

Reg. § 1.5833 ALLOCATION AND APPORTIONMENT OF INCOME

Reg. § 1.5833-1 (Effective for tax years beginning on and after January 1, 1998)
Allocation and apportionment of "Vermont net income" by corporations

(a) Computations of Vermont Apportionment Percentage

(1) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be apportioned to this state in full. If the income of a taxable corporation is derived from any trade, business, or activity conducted both within and without this state, the amount of the corporation's Vermont Net Income apportioned to this state shall be determined by the arithmetic average of the following factors:

(A) The average of the value of all real and tangible property owned or rented by the taxpayer within Vermont expressed as a percentage of all such property both within and without Vermont.

(B) The total wages, salaries or other personal service compensation paid during the taxable year to employees or agents within Vermont expressed as a percentage of such payments both within and without Vermont.

(C) The gross sales or charges for services performed within Vermont expressed as a percentage of such sales or charges both within and without Vermont.

(2) All items of nonbusiness income (income which is not includable in the apportionable tax base) shall be allocated as provided in Sec. 1.5833(e)(6) of this regulation.

(3) The apportionment percentage is computed by adding together the percentages of the taxpayer's real and tangible personal property, sales or receipts, and payrolls within Vermont during the period covered by the return, and dividing the total of such percentages by three. However, if any one of the factors (for property, receipts or payroll) is missing, the other two percentages are added and the sum is divided by two, and if two of the factors are missing, the remaining percentage is the apportionment percentage. (A factor is not missing merely because its numerator is zero, but it is missing if both its numerator and its denominator are zero).

Example: A taxpayer owns no real or tangible personal property and rents no real property either within or without the state. The property factor being missing, the apportionment percentage may be computed by adding the percentages derived from the apportionment of its sales or receipts and payrolls, and dividing the total by two.

(b) Property Factor

(1) The property factor is a fraction, the numerator of which is the average value of all real and tangible property within this state based on original cost at the beginning

of the taxable year and at the end of the taxable year; and the denominator of which is the average value of property based on original cost both within and without the state at the beginning and at the end of the taxable year.

(2) Tangible personal property is within Vermont if, and so long as, it is physically situated or located here. Property of the taxpayer held in Vermont by an agent, consignee or factor is (and property held outside Vermont by an agent, consignee or factor is not) situated or located within Vermont.

Property in transit between locations of the taxpayer to which it belongs shall be considered to be at the destination for purposes of the property factor. Property in transit between a buyer and seller which is included by a taxpayer in the denominator of its property factor in accordance with its regular accounting practices shall 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 which are located within and without this state during the tax period shall be determined for purposes of the numerator of the factor on the basis of total time within the state during the tax period. An automobile assigned to a traveling employee shall be included in the numerator of the factor of the state to which the employee's compensation is assigned under the payroll factor or in the numerator of the state in which the automobile is licensed.

(3) Construction in progress will not be included in the factors until the asset constructed is placed in service.

(4) In determining the property factor, real and personal property rented or leased to the taxpayer, as well as real and personal property owned by it must be considered. The value of rented real and personal property both within and without the state is determined by multiplying the gross rent payable during the tax year by eight (8).

"Gross Rent" as used in this rule, is the actual sum of money payable or other consideration payable, directly or indirectly, by the taxpayer or for its benefit for the use or possession of the property and includes:

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

Example: A taxpayer, pursuant to the terms of a lease, pays the lessor \$1,000.00 per month and at the end of the year pays the lessor one percent of its gross sales of \$400,000.00. Its gross rent is \$16,000.00.

(B) Any amount payable as additional rent or in lieu of rent, such as interest, taxes, insurance, repairs or any other amount required to be paid by the terms of a lease or other arrangement;

Example: A taxpayer, pursuant to the terms of a lease, pays the lessor \$24,000.00 per annum and also pays real estate taxes in the amount of \$4,000.00 and interest on a mortgage in the amount of \$2,000.00. Its gross rent is \$30,000.00.

(C) Any other amount required to be paid by the terms of a lease or other arrangement, including the amount of amortization or depreciation allowed in computing the taxable income base for the taxable year of any improvement to real property made by or on behalf of the business organization which reverts to the owner or lessor upon termination of the lease or other arrangement.

Example: A taxpayer enters into a 21-year lease of certain premises at a rental of \$20,000.00 per annum and after the expiration of one year installs a new store front at a cost of \$10,000.00 which reverts to the owner upon expiration of the lease. Its gross rent for the first year is \$20,000.00. However, for subsequent years its gross rent is \$20,500.00 (\$20,000.00 annual rent plus 1/20th of \$10,000.00, the cost of the improvement apportioned on the basis of the unexpired term of the lease).

Example: A taxpayer leases a parcel of vacant land for 40 years at an annual rental of \$5,000.00 and erects thereon a building which costs \$600,000.00. The value of the land is determined by multiplying the annual rent of \$5,000.00 by eight, and the value of the building is determined in the same manner as if owned by the taxpayer.

"Gross Rent" does not include:

(A) Intercompany rents if both the lessor and lessee are taxed on a consolidated basis.

(B) Amounts payable as separate charges for water and electric service furnished by the lessor.

(C) Amounts payable for storage provided no designated space under the control of the taxpayer as a tenant is rented for storage purposes.

(5) In exceptional cases use of the general method outlined above may result in inaccurate valuations. Accordingly, in such cases, any other method which will properly reflect value may be adopted by the Vermont Department of Taxes, either on its own motion or on request of a taxpayer. Such other method of valuation may not be used by a taxpayer until approved in writing by the Department. Any such request shall set forth full information with respect to the property, together with the basis for the valuation proposed by the taxpayer. Such other method once approved by the Department may be used by the taxpayer in its reports for subsequent years until the facts upon which such other method is based are, in the judgment of the Department, materially changed.

