

## **TITLE 316 - NEBRASKA DEPARTMENT OF REVENUE**

### **CHAPTER 24 - BUSINESS ENTITY REGULATIONS; ART. 3 - APPORTIONMENT**

#### **REG-24-301 APPORTIONABLE AND NONAPPORTIONABLE INCOME**

301.01 In General. A business entity or unitary group generating income from a business activity that is taxable within Nebraska and subject to tax in at least one other state must apportion its income. The income is apportioned using the sales factor only, as provided in Reg-24-301 through Reg-24-350.

301.02 Apportionable Income. The entire federal taxable income of a corporation, a unitary group, or a partnership is presumed to be apportionable income. The apportionable income includes income arising from transactions and activity of the business, and income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property was related to the operation of the business entity's trade or business.

301.03 Nonapportionable Income. Nonapportionable income is any income the taxpayer has shown is not subject to apportionment. Income that is claimed to be nonapportionable must be supported by:

301.03A A detailed description of the source and nature of the income; and

301.03B An affidavit attached to the return and signed by a corporate officer attesting-

301.03B(1) That the income is not a part of the unitary business; and

301.03B(2) That the taxpayer has not claimed the same income as part of the unitary business and subject to apportionment in any other state with substantially the same law on apportionability of income.

301.04 Any nonapportionable income is subtracted from federal taxable income prior to apportioning the income to Nebraska. The amount subtracted must be reduced, but not below zero, by a portion of the interest expense and any expense incurred in the production of the nonapportionable income.

301.04A The interest expense for the reduction is determined by dividing the taxpayer's average investment in the activities producing the nonapportionable income by the taxpayer's average total assets and multiplying the result by the total interest deduction allowed in computing federal taxable income.

301.04A(1) For the purposes of this subsection, investment in activities producing the income means the tax basis of the assets,

both tangible and intangible, that are used in the activities or that are the basis of receiving the income.

301.04A(2) Whenever it is necessary to properly reflect the ratio of the average investment in activities producing the nonapportionable income to the average total assets, the Tax Commissioner may permit or require computing the averages using amounts from interim balance sheets.

301.04A(3) In lieu of the tax basis, the taxpayer may use amounts from an income statement included with the federal return or required to be reported to federal or state regulatory agencies if:

301.04A(3)(a) The amounts are not materially different from the tax basis;

301.04A(3)(b) The amounts are prepared consistently from year to year; and

301.04A(3)(c) Absent a change in circumstances, the amounts are consistently used by the corporation from year to year.

301.04A(4) The Tax Commissioner may require a taxpayer to use the alternative amounts in order to maintain consistency.

301.04B The amount subtracted under this section cannot include any amounts deducted from federal taxable income under any other section of the Nebraska Revenue Act. For example: interest, rents, royalties, and license fees taxed by a foreign country in excess of the maximum federal corporate rates cannot be deducted as nonapportionable income if the same amounts are included in the calculation of the special foreign tax credit deduction.

301.05 A business entity or unitary group engaged in business in Nebraska which is not subject to tax in any other state cannot apportion its income, and must report its entire taxable income to Nebraska.

(Neb. Rev. Stat. §§ 77-2716, 77-2734.05, and 77-2734.06, Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, (1980), ASARCO, Inc. v. Idaho State Tax Commission, 458 U.S. 307 (1982), and Allied Signal, Inc. v. Director, Division of Taxation, 504 U.S. 768 (1992). December 27, 2015)

## **REG-24-305 APPORTIONMENT FORMULA**

305.01 Corporations or Partnerships; Apportionment Formula. The federal taxable income, as adjusted under Reg-24-155, Nebraska Adjustments to Taxable Income, of a corporation or partnership operating both within and outside Nebraska is apportioned to Nebraska by using the sales factor of the corporation or partnership. The income of the taxpayer apportioned to Nebraska is determined by calculating the ratio of the taxpayer's sales in Nebraska compared to the total sales of the taxpayer and applying the computed ratio to the federal taxable income, as adjusted, of the taxpayer.

305.02 Unitary Group. The federal taxable income, as adjusted under Reg-24-155, Nebraska Adjustments to Taxable Income, of a unitary group operating both within and outside Nebraska is apportioned to Nebraska by using the sales factor of the unitary business.

305.03 Unitary Group; Apportionment Formula. When part of a unitary business is conducted in Nebraska by one or more members of the unitary group, the income of the taxpayer apportioned to Nebraska is determined by calculating the ratio of the unitary group's sales in Nebraska compared to the total sales of the entire unitary group and applying the computed ratio to the federal taxable income, as adjusted, of the unitary group.

305.03A In computing the factor, only those business entities that are subject to the IRC are included in the calculation and in the taxpayer's filing.

305.03B Sales of only those business entities with nexus in Nebraska are included in the numerator of the computed apportionment factor.

305.04 Unitary Group; Combined Return. Each unitary group must file only one income tax return for the group for each tax year, even if more than one member of the unitary group is taxable in Nebraska.

305.05 Unitary Group; S Corp Included in Apportionment. If a unitary group includes an S Corp, the apportionment formula in Reg-24-305.03 will be calculated for the entire unitary group and applied to the federal taxable income of the corporate taxpayer and separately to the federal taxable income of the S Corp which is taxable to its owners.

305.06 Unitary Group; Business Entities Excluded. Inactive business entities may not be included in the unitary group. Any business entity that is required or has received permission to use a special apportionment formula under Reg-24-381, Special Apportionment, cannot be included in the unitary group. If more than one affiliated or related company of a unitary group is properly using the same special apportionment formula, these business entities must use the combined income approach and must file a single return.

(Neb. Rev. Stat. §§ 77-2734.01, 77-2734.05, 77-2734.14, 77-2734.15, and 77-2734.16. December 27, 2015.)

## **REG-24-311 SALES FACTOR; IN GENERAL**

311.01 Determining Sales. Sales means gross receipts, less returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges related to sales. Federal and state excise taxes (including sales taxes) must be included as part of gross receipts if the taxes are passed on to the buyer or included as part of the selling price of the product. The following are rules for determining sales for business entities.

311.01A Exclusions from sales. The sales factor does not include:

311.01A(1) Any sales made in producing income that is nonapportionable;

311.01A(2) Income from discharging indebtedness;

311.01A(3) Amounts received from hedging transactions involving intangible assets; or

311.01A(4) Net gains from marketable securities held for investment.

311.01B Sales applicable to particular businesses.

311.01B(1) For a taxpayer that manufactures or purchases goods or products for sale, sales means all gross receipts from the sales of goods or products (or other property of a kind which would properly be included in the inventory if on hand at the close of the tax period) held for sale to buyers.

311.01B(2) For a cost plus fixed fee contract (for example, operating a government-owned plant for a fee) sales means the entire reimbursed cost, plus the fee.

