18 DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES

125 BUREAU OF REVENUE SERVICES

Chapter 801: APPORTIONMENT

Summary: This rule explains apportionment for corporations, pass-through entities, sole proprietorships and other business types as required by 36 ~~M.R.S.A.~~M.R.S., Chapter 821, and § 5142(6). The rule applies to C corporations, S corporations, partnerships, estates, trusts and sole proprietorships that have income from business activity both within and without Maine. ~~See~~ *See* 36 ~~M.R.S.A.~~M.R.S. § 5142(6). This rule also applies for purposes of determining the apportionable income base when calculating the credit for taxes paid to other jurisdictions on certain income. ~~See~~ 36 ~~M.R.S.A.~~M.R.S. § 5217-A. This rule does not apply to financial institutions subject to the Franchise Tax contained in 36 ~~M.R.S.A.~~M.R.S., Chapter 819.

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.01 Definitions

A. Costs of performance. "Costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer. In cases when it is impossible or impracticable to determine the costs of performance attributable to different states, the gross receipts from the performance of services attributable to this state are measured by the ratio that the time spent in performing the services in this state bears to the total time spent in performing the services everywhere. Time spent in performing services include the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, such as time expended in negotiating the contract, is excluded from the computations.

B. **Domicile**. "Domicile" means the principal place from which the business activities of a taxpayer are directed or managed. If it is not possible to determine the principal place from which the business activities of a taxpayer are directed or managed, the state of the taxpayer's incorporation is considered its state of domicile.

C. **Income-producing activity**. "Income-producing activity" means, for each separate item of income, the transactions and activity directly engaged in by the taxpayer for the ultimate purpose of obtaining gain or profit. For apportionment purposes, such activity does not include transactions and activities performed on behalf of a taxpayer, such as those conducted on the taxpayer's behalf by an independent contractor. Income-producing activity includes, but is not limited to:

(1) The rendering of personal services by employees or the utilization of tangible and intangible property by the taxpayer in performing a service;

(2) The sale, rental, leasing, licensing the use of, or other use of real property; and

(3) The rental, leasing, licensing the use of, or other use of tangible or intangible personal property.

D. **Located in the State**. "Located in the State" has the same meaning as in 36 ~~M.R.S.A.~~M.R.S. § 5206-D(11)(A)-(D).

E. **Office**. "Office" means a permanent or temporary location where a business entity makes sales or holds itself out to the public as conducting business. The home of a business's sales representative is generally not an "office" of the business for purposes of this rule unless the representative is publicly held out as doing business on behalf of the business at that location, either by publishing the home address as the business's own address or through other actions.

F. **State**. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof. 36 ~~M.R.S.A.~~M.R.S. § 5210(6).

G. **Total time**. "Total time" means the total number of days. Any portion of a day is counted as an entire day.

H. **Taxpayer.** "Taxpayer" means a corporation required to file a federal income tax return, a pass-through entity required to file a federal information return, a sole proprietorship required to file federal Form 1040, Schedule C, or any other business entity required to file a federal return. "Taxpayer" does not mean a partner or other owner of a pass-through entity, except where specifically stated.

I. **Unitary business**. "Unitary business" means a business activity that is characterized by unity of ownership, functional integration, centralization of management and economies of scale.

.02 **Determination of unitary business**. The activities of a corporation or group of affiliated corporations constitute a unitary business if those activities are integrated with, dependent upon and contributive to each other and to the operations of the corporation or group as a whole. The

presence of any of the following factors creates a strong presumption that the activities of the corporation or group constitute a single trade or business:

A. All activities are in the same general line or type of business;

B. The activities constitute different steps in a vertically-structured enterprise; or

C. The corporation or group is characterized by strong centralized management, including but not limited to centralized departments for such functions as financing, purchasing, advertising and research.