(c) Payroll Factor

(1) The payroll factor is a fraction, the numerator of which includes the total compensation paid in Vermont during the tax period and the denominator of which includes the total compensation paid everywhere during the tax period. In addition to “normal” salary and wages, compensation shall include payments to employees for board, rent, housing, lodging, and any other benefits paid in exchange for labor. These amounts will be treated as compensation if they are considered as income under the Internal Revenue Code.

(2) The taxpayer’s accounting method will determine the actual amounts that are to be included in the factors. If the taxpayer uses the accrual method of accounting, compensation that has been properly accrued and deductible will be considered to have been paid during the taxable period.

(3) For purposes of this regulation, an employee is defined to be any person, including an officer of the corporation, who is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the FICA.

(4) The payroll factor shall include only compensation that is related to the production of apportionable income. Compensation that is related to the operation, maintenance, protection or supervision of nonbusiness income is not included in the payroll factor. To the extent that employee services produce both business and nonbusiness income, proration is allowed.

(5) Compensation will be considered to be paid in Vermont and thus includable in the numerator of the payroll factor if:

- (A) the individuals’ services are performed entirely within Vermont;
- (B) the individuals’ services are performed both within and without Vermont, but the out-of-state services are incidental to the Vermont services;
- (C) some of the individuals’ services are performed within Vermont and the company’s base of operation or the place from where the service is controlled is within Vermont; or
- (D) some of the individual’s services are performed within Vermont, which is his or her state of residence, and there is no base of operation or place from where the service is controlled in any of the other states where part of the individual’s services are performed.

(d) Sales and Receipts Factor

(1) The sales and receipt factor is a fraction, the numerator of which is the receipts of the taxpayer in this state during the taxable year and the denominator of which is the receipts of the taxpayer within and without this state during the taxable year. The method of calculating receipts for purposes of the denominator is the same method used in determining receipts for purposes of the numerator. The receipts factor shall include only those receipts which constitute business income and are includable in

the apportionable base for the tax year. Receipts from the following are allocable to Vermont:

- (A) sales of tangible personal property in Vermont;
- (B) services performed in Vermont;
- (C) rentals from property situated in Vermont;
- (D) royalties from the use in Vermont of patents and copyrights;
- (E) all other business receipts earned in Vermont.

All such receipts of the period covered by the return (computed on the cash or accrual basis, in accordance with the method of accounting used in the computation of the taxpayers "Vermont net income") must be taken into account.

(2) Sales of Tangible Personal Property in Vermont Sales of tangible personal property are made in this state if the property is delivered or shipped to a purchaser, other than the United States government, who takes possession within this state, regardless of fob point or other conditions of sale, or the property is shipped from an office, store, warehouse, factory or other place of storage in this state and:

- (A) the purchaser is the United States Government; or
- (B) the corporation is not taxable in the state in which the purchaser takes possession.

If a seller in Vermont makes sales of tangible personal property to a purchaser who takes delivery of the property at the seller's shipping dock, the sale is a Vermont sale if the purchaser transports the property to one of its in-state locations. If the purchaser transports the property to one of its out-of-state locations the sale is not a Vermont sale, unless the corporation is not taxable in the state to which the property is transported.

(3) Compensation for Services Receipts for services are apportioned to Vermont if the services are performed in Vermont. All amounts received for such services are apportionable irrespective of whether such services are performed by employees, agents, subcontractors or any other persons.

When compensation for services are in payment of services performed both within and without Vermont, sales are apportioned to this state if a greater proportion of the income producing activity is performed in Vermont. If this rule causes an inequitable apportionment of income, the amount attributable to Vermont shall be determined based on the cost of performance.

(4) Rents and Royalties Receipts from rentals of real and personal property situated in Vermont, royalties from the use in Vermont of patents or copyrights and receipts from the licensing of computer software used in Vermont and similar transactions are apportionable to Vermont.

Receipts from rentals include all amounts received directly or indirectly by the taxpayer for use of or occupancy of property, whether or not such property is owned by the taxpayers.

Receipts from royalties include all amounts received by the taxpayer for the use of patents or copyrights whether or not such patents or copyrights were originally issued to or are owned by the taxpayer.

A patent or copyright is used in Vermont to the extent that activities thereunder are carried on in Vermont.

(5) Other Business Receipts All business receipts earned by the taxpayer within Vermont are apportionable to Vermont. Business receipts are not considered to have been earned in Vermont solely by reason of the fact that they were payable in Vermont or were received in Vermont. Business receipts include all income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible or intangible property if the acquisition, management and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

(6) Nonbusiness Receipts Nonbusiness receipts are all receipts other than business receipts resulting from operations unrelated to its regular business operations. Typically nonbusiness receipts are comprised of passive or portfolio income. Income from dividends, interest and capital gains will be considered nonbusiness income unless the acquisition, management, and disposition of the underlying property generating the income constitute an integral part of the taxpayer's regular business operations.

(e) Nonbusiness income will be allocated to the state in which the income producing assets are located. If the income producing asset has no situs, the income will be allocated to the state of commercial domicile, the principle place from which the business is directed or managed.

(f) Discretionary Adjustment of Vermont Apportionment Percentage Generally the apportionment formula will result in a fair apportionment of the taxpayer's income within and without Vermont. However, due to the nature of certain businesses the formula may not result in an equitable allocation of income. In such cases, the taxpayer may petition for, or the commissioner may require:

- (1) Separate accounting;
- (2) the exclusion or modification of any or all of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayers business activity in this state; or
- (4) the employment of any other method to effect an equitable apportionment of the taxpayer's income.