311.01B(3) For providing services for buyers, or performing equipment service contracts or research and development contracts, sales means the gross receipts from providing these services including fees, commissions, and similar charges.

311.01B(4) For renting real or tangible property, sales means the gross receipts from renting, leasing, or licensing the use of the property.

311.01B(5) Sales means receipts from the sales of equipment used in the business.

311.01B(6) For licensing or assigning intangible property (for example, copyrights or patents) sales means the gross receipts from the licensing or assignment.

311.01B(7) For sales of intangible property, sales means the net gain from the sales of all intangible property. Any net loss on sales of all intangible property is not included in the factor.

311.02 Changes in the Items in the Factor. If the taxpayer departs from or modifies the basis for excluding or including gross receipts in the sales factor used in returns for prior years, the return for the current year must disclose the nature and extent of the modification.

311.03 Inconsistent Reporting of Items in the Factor. If the returns or reports filed with all states with laws similar to Nebraska in which the taxpayer reports are not uniform in including or excluding items from the sales factor, the Nebraska return must disclose the nature and extent of the variance.

311.04 Denominator. The denominator of the sales factor includes the total sales of the taxpayer. If the sales factor is to be calculated for a unitary group, the denominator of the sales factor includes the total sales of all members of the unitary group.

311.05 Numerator. The numerator of the sales factor includes sales of the taxpayer that are attributable to Nebraska. All interest income, service charges, carrying charges, or time-price differential charges are included regardless of the place where the accounting records are maintained or the location of the contract or other evidence of indebtedness.

(Neb. Rev. Stat. §§ 77-2734.04 and 77-2734.14. December 27, 2015.)

#### **REG-24-315 SALES FACTOR; BUSINESS ENTITIES AS OWNERS IN A PARTNERSHIP OR JOINT VENTURE**

315.01 A business entity which is required to apportion income and has income from a partnership or joint venture (partnership), will calculate its Nebraska sales factor under this regulation. The entire federal taxable income of a corporate taxpayer is subject to apportionment in this state. Nebraska apportionable income includes any income or loss received due to a business entity's interest in a partnership. If neither the corporation nor the partnership is subject to tax in another state, the entire federal taxable income of the business entity is subject to Nebraska tax and will not be apportioned.

315.02 When a business entity is an owner in a partnership, the business entity's apportionment factor must be calculated based on whether or not the business entity and partnership are considered unitary. A unitary determination must be made for each business entity.

315.02A When a partnership has sufficient contacts with a business entity to be considered unitary if it were a corporation, the partnership will be considered unitary with the business entity regardless of the ownership share of the business entity.

315.02A(1) When a business entity and a partnership are considered unitary, the sales factor of the business entity must include the business entity's share of the partnership's sales determined by multiplying the partnership's sales factor numerator and denominator by the business entity's ownership percentage.

315.02A(2) Intercompany sales will be eliminated using calculations made in the following order:

315.02A(2)(a) Intercompany sales will be eliminated based on the percentage of the business entity's ownership of the partnership; except that sales from the partnership to the business entity or members of the unitary group will be eliminated only to the extent of the business entity's or unitary group's share of total sales of the partnership (See Reg-24-315.02A(4)); and

315.02A(2)(b) If all of the sales from the partnership to the business entity or unitary group are not eliminated based on Reg-24-315.02A(2)(a), the remaining sales in each state will be the same percentage of the sales in the state before any eliminations. (See Reg-24-315.02A(6)) 315.02A(2)(c) Any partnership agreements that identify particular activities to a specific owner will not be considered when determining the income of each owner subject to tax in Nebraska.

315.02A(3) Example 1- Facts. X is a multistate corporation domiciled outside Nebraska and is an owner of AX, a multistate partnership. X has a 40 percent ownership interest in AX. X and AX would be considered unitary if both were corporations. Corporation X has total sales of \$10,000,000, \$2,000,000 of which were made to Partnership AX, and Nebraska sales of \$5,000,000, \$400,000 of which were made to Partnership AX. Partnership AX has sales of \$3,000,000, \$700,000 of which were to Corporation X, and total Nebraska sales of \$40,000.

315.02A(4) Example 1 - Denominator Calculation. The sales factor denominator to be used in the combined report of income with the corporate return is calculated as follows-

| <b>Sales Factor Denominator</b>              |                                                    |
|----------------------------------------------|----------------------------------------------------|
| Sales of Corporation X                       | \$10,000,000                                       |
| Sales of Partnership AX                      | \$1,200,000<br>(\$3,000,000 sales X 40% ownership) |
| <b>Total sales</b>                           | \$11,200,000                                       |
| <b>Minus intercompany sales eliminations</b> |                                                    |
| Corporation X sales to AX                    | (\$800,000)<br>(\$2,000,000 sales X 40% ownership) |
| Partnership AX sales to X                    | (\$700,000)<br>(Actual sales, not limited)         |
| <b>Denominator</b>                           | <b>\$9,700,000</b>                                 |

315.02A(5) Example 1 - Numerator calculation. The sales factor numerator to be used in the combined report of income with the corporate return is calculated as follows-

| <b>Sales Factor Numerator</b>                |                                                           |
|----------------------------------------------|-----------------------------------------------------------|
| Nebraska sales of Corporation X              | \$5,000,000                                               |
| Partnership AX                               | \$6,500<br>(see computation in 315.02A(6) below)          |
| <b>Minus intercompany sales eliminations</b> |                                                           |
| Corporation X sales to AX                    | (\$160,000)<br>(\$400,000 Nebraska sales X 40% ownership) |
| Partnership AX sales to X                    | 0<br>(after eliminations)                                 |
| <b>Numerator</b>                             | <b>\$4,846,500</b>                                        |

315.02A(6) Example 1 - Numerator Calculation when Partnership's Sales Are Not Totally Eliminated. Since Corporation X's share of Partnership AX's total sales were not totally eliminated in the denominator, the Nebraska sales by Partnership AX are determined by multiplying Partnership AX's remaining sales by its percentage of Nebraska sales (before any eliminations) as shown below-

| <b>Numerator Calculation when Partnership's Sales Are Not Totally Eliminated</b> |                                                    |
|----------------------------------------------------------------------------------|----------------------------------------------------|
| Corporation X's share of Partnership AX's total sales                            | \$1,200,000<br>(\$3,000,000 sales X 40% ownership) |
| Partnership AX sales to Corporation X eliminated in the denominator              | \$700,000                                          |
| Partnership AX sales not eliminated                                              | \$500,000<br>(\$1,200,000 - \$700,000)             |

|                                          |                                                  |
|------------------------------------------|--------------------------------------------------|
| Partnership AX % of Nebraska sales       | 1.30%<br>(\$40,000 Nebraska sales / \$3,000,000) |
| Partnership AX Nebraska sales eliminated | \$6,500 (\$500,000 X 1.30%)                      |

315.02B When a partnership does not have sufficient contacts with a business entity to be considered unitary, the business entity's sales factor must include its share of income from the partnership. The net income distributed from the partnership to the business entity will be included in the denominator and the Nebraska source net income distributed from the partnership to the business entity will be included in the numerator.