.03 Apportionment. If the business activity of a taxpayer occurs both within and without Maine, and if by reason of such activity the taxpayer is taxable in another state, the portion of the net income (or net loss) derived from sources within Maine is determined by apportionment in accordance with 36 ~~M.R.S.A.~~M.R.S. §§ 5210, 5211 and 5142(6) and the provisions of this rule. A corporation or affiliated group of corporations may be engaged in more than one unitary business. In that event, the corporation must, for each line of business, separately apportion its income using the appropriate Maine apportionment factor. Maine utilizes a "water's edge" combined reporting methodology for determining the apportionable income base. The income subject to apportionment is income required to be reported on the taxpayer's federal income tax return as modified by Maine law. The apportionment factor must only include those amounts attributable to the apportionable income base for that taxable year. Variations may be allowed when petitioned for by the taxpayer or may be required by the Assessor. ~~See~~ 36 ~~MRSA~~M.R.S. § 5211(17).

Prorating deductions. In most cases, an allowable deduction of a taxpayer will relate to apportionable income. In some cases, an allowable deduction may relate to both apportionable income and to income that Maine is prohibited from taxing by the laws or Constitution of the United States, or by the Constitution of Maine. 36 ~~M.R.S.A.~~M.R.S. § 5200-A (2)(A) and (F). In such cases, the deduction must be prorated between apportionable income and exempt income in a manner that fairly distributes the deduction among the classes of income to which it is applicable.

.04 Taxability in another state

A. **In general**. A taxpayer's income from business activity is taxable in another state if the taxpayer, by reason of such activity, is taxable in that state within the meaning of 36 ~~M.R.S.A.~~M.R.S. § 5211(2).

A taxpayer is taxable in another state if:

(1) By reason of business activity in another state, the taxpayer is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, as described in subsection B below; or

(2) By reason of such activity, the other state has jurisdiction to subject the taxpayer to a net income tax, regardless of whether or not the state actually imposes such a tax on the taxpayer, as described in subsection D below.

B. **When a taxpayer is subject to a tax under 36 ~~M.R.S.A.~~M.R.S. § 5211(2)**. A taxpayer is subject to one of the taxes specified in 36 ~~M.R.S.A.~~M.R.S. § 5211(2) in another state if the taxpayer carries on activities in that state and the state imposes such a tax on the taxpayer. A taxpayer that asserts that it is subject to one of the specified taxes in another state must furnish to the Assessor, upon the Assessor's request, evidence to support that assertion. The Assessor may request that such evidence include proof that 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.

C. **Effect of voluntary tax payment**. A taxpayer is not subject to one of the taxes specified in § 5211(2) in another state if the taxpayer voluntarily files and pays one or more of the specified taxes when not required to do so by the laws of that state or pays a minimal fee for qualification, organization or for the privilege of doing business in that state, but (a) does not actually engage in business activity in that state, or (b) does actually engage in some business activity not sufficient for nexus with that state and the minimal fee bears no relationship to the volume of the taxpayer's business activity within that state.

D. **When a state or foreign country has jurisdiction to subject a taxpayer to a net income tax**. The second test under ~~§5211(2)~~ subsection A, paragraph (2) above applies if the taxpayer's business activity is sufficient to give the state jurisdiction to impose a net income tax by reason of such activity under the Constitution and statutes of the United States. Jurisdiction to tax is not present where the state is prohibited from imposing the tax by reason of the provisions of Public Law 86-272 (15 U.S.C.A. §§ 381-385). The determination of whether a foreign country or a political subdivision thereof has jurisdiction to subject the taxpayer to a net income tax is made as though the jurisdictional standards applicable to a state of the United States, including P.L. 86-272, apply in that country. If jurisdiction is otherwise present, that country or political subdivision thereof is not considered to lack jurisdiction by reason of the provisions of a treaty between it and the United States.

E. **Producing exempt income**. A taxpayer is not "taxable in another state" for purposes of § 5211(2) if the only activities the taxpayer conducts in that other state are activities pertaining to the production of income that the State of Maine is prohibited from taxing by the laws or Constitution of the United States or by the Constitution of Maine.

