

# The Apportionment Provisions of the Michigan Business Tax Act (MBTA)

## APPORTIONMENT

The MBTA will apportion the business income tax and modified gross receipts tax based on the sales factor.<sup>1</sup> No longer will the payroll and property factors be utilized. The sales factor is a fraction where the numerator is total sales in Michigan and the denominator is total sales everywhere.<sup>2</sup>

Sales for a unitary business group include sales in Michigan of every person included in the unitary business group without regard to whether the person has nexus in Michigan. Sales between persons in a unitary business group must be eliminated in calculating the sales factor.<sup>3</sup>

Sales of tangible personal property are in Michigan if the property is shipped or delivered, or, in the case of electricity and gas, the contract requires the property to be shipped or delivered, to any purchaser within Michigan based on the ultimate destination at the point that the property comes to rest regardless of the free on board point or other conditions of the sale.<sup>4</sup>

Receipts from the sale, lease, rental, or licensing of real property are in Michigan if the property is located in Michigan.<sup>5</sup>

Receipts from the lease or rental of tangible personal property are in Michigan to the extent that the property is utilized in Michigan.<sup>6</sup>

Receipts from the lease or rental of mobile transportation property owned by the taxpayer are in Michigan to the extent that the property is utilized in Michigan.<sup>7</sup>

Royalties and other income received for the use of or for the privilege of using intangible property, including patents, know-how, formulas, designs, processes, patterns, copyrights, trade names, service names, franchises, licenses, contracts, customer lists, computer software, or similar items, are attributable to the state in which the property is used by the purchaser.<sup>8</sup>

## Sales from the Performance of Services

Under the Single Business Tax Act<sup>9</sup>, for the purposes of calculating the sales apportionment factor, the sales of services and intangible property (i.e. sales other than sales of tangible personal property) were "sourced" to Michigan if a greater proportion of business activity, based on the cost of performance, occurs within Michigan than outside of Michigan.<sup>10</sup>

The MBTA, instead, uses a "market-based" method of sourcing sales to Michigan, in which sales are sourced based on the location of the purchaser or where the good or service is used.

All receipts from the performance of services are included in the numerator of the apportionment factor if the recipient of the services receives all of the benefit of the services in Michigan.

If the recipient of the services receives some of the benefit in Michigan, the receipts are included in the numerator of the apportionment factor in proportion to the extent that the recipient receives benefit of the services in Michigan.<sup>11</sup>

Special sourcing rules for sales of services are provided for the following:<sup>12</sup>

- Sales derived from security brokerage services
- Sales of services derived from a regulated investment company
- Receipts from the origination of a loan or from the sale of a loan secured by residential real estate
- Interest from loans secured by real property
- Interest from a loan not secured by real property
- Gains from the sale of a loan not secured by real property
- Receipts from credit card receivables, including interest, fees, and penalties from the credit card receivables
- Receipts from the sale of credit card or other receivables
- Loan servicing fees derived from loans of another secured by real property
- Receipts from the sale of securities and other assets from investment and trading activity
- Receipts from transportation services
- Receipts from the sale of telecommunication services or mobile telecommunication services
- Receipts from the sale of telecommunication services sold on an individual call-by-call basis
- Receipts from the sale of postpaid telecommunication services
- Receipts from the sale of prepaid telecommunication services
- Receipts from the sale of private communication services
- Receipts from the sale of billing services and ancillary services for telecommunications service
- Receipts to access a carrier's network or for the sale of telecommunication services for resale

If the apportionment provisions do not fairly represent the extent of the taxpayer's business activity in Michigan, the taxpayer may petition for or the treasurer may require the following, with respect to all or a portion of the taxpayer's business activity, if reasonable:

- Separate accounting.
- The inclusion of 1 or more additional or alternative factors that will fairly represent the taxpayer's business activity in Michigan.
- The use of any other method to effectuate an equitable allocation and apportionment of the taxpayer's tax base.<sup>13</sup>

An alternate method of apportionment may be used only if it is approved by the Department of Treasury.<sup>14</sup>

The MBTA states the apportionment provisions shall fairly represent the business activity attributed to the taxpayer in Michigan, taken as a whole and without a separate examination of the specific elements of the tax base unless it can be demonstrated that the business activity attributed to the taxpayer in Michigan is out of all appropriate proportion to the actual business transacted in Michigan and leads to a grossly distorted result. The Michigan Business Tax is an indivisible tax and not a combination or series of several smaller taxes and relief from apportionment shall be given only in extraordinary circumstances.<sup>15</sup>

The MBTA retains a provision in the SBT (MCL 208.54) permitting spun-off corporations (Delphi and Visteon) to exclude from Michigan and total sales, for the purposes of calculating the sales factor, sales to the firm's immediately preceding former parent corporation.<sup>16</sup>

<sup>1</sup> 2007 P.A. 36 §301(2) MCL 208.1301(2)

<sup>2</sup> 2007 P.A. 36 §303(1) MCL 208.1303(1)

<sup>3</sup> 2007 P.A. 36 §303(2) MCL 208.1303(2) By requiring members of a unitary group who may not have nexus with Michigan to include Michigan sales in the numerator of the sales factor is another change for Michigan. This is the "Finnigan" approach which has been shunned by other states.

<sup>4</sup> 2007 P.A. 36 §305(1)(a) MCL 208.1305(1)(a)

<sup>5</sup> 2007 P.A. 36 §305(1)(b) MCL 208.1305(1)(b)

<sup>6</sup> 2007 P.A. 36 §305(1)(c) MCL 208.1305(1)(c)

<sup>7</sup> 2007 P.A. 36 §305(1)(d) MCL 208.1305(1)(d)

<sup>8</sup> 2007 P.A. 36 §305(1)(e) MCL 208.1305(1)(e)

<sup>9</sup> 1975 P.A. 228

<sup>10</sup> MCL 208.53

<sup>11</sup> 2007 P.A. 36 §305(2)(a) MCL 208.1305(2)(a)

<sup>12</sup> 2007 P.A. 36 §305(2)(b) through §305(21) MCL 208.1305(2)(b) through MCL 208.1305(21)

<sup>13</sup> 2007 P.A. 36 §309(1) MCL 208.1309(1)

<sup>14</sup> 2007 P.A. 36 §309(2) MCL 208.1309(2)

<sup>15</sup> 2007 P.A. 36 §309(3) MCL 208.1309(3)

<sup>16</sup> 2007 P.A. 36 §307 MCL 208.1307

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