315.02B(1) Example 2 – Non-Unitary Facts. Y is a multistate corporation domiciled outside Nebraska and is an owner in AY, a multistate partnership. Corporation Y has a 40 percent ownership interest in Partnership AY. Y and AY are not considered unitary. Corporation Y has sales of \$10,000,000, \$5,000,000 of which were made in Nebraska. Partnership AY has federal taxable income of \$400,000 and Nebraska taxable income of \$8,000-

|                | Sales Factor Denominator             | Sales Factor Numerator             |
|----------------|--------------------------------------|------------------------------------|
| Corporation Y  | \$10,000,000                         | \$5,000,000                        |
|                | \$160,000                            | \$3,200                            |
| Partnership AY | (\$400,000 X 40% ownership interest) | (\$8,000 X 40% ownership interest) |
| <b>Totals</b>  | <b>\$10,160,000</b>                  | <b>\$5,003,200</b>                 |

315.02B(2) The business entity's sales factor does not include sales made by the partnership. Therefore, the business entity's sales factor is not adjusted to eliminate sales made between the business entity and the partnership.

(Neb. Rev. Stat. §§ 77-2729, 77-2734.14, 77-2734.15, and 77-2734.16. December 27, 2015.)

### **REG-24-323 SALES FACTOR; SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA**

323.01 For tax years beginning or deemed to begin on or after January 1, 1997, gross receipts from sales of tangible personal property (TPP) (except as otherwise provided) are considered in Nebraska if the TPP is delivered or shipped to a purchaser in Nebraska regardless of the f.o.b. point, location where title transfers, or other conditions of sale. TPP is delivered or shipped to a purchaser in Nebraska when:

323.01A The recipient is located in Nebraska, even if the property is ordered from outside Nebraska;

323.01B The shipment terminates in Nebraska, even if the property is subsequently transported to another state;

323.01C The purchaser directs the taxpayer in Nebraska to deliver the TPP to the ultimate recipient in Nebraska;

323.01D The purchaser picks up the TPP at the seller's location within Nebraska unless the taxpayer can show that the destination is a location outside Nebraska;

323.01E A purchaser located in Nebraska picks up the TPP at the seller's location outside Nebraska, unless the taxpayer can show that the destination is a location outside Nebraska; or

323.01F The TPP being shipped by a seller from the state of origin to another state is diverted while enroute to a purchaser in Nebraska.

323.02 All mailing lists and prospect lists are considered TPP, even if the mailing or prospect list is delivered to the purchaser in an electronic format. Sales of mailing lists and prospect lists are considered in Nebraska under any of the circumstances in Reg-24-323.01.

323.03 Whether particular sales are attributable to Nebraska is determined on a transaction by transaction basis, not customer by customer, or contract by contract.

(Neb. Rev. Stat. § 77-2734.14; and ABI v. Egr, 264 Neb. 574 (2002). December 27, 2015.)

#### **REG-24-326 SALES FACTOR; SALES OF TANGIBLE PERSONAL PROPERTY TO THE U.S. GOVERNMENT IN NEBRASKA**

326.01 Gross receipts from sales of tangible personal property (TPP) to the U.S. Government are considered in Nebraska if the TPP is shipped from an office, store, warehouse, factory, or other place of storage in Nebraska, regardless of the final destination of the TPP. For the purposes of this regulation, only sales for which the U.S. Government makes direct payment to the seller pursuant to the terms of a contract constitute sales to the U.S. Government. Sales by a supplier or subcontractor to the prime contractor when the prime contractor is the party that contracted with the U.S. Government, are not sales to the U.S. Government.

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

#### **REG-24-329 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; TAX YEARS BEGINNING BEFORE JANUARY 1, 2014**

329.01 In General. For tax years beginning before January 1, 2014, the numerator of the sales factor includes gross receipts from transactions other than the sales of tangible personal property (including transactions with the U.S. Government) if the income-producing activity which gave rise to the receipts is performed within Nebraska. Gross receipts are attributed to this state if, with respect to a particular income-producing activity, the income-producing activity is performed wholly within Nebraska or is performed both within and outside Nebraska but the greater proportion of the income-producing activity is performed in Nebraska, based on costs of performance.

329.02 Income-producing Activity. Income-producing activity means the transactions and activities directly performed for the ultimate purpose of obtaining gains or profit. This determination applies to each separate item of income. Income-producing activity does not include transactions and activities performed on behalf of a taxpayer (for example, those conducted on its behalf by an independent contractor). Income-producing activity includes but is not limited to the following:

329.02A Rendering personal services by employees or utilizing tangible and intangible property by the taxpayer in performing a service;

329.02B Selling, renting, leasing, licensing or other use of real property;

329.02C Renting, leasing, licensing or other use of tangible personal property; and

329.02D Selling, licensing, or other use of intangible personal property. Holding intangible personal property is not, by itself, an income-producing activity.

329.03 Costs of Performance. Costs of performance mean direct costs attributable to the income-producing activity. The costs of performance are determined in a manner consistent with generally accepted accounting principles and accepted conditions or practices in the trade or business of the taxpayer.

329.04 Special Rules. The following are special rules for determining when receipts from the income-producing activities described below are in Nebraska:

329.04A Gross receipts from selling, renting, leasing, or licensing real property are in Nebraska if the real property is located in this state.

329.04B Gross receipts from renting, leasing, or licensing tangible personal property are in Nebraska if the tangible personal property is located in Nebraska. If tangible personal property is used both within and outside Nebraska during the rental, lease, or licensing period, the gross receipts attributable to Nebraska are the total gross receipts multiplied by the ratio that the time the property was physically present or used in Nebraska bears to the total time or use of the property everywhere during the period.

329.04C Gross receipts for performing services are attributable to Nebraska to the extent the services are performed in Nebraska.

329.04C(1) Where services are performed both within and outside Nebraska, and the services performed in each state are separate income-producing activities, the gross receipts for performing these services that are attributable to Nebraska are the total gross receipts multiplied by the ratio which the time spent performing the services in Nebraska bears to the total time spent in performing the services everywhere. Time spent performing services includes the amount of time expended in performing a contract or other obligation which gives rise to the gross receipts.

329.04C(2) Where services relating to a single item of income are performed within and outside Nebraska, the gross receipts for performing these services are attributable to Nebraska if a greater portion of the services were performed in this state, based on costs of performance, than in any other state.

329.04C(3) Services not directly connected with performing the income-producing activity, for example, time expended negotiating the applicable contract, are excluded from the determination.