.05 Consistency

A. **Year-to-year consistency**. The taxpayer must disclose in its Maine return the nature and extent of any inconsistency between that return and its Maine returns for prior years with respect to the composition of its unitary business, the classification of income, the prorating of deductions to business and constitutionally exempt income, and the determination of the sales apportionment factor.

B. **State-to-state consistency**. If the returns filed by a taxpayer for all states to which the taxpayer reports are not uniform in the composition of its unitary business, the classification of income, the prorating of deductions to business and constitutionally exempt income, and the determination of the sales apportionment factor, the taxpayer must disclose in its Maine return the nature and extent of the variance.

.06 Sales factor~~. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the~~

~~taxpayer everywhere during the tax period. The formula must exclude from both the numerator and the denominator sales of tangible personal property delivered or shipped by the taxpayer, regardless of F.O.B. point or other conditions of the sale, to a purchaser within a state in which the taxpayer is not taxable within the meaning of § 5211(2). 36 M.R.S.A. §5211(14). To avoid duplication, intercompany sales between corporations in a unitary business must be eliminated from both the numerator and the denominator of the sales factor.~~

~~For tax years beginning on or after January 1, 2010, "total sales of the taxpayer" includes sales of the taxpayer and of any member of an affiliated group with which the taxpayer conducts a unitary business. The formula must exclude from both the numerator and the denominator sales of tangible personal property delivered or shipped by the taxpayer, regardless of F.O.B. point or other conditions of the sale, to a purchaser within a state in which the taxpayer is not taxable within the meaning of § 5211(2), unless any member of an affiliated group with which the taxpayer conducts a unitary business is taxable in that state in the same manner as a taxpayer is taxable under § 5211(2). 36 M.R.S.A. §5211(14). To avoid duplication, intercompany sales between corporations in a unitary business must be eliminated from both the numerator and the denominator of the sales factor. For discussion of return reporting requirements for unitary business returns see Me. Dep't of Admin. & Fin. Servs., Bur. Of Rev. Servs., 18-125 CMR 810.~~

A. **Formula.** The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this State during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period, except that:

(1) For tax years beginning on or after January 1, 2009, the formula must exclude from both the numerator and the denominator sales of tangible personal property delivered or shipped by the taxpayer, regardless of F.O.B. point or other conditions of the sale, to a purchaser within a state in which the taxpayer is not taxable within the meaning of § 5211(2). 36 M.R.S. § 5211(14). To avoid duplication, intercompany sales between corporations in a unitary business must be eliminated from both the numerator and the denominator of the sales factor.

(2) For tax years beginning on or after January 1, 2010, "total sales of the taxpayer" includes sales of the taxpayer and of any member of an affiliated group with which the taxpayer conducts a unitary business. The formula must exclude from both the numerator and the denominator sales of tangible personal property delivered or shipped by the taxpayer, regardless of F.O.B. point or other conditions of the sale, to a purchaser within a state in which the taxpayer is not taxable within the meaning of § 5211(2), unless any member of an affiliated group with which the taxpayer conducts a unitary business is taxable in that state in the same manner as a taxpayer is taxable under § 5211(2). 36 M.R.S. § 5211(14). To avoid duplication, intercompany sales between corporations in a unitary business must be eliminated from both the numerator and the denominator of the sales factor. For discussion of return reporting requirements for unitary business returns see Me. Dep't of Admin. & Fin. Servs., Bur. Of Rev. Servs., 18-125 C.M.R. 810.

(3) For tax years beginning on or after January 1, 2013, the numerator of the sales factor does not include sales of a person whose only business activity in the State during the taxable year is the performance of services during a disaster period that are solely and directly related to a declared state disaster or emergency that

were requested by the State, a county, city, town, or political subdivision of the State or a registered business. 36 M.R.S. § 5211(16-B).

