

NOTICE OF INTENT

Department of Revenue Policy Services Division

Corporation income tax; apportionment of income; sourcing of sales other than sales of tangible personal property

(LAC 61:I.1135)

Under the authority of R.S. 47:1511 and R.S. 47:287.95 and pursuant to the Administrative Procedure Act, R.S. 49:950 et seq., the Department of Revenue, Policy Services Division, proposes to adopt LAC 61:I.1115.

The primary purpose of this proposed regulation is to implement Act 8 of the 2016 Second Extraordinary Session of the Louisiana Legislature.

Title 61

REVENUE AND TAXATION

Part I. Taxes Collected and Administered by the Secretary of Revenue

Chapter 11. Corporation Income Tax

§1135. Sourcing of sales other than sales of tangible personal property.

- A. General. R.S. 47:287.95 L. provides for the inclusion in the numerator of the sales factor of sales other than sales of tangible personal property.
- B. Market-Based Sourcing. Sales other than sales of tangible personal property are sourced to Louisiana if and to the extent that the taxpayer's market for the sales is in Louisiana. In general, the provisions in this section establish rules for (1) determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Louisiana, (2) reasonably approximating the state or states of assignment where the state or states cannot be determined, (3) excluding certain sales of intangible property from the numerator and denominator of the receipts factor pursuant to R.S. 47:287.95 L.(1)(e), and (4) excluding sales from the numerator and denominator of the sales factor, pursuant to R.S. 47:287.95 M., where the state or states of assignment cannot be determined or reasonably approximated, or where the taxpayer is not taxable in the state to which the sales are assigned.
- C. General Principles of Application; Contemporaneous Records.
In order to satisfy the requirements of this regulation, a taxpayer's assignment of sales other than sales of tangible personal property must be consistent with the following principles:
 1. A taxpayer shall apply the rules set forth in this regulation based on objective criteria and shall consider all sources of information reasonably available to the taxpayer at the time of its tax filing, including, without limitation, the taxpayer's books and records kept in the normal course of business. A taxpayer shall determine its method of assigning sales in good faith, and apply it consistently with respect to similar transactions and year to year. A taxpayer shall retain contemporaneous records that explain the determination and application of its method of assigning its sales, including its underlying assumptions, and shall provide those records to the Secretary of the Louisiana Department of Revenue upon request.
 2. This regulation provides various assignment rules that apply sequentially in a hierarchy. For each sale to which a hierarchical rule applies, a taxpayer must make a reasonable effort to apply the primary rule applicable to the sale before seeking to apply the next rule in the hierarchy (and must continue to do so with each succeeding rule in the hierarchy, where applicable). For example, in some cases, the applicable rule first requires a taxpayer to determine the state or states of assignment, and if the taxpayer cannot do so, the rule requires the taxpayer to reasonably approximate the state or states. In these cases, the taxpayer must attempt to determine the state or states of assignment (i.e., apply the primary rule

in the hierarchy) in good faith and with reasonable effort before it may reasonably approximate the state or states.

3. A taxpayer's method of assigning its sales, including the use of a method of approximation, where applicable, must reflect an attempt to obtain the most accurate assignment of sales consistent with these regulatory standards rather than an attempt to lower the taxpayer's tax liability. A method of assignment that is reasonable for one taxpayer may not necessarily be reasonable for another taxpayer, depending upon the applicable facts.

D. Rules of Reasonable Approximation.

1. In General. In general, this regulation establishes uniform rules for determining whether and to what extent the market for a sale other than the sale of tangible personal property is in Louisiana. This regulation also sets forth rules of reasonable approximation, which apply if the state or states of assignment cannot be determined. In some instances, the reasonable approximation must be made in accordance with specific rules of approximation as prescribed in this regulation. In other cases, the applicable rule in this regulation permits a taxpayer to reasonably approximate the state or states of assignment, using a method that reflects an effort to approximate the results that would be obtained under the applicable rules or standards set forth in this regulation.
2. Approximation Based Upon Known Sales. In an instance where, applying the applicable rules set forth for sale of a service, a taxpayer can ascertain the state or states of assignment of a substantial portion of its sales from sales of substantially similar services ("assigned sales"), but not all of those sales, and the taxpayer reasonably believes, based on all available information, that the geographic distribution of some or all of the remainder of those sales generally tracks that of the assigned sales, it shall include those sales which it believes tracks the geographic distribution of the assigned sales in its sales factor in the same proportion as its assigned sales.
3. Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has sales subject to this regulation from transactions with a related-party customer, information that the customer has that is relevant to the sourcing of receipts from these transactions is imputed to the taxpayer.