329.04D For the sale, assignment, or licensing of intangible personal property, for example, patents and copyrights, sales means the net gain from these sales, assignments, or licensing.

(Neb. Rev. Stat. §§ 77-2734.13 and 77-2734.14. December 27, 2015.)

**REG-24-331 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; TAX YEARS BEGINNING ON OR AFTER JANUARY 1, 2014**

331.01 In General. For tax years beginning January 1, 2014, sales other than the sales of tangible personal property are included in the numerator of the sales factor as provided in Reg-24-333 to Reg-24-340. Whether particular sales are attributable to Nebraska is determined on a transaction-by-transaction basis, not customer-by-customer, or contract-by-contract. See, for example Reg-24-333.01D(4).

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

**REG-24-333 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; SERVICES**

333.01 Services. Sales of services are attributable to Nebraska if the service, when rendered:

333.01A Relates to real property located in Nebraska;

333.01B Relates to tangible personal property located in Nebraska at the time the service is received, even if the buyer is located in another state;

333.01C Is provided to an individual physically present in Nebraska at the time the service is received; or

333.01D Is provided to a buyer engaged in a trade or business in Nebraska and the service relates to a part of the trade or business that is operated in Nebraska. It is presumed that a service provided to a buyer operating in Nebraska relates to a part of the trade or business that is operated in Nebraska.

333.01D(1) If the service relates to a part of the trade or business that is operated both within and outside Nebraska, the sales are sourced to Nebraska in proportion to the use of the service in Nebraska and the use of the service everywhere for the tax period calculated using any reasonable method.

333.01D(2) For purposes of Reg-24-333.01D(1), operating or engaged in a trade or business in Nebraska means having property, payroll, or customers in Nebraska.

333.01D(3) Services which relate to a product of the buyer are considered used by the buyer at a location without considering where the customers of the buyer are located. Services that relate to the buyer as a trade or business are considered used by the buyer at multiple locations where the buyer operates its trade or business.

333.01D(4) For example:

333.01D(4)(a) If the service is a payroll service and the buyer only has employees in Nebraska, the receipts from providing that service are entirely attributable to Nebraska. However, if the buyer has employees in multiple states, the receipts from providing the service to the buyer could be attributed to Nebraska in proportion to the number of employees in Nebraska.

333.01D(4)(b) If the service contributes to finishing a product that the buyer produces only in Nebraska, the receipts from providing the service are entirely attributable to Nebraska even if the product is sold outside Nebraska.

333.01D(4)(c) If the service is advertising services that will be broadcast in many states, the sales could be attributed to Nebraska in proportion to the market in Nebraska relative to the market in all states.

333.02 Application Services. Sales of application services are attributable to Nebraska if the buyer uses the application service in Nebraska. The application service is used in Nebraska if the buyer:

333.02A Is an individual, and his or her billing address is in Nebraska; or

333.02B Is a business entity, and uses the application service in a trade or business in Nebraska.

333.02B(1) If the buyer uses the application service within and outside Nebraska, these sales are attributed to Nebraska in proportion to the use of the application service in Nebraska and the use everywhere for the tax period, calculated using any reasonable method.

333.02B(2) If the location of use of the application cannot be determined, the sale of an application service is in the state from which the order was placed in the regular course of the buyer's business.

333.02B(3) If that location cannot be determined, the sales are attributable to the buyer's billing address.

333.03 Communications Company. The sales of a communications company other than sales of tangible personal property are attributable to Nebraska if:

333.03A The income-producing activity is performed in Nebraska; or

333.03B The income-producing activity is performed both within and outside Nebraska and a greater proportion of the activity is performed in Nebraska than in any other state, based on costs of performance.

333.04 Reasonable Method. To be a reasonable method of calculation, the method must be applied in a consistent manner to determine what amount of the service or application is received or used in Nebraska.

333.04A The method must be supported by the service or application provider's business records at the time the service is received.

333.04B The method used must be described by the taxpayer.

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

**REG-24-335 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; INTANGIBLE PROPERTY**

335.01 Sales of Intangible Property. Sales of intangible property are attributable to Nebraska if the buyer uses the intangible property at a location in Nebraska, even if the buyer's customers are located in another state.

335.01A If the buyer uses the intangible property within and outside Nebraska, the sales are attributable to Nebraska in proportion to the use of the intangible property in Nebraska and the use everywhere during

the tax period.

335.01A(1) Marketing Intangible. If the intangible is used by the buyer in marketing its products, the use of the intangible in Nebraska is the share of the receipts that reflects the sales of the buyer within and outside Nebraska. If this cannot be determined, the use of the intangible in Nebraska is the share of the receipts that reflects the population of Nebraska relative to the population everywhere the buyer markets the product using the intangible. Examples of a marketing intangible include licensing of a service mark, trademark, or trade name.

335.01A(2) Production Intangible. If the intangible is used by the buyer to produce its products, the use of the intangible in Nebraska is the share of the production which occurs in Nebraska using the intangible relative to the production of the product using the intangible everywhere. Examples of a production intangible include licensing of patents or copyrights.

335.01A(3) Service Intangible. If the intangible is used by the buyer like a good or service, or used by the business itself, the sales are attributable to Nebraska using the rules for sales of services in Reg-24-333. Examples of a service intangible include licensing use of a legal research service.

335.01A(4) Mixed Intangible. If the intangible is used by the buyer in more than one of the ways listed in Reg-24-335.01A(1), (2), or (3), and the fees charged for each type of use are separately stated in the license, the separate uses are attributable to Nebraska separately. If the intangible is used by the buyer in more than one of the ways listed in Reg-24-335.01A(1), (2), or (3), and the fees charged for each type of use are not separately stated in the license, the sales are attributable to Nebraska based on which use is most predominant.

335.01B If the location of use cannot be determined, the sale of intangible property is attributable to Nebraska if the buyer's billing address is in Nebraska.

### 335.02 Income from Intangible Assets Used in a Treasury Function.

335.02A Income from intangible assets held in connection with a treasury function is attributable to Nebraska:

335.02A(1) To the extent that intangible asset income is included in taxable income; and

335.02A(2) To the extent the investment, management, and record-keeping activities associated with corporate investments occur in Nebraska.

335.02B This section does not include net gains from the sale or redemption of marketable securities or hedging transactions.

335.03 Income from Loans Secured by Real or Tangible Personal Property.

Loans secured by real property or tangible personal property are attributable to Nebraska if the property securing the loan is located in Nebraska. This income includes gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including loans under a participation agreement.

335.03A If the real property or tangible personal property securing a loan is located within and outside Nebraska, the sale is attributable to Nebraska in proportion to the annual average amortized loan balance of the loan secured by the real property or tangible personal property located in Nebraska compared to the annual average amortized loan balance of the loan.