~~A~~B. **Generally**. "Sales" means all gross receipts of the taxpayer. "Sales" includes federal and state excise taxes (including sales taxes) if those taxes are passed on to the buyer or included as part of the selling price of the product. “Sales in this State” means all gross receipts of the taxpayer in the State of Maine including, but not limited to, receipts derived from the sale of tangible personal property pursuant to § 5211(15) and receipts derived from the sale of other than tangible personal property pursuant to § 5211(16-A). Interest income, service charges, carrying charges or time-price differentials incidental to a sale must be included as sales in the state to which the sale is attributable, regardless of the place where the accounting records are maintained or the contract or other evidence of indebtedness is located. The following are rules for determining "sales" in various situations.

(1) In the case of a taxpayer engaged in manufacturing and selling or purchasing and reselling goods or products, "sales" includes all gross receipts from the sales of such goods or products (or other property of a kind that 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.

(2) In the case of cost-plus-fixed-fee contracts, such as the operation of a government-owned plant for a fee, "sales" includes the entire reimbursed cost plus the fee.

(3) In the case of a taxpayer engaged in providing services, such as the operation of an advertising agency or the performance of equipment service contracts or research and development contracts, "sales" includes the gross receipts from the performance of such services, including fees, commissions, and similar items.

(4) In the case of a taxpayer engaged in renting real or tangible property, "sales" includes the gross receipts from the rental, lease, or licensing the use of the property.

(5) In the case of a taxpayer engaged in the sale, assignment, or licensing of intangible personal property such as patents and copyrights, "sales" includes the gross receipts therefrom.

(6) If a taxpayer derives receipts from the sale of equipment used in its business, those receipts constitute sales. For example, a truck express company owns a fleet of trucks and sells its trucks under a regular replacement program. The gross receipts from the sales of the trucks are included in the sales factor.

(7) “Sales” includes income from capitalized leases to the extent that the income from such leases is included in the federal gross income of the taxpayer.

~~B~~C. **Gross receipts**. “Gross receipts” means the gross amounts realized (the sum of money and the fair market value of other property or services received, less any returns and allowances) on the sale or exchange of property, the performance of services, or the use of property or capital (including rents, fees, royalties, interest and dividends) in a

transaction that produces income, in which the income or loss is recognized (or would be recognized if the transaction were in the United States) under the Internal Revenue Code. Amounts realized on the sale or exchange of property are not reduced for the cost of goods sold or the basis of property sold. Gross receipts do not include, for example, such items as:

(1) Repayment, maturity, or redemption of the principal of a loan, bond, or mutual fund or certificate of deposit or similar marketable instrument;

(2) The principal amount received under a repurchase agreement or other transaction properly characterized as a loan;

(3) Proceeds from issuance of the taxpayer's own stock or from sale of treasury stock;

(4) Damages and other amounts received as the result of litigation;

(5) Property acquired by an agent on behalf of another;

(6) Tax refunds and other benefit recoveries;

(7) Pension reversions;

(8) Contributions to capital (except for sales of securities by securities dealers);

(9) Income from forgiveness of indebtedness; or

(10) Amounts realized from exchanges of inventory that are not recognized by the Internal Revenue Code.

~~C~~D. **Sales of tangible personal property in this State**. A sale of tangible personal property is in Maine if the property is delivered or shipped to a purchaser (other than the United States Government, see subsection D below) who takes possession within Maine.

Sales are in Maine if the property is delivered or shipped to a purchaser in Maine regardless of the f.o.b. point or other conditions of sale.

(1) Tangible property is delivered or shipped to a purchaser within Maine if the recipient is located in Maine, even though the property is ordered from outside Maine.

(2) Property is delivered or shipped to a purchaser in Maine if the shipment terminates in Maine, even if the purchaser subsequently transfers the property to another state.

(3) The term "purchaser within this state" includes the ultimate recipient of the property if the taxpayer, at the direction of the purchaser, delivers to or has the property shipped to the ultimate recipient within Maine.

(4) When property being shipped by a seller from the state of origin to a consignee in another state is diverted to a purchaser in Maine, the sales are in Maine.

~~D~~E. **Sales of tangible personal property to the United States Government**. Sales of tangible personal property to the United States Government are in this State if the property is shipped from an office, store, warehouse, factory, or other place of storage in this State. Generally, sales by a subcontractor to a prime contractor who is the party to the contract with the United States Government do not constitute sales to the United States Government.