E. Rules with Respect to Exclusion of Receipts from the Receipts Factor

1. The sales factor only includes those amounts defined as sales under applicable statutes and regulations.
2. Certain sales arising from the sale of intangibles are excluded from the numerator and denominator of the sales factor pursuant to R.S. 47:287.95 L.(1)(e).
3. In a case in which a taxpayer cannot ascertain the state or states to which sales are to be assigned pursuant to the applicable rules set forth in this regulation, (including through the use of a method of reasonable approximation, where relevant) using a reasonable amount of effort undertaken in good faith, the receipts must be excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95 M.
4. In a case in which a taxpayer can ascertain the state or states to which sales are to be assigned pursuant to this regulation, but the taxpayer is not taxable in one or more of those states, the sales that would otherwise be assigned to those states where the taxpayer is not taxable must be excluded

from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95 M.

F. Sale of Immovable Property. In the case of the sale of immovable property, the sale is in Louisiana if and to the extent that the immovable property is located in Louisiana.

G. Sale of a Service.

(1) General Rule.

The sale of a service is sourced to Louisiana if and to the extent that the service is delivered to a location in Louisiana. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The rules to determine the location of the delivery of a service in the context of several specific types of service transactions are set forth below.

(2) Direct Personal Services Received by a Natural Person.

(a) In General.

Except as otherwise provided in this regulation, direct personal services are services that are physically provided in person by the taxpayer, where the customer or the customer's 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 direct personal services include, without limitation: cleaning services; pest control; medical and dental services, including medical testing, x-rays and mental health care and treatment; child care; hair cutting and salon services; live entertainment and athletic performances; and in-person training or lessons. Direct personal services include services within the description above that are performed at (1) a location that is owned or operated by the service provider or (2) a location of the customer, including the location of the customer's tangible property. Various professional services, including legal, accounting, financial and consulting services, and other similar services, although they may involve some amount of direct person contact, are not treated as direct personal services within the meaning of this regulation.

(b) Assignment of sales.

1. Rule of Determination. Except as otherwise provided in this regulation, if the service provided by the taxpayer is a direct personal service, the service is delivered to the location where the service is received. Therefore, the sale is in Louisiana if and to the extent the customer receives the direct personal service in Louisiana. In assigning its sales from direct personal services, a taxpayer must first attempt to determine the location where a service is received, as follows:

- i. If the service is performed with respect to the body of an individual customer in Louisiana (e.g. hair cutting or x-ray services) or in the physical presence of the customer in Louisiana (e.g. live entertainment or athletic performances), the service is received in Louisiana.
- ii. If the service is performed with respect to the customer's immovable property in Louisiana or if the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in Louisiana, the service is received in Louisiana.

- ii. If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside Louisiana, the service is received in Louisiana if the property is shipped or delivered to the customer in Louisiana.

(c) Rule of Reasonable Approximation. In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of sale from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. If the state to which the sales are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to the state are excluded from the numerator and denominator of the taxpayer's sales factor pursuant to R.S. 47:287.95 M.

(3) Non Direct Personal Services Received by a Natural Person. Non direct personal services delivered to a natural person shall be sourced to the customer's billing address.

- (a) Non direct personal services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.
- (b) "Billing address" means the location indicated in the books and records of the taxpayer as the primary mailing address relating to a customer's account as of the time of the transaction as kept in good faith in the normal course of business and not for tax avoidance purposes.

(4) Services Delivered to an Unrelated Business Entity. In any instance in which the service provided is delivered to a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth below, the taxpayer shall assign the sales as follows: first, by assigning the sales to the state where the contract of sale is principally managed by the customer; second, if the place of customer management is not reasonably determinable, to the customer's place of order; and third, if the customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5% of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

- (a) Safe Harbor; Large Volume of Transactions. A taxpayer may assign its sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer (1) engages in substantially similar service transactions with more than 250 customers, whether individual or business, and (2) does not derive more than 5% of its receipts from sales of all services from that customer.