335.03A(1) If a loan is secured by property that is located both inside and outside Nebraska, the average amortized loan balance is attributable to Nebraska based on the ratio of the value of the property securing the loan that is in Nebraska compared to the total value of all property securing the loan.

335.03A(2) If a loan is secured by mobile property that is in Nebraska only part of the time, the average amortized loan balance is attributable to Nebraska in proportion to the time the property was physically present or was used in Nebraska compared to the total time or use of the property everywhere during the tax period.

335.04 Loans Not Secured by Real or Tangible Personal Property. A loan not secured by real property or tangible personal property is attributable to Nebraska if the borrower is in Nebraska based upon the borrower's billing address. This income includes gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees from loans owned by the taxpayer or another person, including loans under a participation agreement.

335.05 Credit Cards. For credit cards; the gross interest, fees, points, charges, and penalties from credit card receivables and gross receipts from annual fees and other fees charged to credit card holders are attributable to Nebraska if the billing address of the credit card holder is in Nebraska.

335.06 Credit Card Receivables. Net gains from the sale of credit card receivables are attributed to Nebraska if the billing address of the credit card holder is in Nebraska. The net gains cannot be less than zero.

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

**REG-24-337 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; LEASING TANGIBLE PERSONAL**

## **PROPERTY IN NEBRASKA; SELLING OR LEASING REAL PROPERTY IN NEBRASKA**

337.01 Lease, Rental, or Licensing of Tangible Personal Property. Gross receipts from the lease, rental, or licensing of tangible personal property are attributed to Nebraska to the extent the tangible personal property is located in Nebraska.

337.01A Tangible personal property is located in Nebraska to the extent the tangible personal property is physically present or used in Nebraska.

337.01B If the property is located within and outside Nebraska, the gross receipts are attributed to Nebraska in proportion to the percentage of time the property was located in Nebraska.

337.02 Sale, Lease, Rental, or Licensing of Real Property. Gross receipts from the sale, lease, rental, or licensing of real property are attributed to Nebraska if the real property is located in Nebraska.

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

## **REG-24-338 SALES FACTOR; SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN NEBRASKA; SALE NOT SPECIFICALLY ADDRESSED**

338.01 Sale Not Specifically Addressed. For sales other than sales of tangible personal property which are not specifically addressed in these regulations, the sales must be attributed to Nebraska so that they fairly represent the extent of the taxpayer's business activity in Nebraska.

338.01A If the buyer is an individual, the sale is deemed to have occurred at the buyer's billing address.

338.01B If the buyer is not an individual and the order is placed in the regular course of the buyer's business, the sale is deemed to have occurred in the state from which the order was placed. If the state from which the order was placed cannot be determined, the sale is deemed to have occurred at the buyer's billing address.

(Neb. Rev. Stat. § 77-2734.14. December 27, 2015.)

## **REG-24-341 SPECIAL APPORTIONMENT RULES; ALL TAX YEARS; AIRLINES**

341.01 Scope. This regulation governs the apportionment of taxable income of an airline that has income from sources both within and outside Nebraska.

341.02 Definitions. The following definitions are applicable to the terms used in the apportionment factor descriptions.

341.02A Aircraft ready for flight are aircraft owned or acquired through rental or lease (but not interchange) which are in the possession of the taxpayer and are available for service on the taxpayer routes.

341.02B Cost of aircraft by type is the average original cost or value of aircraft by type which are ready for flight.

341.02C Departures are all takeoffs, whether they are regularly-scheduled or charter flights, that occur during revenue service.

341.02D Original cost is the initial federal tax basis of the property plus the value of capital improvements to the property, except that, for this purpose, it is assumed that safe harbor leases are not true leases and do not affect the original initial federal tax basis of the property.

341.02E Net annual rental rate is the annual rental rate paid by the taxpayer.

341.02F Revenue service is using aircraft ready for flight for producing revenue.

341.02G Transportation revenue is flight revenue earned by transporting passengers, freight, and mail as well as revenue earned in connection with providing transportation, including, but not limited to, food, beverage, and media sales made on the plane; pet crate rentals, baggage fees, etc.

341.02H Value of rented real and tangible personal property is the product of eight times the net annual rental rate.

341.03 Sales Factor: Numerator. The numerator is the revenue other than transportation revenue as calculated in Reg-24-341.03A plus the result of the calculation of the transportation revenue in Reg-24-341.03B.

341.03A Revenue Other than Transportation Revenue. The gross receipts of the taxpayer, other than transportation revenue, are included in the sales factor numerator in accordance with Reg-24-301 through Reg-24-340.

341.03B Transportation Revenue. The gross receipts of the transportation revenue that is included in the numerator is the total revenue of the taxpayer in Nebraska during the income year. To compute the total transportation revenue of the taxpayer in Nebraska during the income year:

341.03B(1) Calculate the ratio of departures of aircraft in this state weighted as to the cost and value of aircraft by type, compared to total departures also weighted as to the cost and value of the aircraft by type; and

341.03B(2) Multiply this ratio by the total transportation revenue.

341.04 Sales Factor; Denominator. The denominator is revenue derived from all transactions and activities in the regular course of the trade or business of the taxpayer, including both the revenue that is other than transportation revenue and the transportation revenue.

341.05 Income Excluded from the Factors. Investment income items such as interest, rental income, dividends, or proceeds or net gains or losses from the sale of aircraft will not be included in either the numerator or the denominator.

341.06 Unitary Group. An airline must be included in a unitary group with business entities which are not airlines.

341.07 Records. The taxpayer must maintain the records necessary to determine departures by type of aircraft as described in these regulations. These records are subject to review by the Department.

(Neb. Rev. Stat. §§ 77-2734.14, 77-2734.15, and 77-2734.16. December 27, 2015.)

#### **REG-24-342 SPECIAL APPORTIONMENT RULES; ALL TAX YEARS; PIPELINE COMPANIES**

342.01 In General. The regulation governs the apportionment of the income of a pipeline company that has income from sources both within and outside Nebraska.

342.02 Definitions. The following definitions are applicable to the terms used in the apportionment factor descriptions.

342.02A Pipeline company is any business entity engaged in the business of moving, conveying, or transporting any oil, gas, refined petroleum products, or any other substance through a pipeline for a consideration.

342.02B Revenue mile is transporting one barrel of oil, refined petroleum product, or other liquid; one thousand cubic feet of gas, or any other standard measure of a product, the distance of one mile for a consideration.

342.02C Transportation revenue is the gross receipts or sales derived from moving, conveying, or transporting oil, gas, refined petroleum products, or any other substance through a pipeline for a consideration.

342.03 Sales Factor.

342.03A Numerator. The gross receipts of the taxpayer, other than transportation revenue, are included in the sales factor numerator in accordance with Reg-24-301 through Reg-24-340. Transportation revenue must be included in the sales factor numerator on the basis of the ratio of the revenue miles in this state to the total revenue miles.