~~E~~F. **Sales other than sales of tangible personal property.** Receipts from the sales of other than tangible personal property must be sourced as follows below. When no other sourcing rule is applicable, the sales must be sourced so as to fairly represent the extent of the taxpayer's business activity in this State.

(1) **Receipts from the performance of services**. Generally, receipts from the performance of services must be sourced to the state where the services are received.

(a) **Non-business customer**. When it is unclear where the services were received, the sale is deemed to have occurred at the home of the customer.

(b) **Business customer**. When it is unclear where the services were received, the sale is deemed to have occurred at the office of the business customer where the services were ordered in the regular course of the customer's trade or business. If the ordering location can not be determined, the sale is deemed to have occurred at the office to which the services were billed.

(c) **Federal government**. If the customer is the federal government, the services are deemed to have been received in this State if the greater proportion of the income-producing activity is performed in this State than in any other state based on costs of performance.

(2) **Gross receipts from the sale of patents, copyrights, or trademarks**. Generally, gross receipts from the license, sale or other disposition of patents, copyrights, trademarks or similar items of intangible personal property must be attributed to this State if the intangible property is used in this State by the licensee.

(a) **Used in more than one state**. When the intangible personal property is used by the licensee in more than one state, the income must be apportioned to this State according to the portion of use in this State.

(b) **Federal government**. When the purchaser or licensee of the intangible personal property is the Federal Government, the receipts are attributable to this State if the greater proportion of the income-producing activity is performed in this State than in any other state based on the costs of performance.

(3) **Receipts from the sale, lease, or rental of real property**. Generally, receipts from the sale, lease, rental or other use of real property must be sourced to this State if the real property is located in this State.

(4) **Receipts from the lease or rental of tangible personal property**. Generally, receipts from the lease or rental of tangible personal property must be attributed to this State if the tangible personal property is located in this State.

(5) **Receipts from the sale of partnership interest**. Gain or loss from the sale of a partnership interest must be sourced in accordance with § 5142(3-A). The gain or loss from the sale of a partnership interest is sourced to Maine by multiplying the gain or loss by the ratio of the original cost of the partnership's tangible property located in Maine to the original cost of the partnership's tangible property everywhere, determined at the time of the sale. A different ratio must be calculated if more than 50% of the value of the partnership's assets consists of intangible property. The foregoing allocation calculations do not apply to the sale of a limited partner's interest in an investment partnership when more than 80% of the value of the partnership's total assets consists of intangible personal property held for investment, except that such property cannot include an interest in a partnership unless that partnership is itself an investment partnership.

(6) **Receipts from financial services**. Receipts from financial services must be sourced to this State in accordance with § 5206-E (2)(C)-(I), and as follows:

(a) Interest, including fees and penalties in the nature of interest from loans located in Maine, is determined at the time the original agreement was made;

(b) Net gain attributed to this State from the sale of loans is determined based on the ratio of interest, fees and penalties from loans located in this State, determined in accordance with subparagraph (a), to interest, fees and penalties from all loans;

(c) Interest, including fees and penalties in the nature of interest from credit card receivables, and receipts from fees (including annual fees) is charged to credit card holders associated with credit card holders whose billing address is in this State;

(d) Net gain attributed to this State from the sale of credit card receivables is determined based on the ratio of credit card interest, fees and penalties associated with credit card holders whose billing address is in this State to all credit card interest, fees and penalties;

(e) Receipts from credit card reimbursement fees, including related payment processing fees, attributed to this State are determined based on the ratio of credit card interest, fees and penalties associated with credit card holders whose billing address is in this State to all credit card interest, fees and penalties;

(f) Receipts from merchant discount, including related payment processing fees, are in this State if the commercial domicile of the merchant is in this State. The receipts are computed net of any credit card holder charge-backs, but are not reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its credit card holders; and

(g) Receipts from loan servicing fees attributed to this State are determined based on the ratio of interest, fees and penalties in the nature of interest from loans located in this State, determined in accordance with subparagraph (a), to interest, fees and penalties in the nature of interest from all loans. Loan servicing fees received for servicing secured or unsecured loans of another must be included in the numerator if the borrower is located in this State.