(5) Services Delivered to a Related Business Entity. In any instance in which the service is sold to a related entity, the state or states to which the service is assigned is the place of receipt by the related entity as reasonably

approximated using the following hierarchy: (1) if the service primarily relates to specific operations or activities of a related entity conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related entity's payroll at the locations to which the service relates in the state or states; or (2) if the service does not relate primarily to operations or activities of a related entity conducted in particular locations, but instead relates to the operations of the related entity generally, then to the state or states in which the related entity has employees, in proportion to the related entity's payroll in those states. The taxpayer may use the safe harbor provided above provided that the Secretary of the Louisiana Department of Revenue may aggregate the sales to related entities in applying the 5% rule if necessary or appropriate to avoid distortion.

H. Sale of Intangible Property.

- (1) Assignment of Sales. The assignment of sales to a state or states in the instance of a sale or exchange of intangible property depends upon the nature of the intangible property sold.
- (2) Sale Where Receipts are Contingent on Productivity, Use or Disposition of the Intangible Property.

In the case of a sale or exchange of intangible property where the receipts from the sale or exchange are contingent on the productivity, use or disposition of the property, the receipts from the sale are assigned as follows:

- (a) The receipts are in Louisiana if and to the extent the intangible is used in Louisiana. In general, the term "use" is construed to refer to the location of the market for the use of the intangible property that is being sold and is not to be construed to refer to the location of the property or payroll of the owner.

- (3) Contract Right or Government License that Authorizes Business Activity in Specific Geographic Area.

In the case of a sale or exchange of intangible property where the property sold or exchanged is a contract right, government license or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the sale is assigned to a state if and to the extent that the intangible property is used or is authorized to be used within the state. If the intangible property is used or may be used only in this state, the taxpayer shall assign the sale to Louisiana. If the intangible property is used or is authorized to be used in Louisiana and one or more other states, the taxpayer shall assign the sale to Louisiana to the extent that the intangible property is used in or authorized for use in Louisiana through the means of a reasonable approximation.

- (4) Excluded Sales.

The sale of intangible property that is excluded from the numerator and denominator of the taxpayer's sales factor under this provision includes, without limitation, the sale of a partnership interest, the sale of business "goodwill," the sale of an agreement not to compete, or similar intangible value. Also, in any instance in which, the state to which the receipts from a sale is to be assigned can be determined or reasonably approximated, but where the taxpayer is not taxable in such state, the receipts that would otherwise be assigned to such state shall be excluded from the numerator and denominator of the taxpayer's receipts factor.

HISTORICAL NOTE: Promulgated by the Department of Revenue, LR 43:0000 (January 2017).

Family Impact Statement For Administrative Rules

Rule Title: LAC 61:I.1135. Corporation income tax; apportionment of income; sourcing of sales other than sales of tangible personal property

The proposed adoption of LAC 61:I.1135 regarding corporation income tax; apportionment of income; sourcing of sales other than sales of tangible personal property should not have any known or foreseeable impact on any family as defined by R.S. 49:972(D) or on family formation, stability and autonomy. Specifically, the implementation of this proposed rule will have no known or foreseeable effect on:

1. The stability of the family.
2. The authority and rights of parents regarding the education and supervision of their children.
3. The functioning of the family.
4. Family earnings and family budget.
5. The behavior and personal responsibility of children.
6. The ability of the family or a local government to perform this function.

Poverty Statement

The proposed regulation will have no impact on poverty as described in R.S. 49:973.

Small Business Statement

It is anticipated that the proposed Rule should not have a significant adverse impact on small businesses as defined in the Regulatory Flexibility Act. The agency, consistent with health, safety, environmental and economic factors has considered and, where possible, utilized regulatory methods in drafting the proposed Rule to accomplish the objectives of applicable statutes while minimizing any anticipated adverse impact on small businesses.

Provider Impact Statement

The proposed regulation will have no known or foreseeable effect on:

1. The staffing levels requirements or qualifications required to provide the same level of service.
2. The total direct and indirect effect on the cost to the provider to provide the same level of service.
3. The overall effect on the ability of the provider to provide the same level of service.

Any interested person may submit written data, views, arguments or comments regarding this proposed regulation to David Hansen, Attorney, Policy Services Division, Office of Legal Affairs by mail to P.O. Box 44098, Baton Rouge, LA 70804-4098. All comments must be received no later than 4:00 p.m., November 10, 2016. A public hearing will be held on November 30, 2016, at 11:00 a.m. in the LaBelle Room, on the first floor of the LaSalle Building, 617 North Third Street, Baton Rouge, LA 70802.

Kimberly Lewis Robinson
Secretary, Department of Revenue