342.03B Denominator. The denominator is all sales everywhere, calculated in accordance with Reg-24-301 through Reg-24-340.

342.04 Unitary Group. A pipeline company must be included in a unitary group with business entities which are not pipeline companies.

342.05 Records. The taxpayer must maintain the records necessary to identify total revenue miles and revenue miles by state. These records are subject to review by the Department.

(Neb. Rev. Stat. § 77-2734.15. December 27, 2015.)

**REG-24-343 SPECIAL APPORTIONMENT RULES; ALL TAX YEARS; TRUCKING COMPANIES**

343.01 In general. This regulation governs the apportionment of income of a trucking company that has income from sources both within and outside Nebraska.

343.02 Definitions. The following definitions are applicable to the terms used in the apportionment factor descriptions.

343.02A Mobile property means all motor vehicles, including trailers, engaged directly in the movement of tangible personal property.

343.02B Mobile property mile means moving a unit of mobile property a distance of one mile, whether loaded or unloaded.

343.02C Transportation revenue means revenue derived from hauling freight, mail, and express delivery.

343.02D Trucking company means a motor common carrier, a motor contract carrier, or an express carrier which primarily transports tangible personal property of others by motor vehicle for compensation.

343.03 Sales Factor.

343.03A Numerator:

343.03A(1) The gross receipts of the taxpayer, other than transportation revenue, are included in the sales factor numerator in accordance with Reg-24-301 through Reg-24-340;

343.03A(2) The transportation revenue from any movements or shipments which are entirely within Nebraska are included in the sales factor numerator; and

343.03A(3) The transportation revenue from movements or shipments passing through, into, or out of this state must be included in the sales factor numerator on the basis of the ratio that the mobile property miles traveled in Nebraska bears to the total mobile property miles traveled everywhere.

343.03B Denominator. The denominator of the sales factor is all sales everywhere, calculated in accordance with Reg-24-301 through Reg-24-340.

343.04 Unitary Group. A trucking company must be included in a unitary group with companies which are not trucking companies.

343.05 Records. The taxpayer must maintain the records necessary to identify mobile property and the mobile property miles traveled by such mobile property in each state. These records are subject to review by the Department.

(Neb. Rev. Stat. § 77-2734.15. December 27, 2015.)

**REG-24-347 SPECIAL APPORTIONMENT RULES; ALL TAX YEARS;  
INSURANCE COMPANIES**

347.01 Unitary Group. An insurance company, including a captive insurance company, cannot be included in a unitary group when the other members of the unitary group are not insurance companies. A unitary group of insurance companies cannot include a corporation that is not an insurance company.

347.02 In General. Reg-24-347.04 governs the apportionment of income of an insurance company that has income from insuring property or risks both within and outside Nebraska.

347.03 Definitions. The following definitions apply to the terms used in the apportionment factor descriptions in this regulation.

347.03A Direct premiums are all premiums received for insurance other than reinsurance premiums.

347.03B Insurance company is a company engaged in the business of insurance as defined in Neb. Rev. Stat. § 44-102.

347.03C Premiums are the consideration paid to insurance companies for insurance and includes policy fees, assessments, dues, or other similar payments, except premiums on all annuity contracts and pension, profit-sharing, individually sponsored retirement plans, and other pension plan contracts which are described in IRC § 818(a).

347.03D Quota-share reinsurance is reinsurance of a certain percentage of all or certain parts of the business being reinsured.

347.03E Reinsurance premiums means premiums which are paid by an insurer to a third party to insure it against loss or liability by reason of the original insurance.

347.03F Schedule T is part of the annual statement prescribed by the National Association of Insurance Commissioners, which is required to be filed annually with the various state insurance departments.

347.04 Sales Factor. The numerator of the sales factor of an insurance company or a unitary group of insurance companies is direct premiums received on property or risks in Nebraska. The denominator is direct premiums received on property or risks everywhere.

347.04A Reinsurance premiums are included in the numerator and denominator only when more than one-third of the premiums received by an insurance company or a unitary group of insurance companies consist of premiums received for reinsurance accepted. If more than one-third of the premiums received by an insurance company or a unitary group of insurance companies consist of premiums received for reinsurance accepted, all premiums for reinsurance are included in the denominator.

347.04A(1) Premiums received for reinsurance accepted will be included in the numerator if it can be established or reasonably assumed that the underlying risks are in Nebraska.

347.04A(2) In the case of reinsurance accepted for which the location of the underlying risk can neither be established nor reasonably assumed, premiums received will be included in the numerator if Nebraska is the state of commercial domicile of the ceding company, except:

347.04A(2)(a) If more than half of the ceding company's premiums written are direct premiums, reinsurance premiums received with respect to quota-share will be sourced in proportion to the ceding company's Annual Statement -- Schedule T allocation of its direct premiums written.

347.04B All transactions between corporate members of the same unitary group are eliminated prior to making the determinations outlined in this regulation.

(Neb. Rev. Stat. § 77-2734.15. December 27, 2015.)

#### **REG-24-361 PROPERTY FACTOR; SCOPE**

361.01 The property factor is described in Reg-24-361 through Reg-24-367. The property factor must be used to apportion the income of a multistate business for tax years beginning before January 1, 1992. The property factor may be used in a special apportionment formula, to calculate the Financial Institutions Deposit Tax, or to calculate the Nebraska Advantage Research and Development Tax Credit.

(Neb. Rev. Stat. §§ 77-2734.12, 77-3805, and 77-5803. December 27, 2015.)

#### **REG-24-362 PROPERTY FACTOR; IN GENERAL**

362.01 Property That Is Used; Included. The property factor of the apportionment formula includes all real and tangible personal property

owned or rented and used during the tax period. Real and tangible personal property includes land, buildings, machinery, stocks of goods, equipment, and other real and tangible personal property, but does not include coins or currency.

362.01A Property is included in the property factor if it is actually used, is available for use, or capable of being used during the tax period.

362.01B Property held as reserves, standby facilities, or property held as a reserve source of materials must be included in the factor. For example, a temporarily idle plant or raw material reserves not currently being processed are included in the factor.

362.01C Property used remains in the property factor until its permanent withdrawal is established by an identifiable event or the lapse of an extended period of time (normally, five years) during which the property is held for sale.

362.01D Leasehold improvements are property owned by the taxpayer regardless of whether the taxpayer is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. The original cost of leasehold improvements must be included in the factor.

362.02 Property That Is Not Used; Excluded. Property used in connection with producing income that is not subject to apportionment is excluded from the property factor.

362.03 Property Under Construction. Property or equipment under construction during the tax period, except goods in process that will become inventory, are excluded from the factor until the property is actually used. If the property is used while under construction, the value of the property must be included in the property factor to the extent used.