(7) **Gross receipts from the sale of goodwill**. Receipts from the sale of goodwill must be sourced to this State according to the portion of use in this State based upon the previous taxable year's sales factor for all sales.

(8) **Gross receipts from the sale of accounts receivable and the sale of collection services**. Receipts from the sale of accounts receivable and collection services must be sourced as the underlying sales related to the debt was sourced.

.07 Corporate partners.

A. **Generally**. A corporation with an interest in a pass-through entity, such as a partnership, limited partnership, limited liability partnership, limited liability company, S corporation, or other similar entity must include its distributive share of the pass-through entity income, loss, or deduction in calculating its income, in accordance with the Internal Revenue Code and 36 ~~M.R.S.A.~~M.R.S. § 5102(8), and must apportion its income pursuant to paragraph D below. The character of any item included in the distributive share is determined as if it were realized or incurred directly by the corporation. The business of the pass-through entity is treated as the business of the corporation.

B. **Taxable in Maine**. A corporation that is not otherwise subject to Maine's tax jurisdiction is nevertheless taxable in Maine if it is a partner, shareholder or member in a pass-through entity whose activities, if conducted directly by the corporation, would subject the corporation to the Maine corporate income tax.

C. **Taxable in another state**. A corporation is taxable in another state within the meaning of Section .04 if the corporation is a partner, shareholder or member in a pass-through entity with activities in that state that cause the pass-through entity or its partner, shareholder or member to be taxable in that state under the rules described in Section .04.

D. **Apportionment rules**. In general, if a corporate partner, shareholder or member is taxable in another state, it must apportion its taxable net income using the apportionment percentage in 36 ~~M.R.S.A.~~M.R.S. § 5211(8).

(1) **Sales factor**. In determining the denominator of its sales factor, a corporate partner, shareholder or member must include its pro rata share of the pass-through entity's total sales during the pass-through entity's taxable year. In determining the numerator of its sales factor, a corporate partner, shareholder or member must include its pro rata share of such sales in Maine. To avoid duplication, however, the following sales must be eliminated from both the numerator and denominator of the sales factor:

(a) Sales by the corporation to the pass-through entity in an amount equal to the total of such sales multiplied by the corporation's interest in the pass-through entity; and

(b) Sales by the pass-through entity to the corporation in an amount not to exceed the total of all sales made by the pass-through entity multiplied by the corporation's interest in the pass-through entity.

(2) **Pro rata share**. For purposes of this section, a corporate partner's, shareholder's or member's -pro rata share of a pass-through entity's -sales shall be its percentage interest in pass-through entity profit or loss for the taxable year, as stated on the partner's, shareholder's or member's Schedule K-1. However, if, under the pass-through entity agreement, a partner's, shareholder's or member's share of gain or loss from the sale of particular pass-through entity assets is different from its profit or loss ratio stated on Schedule K-1, gross receipts from sales of such assets shall be attributed to its sales factor in the same proportion as the partner's, shareholder's or member's interest in gain or loss from the sale. In the event of a termination or other change in a partner's, shareholder's or member's interest during the taxable year, the partner's, shareholder's or member's pro rata share of sales must be modified to reflect pass-through entity sales during the actual period that the partner, shareholder or member held its interest.

.08 Variations

A. **Special apportionment formulas**. A taxpayer may petition for, or the assessor may require, an apportionment variation, if the apportionment provided by statute and this rule does not fairly represent the extent of the taxpayer's business activity in the State. Nothing in this rule precludes the assessor from establishing appropriate procedures for determining the correct apportionment, including the use of separate accounting, determination of appropriate factors, or any other method to effectuate equitable apportionment.

B. **Factors for corporate partners**. The property and payroll factors of a special apportionment formula for a corporation with an interest in a pass-through entity may be proposed using the guidance below.

