but not all, frequently occurring transactions or activities will be in the regular course of that trade or business. It is sufficient to classify a transaction or activity as being in the regular course of a trade or business, if it is reasonable to conclude transactions of that type are customary in the kind of trade or business being conducted or are within the scope of what that kind of trade or business does. However, even if a taxpayer frequently or customarily engages in investment activities, if those activities are for the taxpayer's mere financial betterment rather than for the operations of the trade or business, such activities are not in the regular course of the taxpayer's trade or business. Examples of income from activity in the regular course of the taxpayer's trade or business include, but are not limited to:

- (A) Income from sales of inventory, property held for sale to customers, and services which are commonly sold by the trade or business; and
- (B) Income from the sale of property used in the production of apportionable income of a kind that is sold and replaced with some regularity, even if replaced less frequently than once a year.

(14) Unitary Business of the Taxpayer.

- (A) A unitary business is a single economic enterprise that is made up either of separate parts of a single entity or of a commonly controlled group of entities that are sufficiently interdependent, integrated, or interrelated through their activities so as to provide synergy, mutual benefit, the sharing or exchange of value among them, or a significant flow of value to the separate parts of the economic enterprise. This sharing, exchange, or flow of value may also be described as requiring that the operation of one (1) part of the business be dependent upon, or contribute to, the operation of another part of the business. If the activities of one (1) business either contributes to the activities of another business or are dependent upon the activities of another business, those businesses are part of a unitary business. A single taxpayer may have more than one (1) unitary business.
- (B) A unitary business may exist within a single taxpayer or among a commonly controlled group of taxpayers. A taxpayer's formal business organization structure is not determinative of a taxpayer's unitary business.
- (C) The purpose of this section is to clarify the concept of "unitary business" to aid in determining a taxpayer's apportionable income. A taxpayer's apportionable income includes, but is not necessarily limited to, the income from one (1) or more unitary business(es) of the taxpayer, any part of which is conducted within Missouri. An item of income is from a unitary business if it is described by either sections 143.455.3(1)(a)a. or 143.455.3(1)(a)b., RSMo, but the concept of unitary business income is not necessarily limited to income described in those statutory provisions.
- (D) The factors of functional integration, centralization of management, and economies of scale, alone or in combination, provide evidence of whether a set of business activities constitutes a unitary business. Further indicators providing evidence of a unitary business

include business activities in the same line of business or business activities which are steps in a vertical business process.

- (E) Nothing in this section should be construed to create a “combined reporting” requirement under which a taxpayer is obligated to include in its consolidated group on its consolidated Missouri tax return all entities with which the taxpayer has a unitary business relationship.
- (F) A taxpayer’s unitary business is presumed to include, but is not presumptively limited to, the industry description within the North American Industry Classification System corresponding to the Principal Business Activity Code(s) reported on the taxpayer’s federal income tax return or related filings.

AUTHORITY: section 143.961, RSMo 1986 and section 143.455, RSMo Supp. 2020. Original rule filed Sept. 8, 2020.

PUBLIC COST: This proposed rule will not cost state agencies or political subdivisions more than five hundred dollars (\$500) in the aggregate.

PRIVATE COST: This proposed rule will not cost private entities more than five hundred dollars (\$500) in the aggregate.

*NOTICE TO SUBMIT COMMENTS: Anyone may file a statement in support of or in opposition to this proposed rule with the Missouri Department of Revenue, Administration Division, 301 W High Street, Room 218, Jefferson City, MO 65105-0475. To be considered, comments must be received within thirty (30) days after publication of this notice in the **Missouri Register**. No public hearing is scheduled.*