(Neb. Rev. Stat. §§ 77-2734.12, 77-2734.15, 77-2734.16, and 77-5803. December 27, 2015.)

## **REG-24-363 PROPERTY FACTOR; NUMERATOR AND DENOMINATOR**

363.01 Numerator. The numerator of the property factor includes the average value of the real and tangible personal property owned or rented by the taxpayer and used in this state during the tax period.

363.01A Property in transit between locations of the taxpayer is considered to be at its destination for purposes of the property factor.

363.01B 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 must be included in the numerator if the destination is Nebraska.

363.01C The value of mobile property which is located within and outside Nebraska during the tax period must be included in the numerator of the factor in proportion to the total time within the state compared to its total time in all states during the tax period.

363.01D Mobile property assigned to a traveling employee must be included in the numerator if the employee's compensation is assigned to Nebraska under the payroll factor or if the mobile property is a motor vehicle that is licensed in Nebraska.

363.02 Denominator. The denominator of the property factor is the average value of all real and tangible personal property owned or rented by the taxpayer.

363.03 Average Value. The property factor is the average value of the property for the tax year.

363.03A The average value of property owned by the taxpayer is calculated by averaging the values at the beginning and ending of the tax period. However, the Tax Commissioner may require or allow averaging the monthly values if necessary to properly reflect the average value of the property for the tax period.

363.03B Averaging by monthly values may be applied if substantial fluctuations in the values of the property exist during the tax period, or if property is acquired after the beginning of the tax period or disposed of before the end of the tax period.

(Neb. Rev. Stat. § 77- 2734.12. December 27, 2015.)

#### **REG-24-364 PROPERTY FACTOR; VALUATION OF OWNED PROPERTY**

364.01 Property that is owned must be valued at its original cost. Original cost is the basis of the property for federal income tax purposes (prior to any federal adjustments) at the time of acquisition and as adjusted by subsequent capital additions or improvements and partial dispositions, by reason of sale, exchange, abandonment, etc.

364.02 If the original cost of property cannot be determined, the property is included in the factor at its fair market value at the date of acquisition by the taxpayer.

364.03 Inventory must be included in the factor consistent with the valuation method used for federal income tax purposes.

364.04 Property acquired by gift or inheritance must be included in the factor at its basis for determining depreciation for federal income tax purposes.

(Neb. Rev. Stat. § 77-2734.12. December 27, 2015.)

## **REG-24-365 PROPERTY FACTOR; VALUATION OF LEASED OR RENTED PROPERTY**

365.01 Leased or Rented Property. Property that is leased or rented by the taxpayer during the tax year is valued at eight times its annual lease or rental payment. The annual lease or rental payment for any items of rented property is the total amount paid to lease or rent the property for the year. Subleases or subrents are not deducted when the amounts received are apportionable income.

365.01A If a taxpayer has leased or rented property for a term of 12 or more months and the current tax period is less than 12 months (due, for example, to a reorganization or change of accounting period), the amount payable for the short tax period must be annualized. The payment is not annualized if the lease or rental term expires during the tax period.

365.01B If property is leased or rented for less than a 12-month period, or the term remaining during the tax year is less than 12 months, the amount paid for the period is substituted for the annual lease or rental payment for the tax period. The payment is not annualized if the lease or rental term expires during the tax period.

365.02 Day to Day Rentals; Excluded. Leased or rented property does not include incidental day-to-day rentals, for example, hotel or motel accommodations, or daily rental of automobiles.

365.03 Annual Lease or Rental Payment. The annual lease or rental payment is the total amount of money or other consideration payable, directly or indirectly, for the use of the property and includes:

365.03A Any amount payable for using some or all of any real or tangible personal property, whether designated as a fixed sum of money or as a percentage of sales, profits, or another measure; and

365.03B Any amount payable as additional rent or in lieu of rent (for example, interest, taxes, insurance, repairs, or any other items which are required to be paid by the terms of the lease or other arrangement). These additional amounts do not include amounts payable as service charges (for example, utilities or janitor services). If a payment includes rent and service charges but the service charges are not separately stated, the annual lease or rental payment is the fair market value of the lease or rent excluding the other charges.

(Neb. Rev. Stat. § 77-2734.12. December 27, 2015.)

## **REG-24-367 PROPERTY FACTOR; CONSISTENCY IN REPORTING**

367.01 In filing returns with Nebraska, if the taxpayer departs from or modifies the manner of valuing property, or of including or excluding property in the property factor, as compared to returns for prior years, the

taxpayer must disclose the nature and extent of the modification in the return for the current year.

367.02 If the returns or reports filed by the taxpayer with all states to which the taxpayer reports are not uniform in the valuation of property and in the inclusion or exclusion of property in the property factor, the taxpayer must disclose the nature and extent of the variance in the Nebraska return.

(Neb. Rev. Stat. §§ 77-2734.06 and 77-2774. December 27, 2015.)

### **REG-24-371 PAYROLL FACTOR; SCOPE**

371.01 The payroll factor is described in Reg-24-371 through Reg-24-374. The payroll factor must be used to apportion the income of a multistate business for tax years beginning before January 1, 1992. The payroll factor may be used in a special apportionment formula, to calculate the Financial Institutions Deposit Tax, and to calculate the Nebraska Advantage Research and Development Tax Credit.

(Neb. Rev. Stat. §§ 77-2734.13, 77-3805, and 77-5803. December 27, 2015.)

### **REG-24-372 PAYROLL FACTOR; IN GENERAL**

372.01 Total Compensation Paid to Employees. The payroll factor of the apportionment formula includes the total compensation paid to employees in the regular course of the trade or business during the tax period.

372.01A The total compensation paid to employees is determined by the accounting method used. If the taxpayer uses the accrual method of accounting, all compensation properly accrued is deemed to have been paid during the tax period. If the taxpayer is required to report compensation under the cash method for unemployment compensation purposes, the taxpayer may use this method to calculate the payroll factor regardless of the taxpayer's method of accounting.

372.01B Compensation paid to employees includes wages, salaries, commissions, and any other form of payment given to employees for services, as well as the value of the board, rent, housing, lodging, or other benefits or services furnished to employees by the taxpayer in return for personal services if the value received constitutes income to the recipient under the IRC.

372.01C In the case of employees not subject to the IRC (for example, those employed in foreign countries) the determination of whether benefits or services would constitute income to the employees will be made as though the employees were subject to the IRC.

#### **372.02 Employees.**

372.02A Employees include any officer of a corporation, or any individual who, under the common-law rules applicable when determining the employer-employee relationship, has the status of an

employee.

272.02B Generally, a person will be considered an employee if he or she is included by the taxpayer as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act. Individuals included within the term "employees" in the Federal Insurance Contributions Act who would not be employees under the usual common-law rules, are not employees for purposes of this regulation.