(1) **Property factor**. In determining the denominator of its property factor, a corporate partner, shareholder or member must include its pro rata share of the total value of the pass-through entity's real and tangible personal property, owned or rented, used during the pass-through entity's taxable year. In determining the numerator of its property factor, a corporate partner, shareholder or member must include its pro rata share of the value of such property located in Maine. To avoid duplication, however, the following adjustments must be made to the value of any property leased or rented by the corporation to the pass-through entity or vice versa.

(a) When a corporation rents property to the pass-through entity, the corporation must include the original cost of the property in its property factor. The pass-through entity must not include any portion of the value of this property in its property factor.

(b) When the pass-through entity rents property to the corporation, the corporation must include in its property factor the sum of (i) the original cost of the property multiplied by the corporation's percentage interest in the pass-through entity, plus (ii) eight times the net annual rental rate of the property multiplied by the difference between 100% and the corporation's percentage interest in the pass-through entity.

(2) **Payroll factor**. In determining the denominator of its payroll factor, a corporate partner, shareholder or member must include its pro rata share of the total compensation paid by the pass-through entity during the pass-through entity's taxable year. In determining the numerator of its payroll factor, a corporate partner, shareholder or member must include its pro rata share of such compensation paid in Maine during the taxable year.

.09 **Property value and factor**. The Assessor may require taxpayers to provide information on tax returns on property value and factor. The property factor also may be used in appropriate circumstances in determining an apportionment variation, as provided under § 5211(17). The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in Maine during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

A. **Real and tangible personal property**. The term "real and tangible personal property" includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property but does not include coin or currency.

B. **Property used during the taxable year**. Property is included in the property factor if it is actually used or is available for use or capable of being used during the tax period by the taxpayer. Property held in reserve or standby facilities or property held as a reserve source of materials must be included in the factor. For example, a plant temporarily idle or raw material reserves not currently being processed are includable in the factor. Property or equipment under construction during the tax period (except inventoriable goods in process) must be excluded from the factor until such property is actually used by the taxpayer. If the property is partially used by the taxpayer while under construction, the value of the property to the extent used must be included in the property factor. Property used by the taxpayer must remain in the property factor until its permanent withdrawal is established by an identifiable event such as its sale~~,~~ or the lapse of an extended period of time (normally, five years) during which the property is held for sale.

C. **Property in transit; mobile property**. Property in transit between locations of the taxpayer to which it belongs is considered to be located at the destination for purposes of the property factor. Property in transit between a buyer and seller that is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices must be included in the numerator according to the state of destination. The value of mobile or movable property, such as construction equipment, trucks or leased electronic equipment, that is located both within and without this State during the taxable year, is determined for purposes of the numerator of the property factor on the basis of total time within Maine during the taxable year. Automobiles

assigned to traveling employees are included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor.

D. **Valuation of owned property**. Property owned by the taxpayer is valued at its original cost. "Original cost" means the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition by the taxpayer and adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc. However, capitalized intangible drilling and development costs are included in the factor whether or not they have been expensed for either federal or state tax purposes. If the original cost cannot be ascertained, the property must be included in the factor at its fair market value as of the date of its acquisition by the taxpayer.

Generally, the average value of all property owned by the taxpayer is determined by averaging the values at the beginning and ending of the tax period. However, the Assessor may require or allow averaging of monthly values if substantial fluctuations in the values of the property exist during the taxable year or if property is acquired after the beginning of the taxable year or disposed of before the end of the taxable year.

E. **Valuation of rented property**. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Subrentals are not deducted.

If property is used at no charge or rented for a rate other than a reasonable market rate, the property must be included in the property factor on the basis of a reasonable market rental rate.

The "annual rental rate" is the amount paid as rent for the property for a twelve-month period. When property is rented for less than a twelve-month period, the net rent paid for the actual period of rental constitutes the "annual rental rate" for the tax period. However, when a taxpayer has rented property for a term of 12 or more months and the current tax period covers a period of less than 12 months, the net rent paid for the short tax period must be annualized. If the rental term is for less than 12 months, the rent must not be annualized beyond its term. Rent will not be annualized because of the uncertain duration when the rental term is on a month-to-month basis.

"Rent" is the actual sum of money or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use of the property and includes:

(1) Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise;

(2) Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items required to be paid by the terms of the lease or other arrangement but does not include amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent must be determined by consideration of the relative values of the rent and the other items.

"Rent" does not include incidental day-to-day expenses such as hotel or motel accommodations, daily rental of automobiles, etc. “Rent” does not include royalties based

on extraction of natural resources, whether represented by delivery or purchase. For this purpose, a royalty includes any consideration conveyed or credited to a holder of an interest in property that constitutes a sharing of current or future production of natural resources from such property, irrespective of the method of payment or how such consideration may be characterized, whether as a royalty, advance royalty, rental or otherwise.

Leasehold improvements are treated as property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or of whether the improvements revert to the lessor upon expiration of the lease.

.10 **Payroll value and factor**. The Assessor may require taxpayers to provide information on tax returns on payroll value and factor. The payroll factor also may be used in appropriate circumstances in determining variations on the apportionment formula as provided under § 5211(17). The payroll factor is a fraction, the numerator of which is the total amount of compensation paid in this State during the tax period by the taxpayer, and the denominator of which is the total compensation paid everywhere during the tax period.

A. **Effect of accounting method**. If a taxpayer has adopted the accrual method of accounting, all compensation properly accrued will be deemed to have been paid. However, compensation may be included in the payroll factor by use of the cash method if the taxpayer is required to report such compensation under that method for unemployment compensation purposes.

B. **Base of operations**. “Base of operations” means the taxpayer’s place of business from which an employee customarily begins work or to which the employee customarily returns at some other time to receive instructions, direction and supervision from the taxpayer or communications from customers or other persons, to replenish stock or other materials, to repair equipment, or to perform any other function necessary to the exercise of the employee’s trade or profession.

C. **Compensation**. The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made pursuant to a contract to an employee-leasing company for leased employees or to a temporary service company for temporary employees are compensation. Payments made to an independent contractor, or any other person not properly classifiable as an employee, are excluded. Only amounts paid directly to employees are included in the payroll factor. Amounts considered paid directly include the value of board, rent, housing, lodging~~,~~ and other benefits or services furnished to an employee by the taxpayer in return for personal services provided that such amounts constitute income to the recipient under the Internal Revenue Code. In the case of employees not subject to the Internal Revenue Code (e.g., those employed in foreign countries), the determination of whether such benefits or services would constitute income to the employees is made as though such employees were subject to the Internal Revenue Code. Employer contributions under a retirement plan, qualified cash or deferred arrangement as defined in Internal Revenue Code §401(k) and employer contributions to nonqualified deferred compensation plans are generally included in the payroll factor.

D. **Employee**. "Employee" means any officer of a corporation or any individual who would be considered an employee under the common law rules governing the employer-employee relationship. Generally, an individual is considered to be an employee if the

individual is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act. This presumption may be overcome by evidence provided by a taxpayer that an individual who is included as an employee for purposes of the Federal Insurance Contributions Act would not be an employee of the taxpayer under the usual common law rules.

E. **Independent contractor**. "Independent contractor" means any individual who performs services for a taxpayer, but who is not an employee of the taxpayer, and who is not otherwise subject to the supervision or control of the taxpayer in the performance of the services.

F. **Payroll in states in which taxpayer is not taxable**. Compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune from taxation, for example, by P.L. 86-272, is included in the denominator of the payroll factor.

.11 **Application date**. Except where otherwise stated, this~~This~~ Rule applies to tax years beginning on or after January 1, 2010.

STATUTORY AUTHORITY: 36 ~~M.R.S.A.~~M.R.S. § 112(1)

EFFECTIVE DATE:
September 30, 1976

AMENDED:
December 31, 1979
April 27, 1982

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REPEALED AND REPLACED:
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March 12, 2008 – filing 2008-98
February 8, 2009-filing 2009-47
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