372.03 Excluded from the Payroll Factor. The payroll factor does not include:

372.03A Compensation paid in producing income that is not subject to apportionment; or

372.03B Payments made to an independent contractor or any other person not properly considered an employee.

(Neb. Rev. Stat. § 77-2734.13. December 27, 2015.)

### **REG-24-373 PAYROLL FACTOR; NUMERATOR AND DENOMINATOR**

373.01 Numerator. The numerator of the payroll factor is the total compensation paid to employees in Nebraska during the tax period.

373.01A If compensation paid to employees is included in the payroll factor using the cash method of accounting, or if the taxpayer is required to report compensation under the cash method of accounting for unemployment compensation purposes, it is presumed that the total wages reported to Nebraska for unemployment compensation purposes is also compensation paid in Nebraska, except as provided in Reg-24-373.01B below.

373.01B The presumption may be overcome by satisfactory evidence that an employee's compensation is not properly reportable to Nebraska for unemployment compensation purposes.

373.02 Compensation Paid in Nebraska. Compensation is paid to employees in Nebraska when, applied consecutively, any of the following tests are met:

373.02A The employee's service is performed entirely within Nebraska;

373.02B The employee's service is performed both within and outside Nebraska, but the service performed outside Nebraska is incidental to the employee's service within Nebraska. Any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction, is incidental;

373.02C If the employee's services are performed both within and outside Nebraska, the employee's compensation will be considered compensation paid to employees in Nebraska if-

373.02C(1) The employee's base of operations is in Nebraska;

373.02C(2) There is no base of operations in any state in which some part of the service is performed, but the place where the service is directed or controlled is in Nebraska; or

373.02C(3) The base of operations or the place from which the service is directed or controlled is not in any state where some part of the service is performed but the employee's residence is in Nebraska.

373.02D The base of operations is the location from which the employee customarily starts working and to which the employee customarily returns in order to receive instructions from the employer, receive communications from his or her customers or other persons, replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his or her trade or profession.

373.02E The place from which the service is directed or controlled is the location from which the power to direct or control the service is exercised by the employer.

373.03 Denominator. The denominator of the payroll factor is the total compensation paid to employees everywhere during the tax period. Compensation paid to employees whose services are performed entirely in a state where the taxpayer is immune, for example, under 15 U.S.C. §§ 381-385, are included in the denominator of the payroll factor.

(Neb. Rev. Stat. § 77-3734.13. December 27, 2015.)

#### **REG-24-375 PAYROLL FACTOR; CONSISTENCY IN REPORTING**

375.01 When filing a Nebraska return, if the taxpayer departs from or modifies the treatment of compensation from that used in returns for prior years, the taxpayer must disclose in the return for the current year the nature and extent of the departure or modification in the return for the current year.

375.02 If the returns or reports filed with all states to which the taxpayer reports are not uniform in the treatment of compensation paid to employees, the Nebraska return must disclose the nature and extent of the variance in the Nebraska return.

(Neb. Rev. Stat. §§ 77-2734.06 and 77-2774. December 27, 2015.)

#### **REG-24-381 SPECIAL APPORTIONMENT**

381.01 If the apportionment provisions contained in Reg-24-301 through 24-380 do not fairly represent the taxable income that is reasonably attributable to Nebraska, the taxpayer may petition the Tax Commissioner for a special apportionment formula.

381.01A The petition must be filed before filing any returns that propose to use the special apportionment formula.

381.01B Content. The petition must:

381.01B(1) Identify the taxpayer;

381.01B(2) State the pertinent facts;

381.01B(3) Show that the standard apportionment formula does not fairly represent the taxable income attributable to Nebraska;

381.01B(4) State the reasons why a special apportionment formula does fairly represent the taxable income attributable to Nebraska;

381.01B(5) Describe clearly the proposed special apportionment formula;

381.01B(6) Include a request for hearing, if one is desired; and

381.01B(7) Include any other information that the taxpayer believes supports the petition.

381.01C A special apportionment formula may be:

381.01C(1) The inclusion of one or more additional factors which will fairly represent the taxpayer's taxable income in this state;

381.01C(2) The exclusion of any one or more factors;

381.01C(3) Separate accounting; or

381.01C(4) The employment of any other method to effectuate an equitable apportionment of the taxpayer's income.

381.01D The Tax Commissioner may approve the petition if he or she finds that the taxpayer's factual situation is unique and nonrecurring, and the apportionment formula in Reg-24-301 through Reg-24-380 otherwise produces incongruous results.

381.01E The Tax Commissioner may place conditions on approving a petition for a special apportionment formula, including, but not limited to:

381.01E(1) A change in the proposed special apportionment formula;

381.01E(2) A delay or retroactive application of the special apportionment formula; or

381.01E(3) An expiration of the special apportionment formula.

381.01F The Tax Commissioner must mail notice of the decision to the taxpayer by first class mail. If the Tax Commissioner does not mail the notice of final action on the petition within 30 days of filing the petition, the taxpayer may consider the petition denied.

381.02 The Tax Commissioner may determine that a taxpayer's factual situation is unique and nonrecurring, and the apportionment formula in Reg-24-301 through Reg-24-380 otherwise produces incongruous results.

381.02A If the Tax Commissioner makes this determination, he or she may require a taxpayer to use a special apportionment formula as described in Reg-24-381.01C, for any tax year.

381.02B The Tax Commissioner must mail notice of this determination and requirement to the taxpayer by first class mail.

381.03 If a business entity is engaged in a multistate business and the income derived from within Nebraska is separate and distinct from the income derived in other states, the taxpayer may petition the Tax Commissioner for permission to separately account taxable income to Nebraska rather than apportioning the taxable income to Nebraska. The petition must meet the requirements of Reg-24-381.01B.

381.03A Books and records must be kept by recognized accounting standards to accurately reflect the amount of income of the multistate business which was derived in Nebraska during the tax period.

381.03B Business operations must be separate and distinct and there cannot be interstate, intercompany, or interdivisional purchases, sales, or transfers during the period.

381.03C The Tax Commissioner must mail notice of the decision on the petition to the taxpayer by first class mail. If the Tax Commissioner does not mail the notice of final action on the petition within 30 days of filing the petition, the taxpayer may consider the petition denied.

381.04 Request for Hearing. A petition for special apportionment or a request for separate accounting is not presumed to be a request for a hearing. The Tax Commissioner will grant a request for a hearing on the issue if requested in writing prior to the Tax Commissioner taking action on the petition or request.

381.05 The denial of a petition for special apportionment or a request for separate accounting and a determination by the Tax Commissioner to require a special apportionment formula are considered final actions of the Tax Commissioner and may be appealed to the Lancaster County District Court as provided in the Administrative Procedure Act. Petitions for review must be filed within 30 days after the notice of determination is mailed by the Tax Commissioner.

