



MOTION PICTURE ASSOCIATION AMERICA

MPA

AMERICA

February 25, 2021

Via Oral Testimony and Electronic Mail - policy.office@state.nm.us

Ms. Stephanie Schardin Clarke
Cabinet Secretary
New Mexico Department of Taxation and Revenue
Post Office Box 630
Santa Fe, New Mexico 87504-0630

RE: MPA Comments on proposed rules to reflect the 2019 legislative session changes in House Bill 6 to the Corporate Income Tax Act and the Uniform Division of Income for Tax Purposes Act.

Dear Ms. Schardin Clarke:

Thank you very much for the opportunity to appear before you on behalf of the Motion Picture Association (MPA), - my name is Angela Miele and I am the Vice President of State Government Affairs and State Tax Policy, our Members include: Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Universal City Studios LLC, Walt Disney Studios Motion Pictures, Warner Bros. Entertainment Inc., and Netflix. As you are aware, the MPA members are the leading producers and distributors of filmed entertainment content across all platforms, including theatrical motion pictures, broadcast, cable and satellite television, and streaming via the Internet. The MPA member companies also own and operate all of the national broadcast networks, most of the national cable program networks and many local television stations around the United States.

I am here to urge the Department to favorably consider adding an important amendment to the proposed rules governing sales other than sales of tangible personal property to clarify the law's application to broadcasters. There is no guidance provided in these proposed rule changes and no proposed amendment to the current apportionment regime for broadcasters N.M. Code Rule § 3.5.19.18. It is important to note, New Mexico adopted this apportionment formula over two decades ago in **1999** when New Mexico's statute was based on a "Cost of Performance regime," and the legislature's intent with the enactment of market sourcing was to transition the state to a more contemporary apportionment formula.

We respectfully submit the state must change this obsolete "audience apportionment" as it is not "market sourcing" for broadcasters because the "audience" is not "the broadcasters' market." Content delivery in 1999 as you know was very different than it is today.

The Broadcasters' markets are the entities with whom they have direct privity of contract (advertisers and licensees) with whom they do business. It is important to clarify the broadcasters' "market" for tax compliance now that the state has adopted "Market Sourcing." It is vital to ensure there is clear direction of the application of the statute for the broadcast industry.

What is Commercial Domicile and why is it vital to adopt this apportionment regime?

The MPA's proposed amendment will attribute revenues to the State if the commercial domicile of the broadcaster's customer (i.e., where its corporate headquarters are maintained) is in the state. Under this method, a broadcaster's advertising and programming receipts would be sourced based on the commercial domicile of its direct advertising or programming customers.

- This methodology is based on the notion that a broadcaster's market for generating revenue is the location of its direct customers and that the customer's commercial domicile typically is where its ultimate decisions are made.
- It represents a modern apportionment method because it may be applied to all program distribution technologies.
- It has been adopted in 11 states and is therefore consistent with the trend in modern state tax policy.
- It would provide fairness, clarity and certainty and predictability for both the State of New Mexico Department of Taxation and the broadcast industry.
- The MPA's proposed amendments carefully limit the applicability of this apportionment formula to the broadcast industry and do not in any way change the current sourcing methodologies utilized by other industries.
- Finally, and importantly, the MPA's proposed apportionment formula brings additional revenue to New Mexico.

For these reasons we respectfully urge the Department's favorable consideration of these proposed changes and look forward to our continued partnership. Please do not hesitate to contact me if you have any questions.

Thank you for time today and the opportunity to present our concerns.

Sincerely,



Copy: Mark Chaiken

Attachment

Vice President, State Government Affairs & State Tax Policy

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(Sales Factor - Sales Other Than Sales of Tangible Personal Property in This State:) 3.5.18.9 NMAC Section 7-4-18 NMSA 1978

(Sales Factor - Sales Other Than Sales of Tangible Personal Property in This State – Applicable to Tax Years Beginning on or After January 1, 2020)

3.5.18.8 SALES FACTOR - SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE – APPLICABLE TO TAXABLE YEARS BEGINNING PRIOR TO JANUARY 1, 2020:

A. In general. Section 7-4-18 NMSA 1978 provides for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States government). Under Section 7-4-18 NMSA 1978 gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, gross receipts are attributed to this state if, with respect to a particular item of income, the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance.

B. Income producing activity: defined:

(1) The term “income producing activity” applies to each separate item of income and means the transactions and activity directly engaged in by the taxpayer in the regular course of its obtaining gains or profit. Such activity does not include transactions and activities performed on behalf of a taxpayer such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:

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

(b) the sale, rental, leasing, licensing or other use of real property;

(c) the rental, leasing, licensing or other use of tangible personal property; or

(d) the sale, licensing or other use of intangible personal property.

(2) The mere holding of intangible personal property is not, of itself, an income producing activity.

C. Costs of performance: defined. The term “costs of performance” means direct cost determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer.

D. Application:

(1) In general. Receipts (other than from sales of tangible personal property) in respect to a particular income producing activity are in this state if:

(a) the income producing activity is performed wholly within this state; or

(b) the income producing activity is performed both in and outside this state and a greater proportion of the income producing activity is performed in this state than in any other state, based on costs of performance.

(2) Special rules: The following are special rules for determining when receipts from the income producing activities described below are in this state:

(a) Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.

(b) Gross receipts from the rental, lease or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental lease or licensing period, gross receipts attributable to this state shall be measured by the ratio which the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during such period.

(c) Gross receipts for the performance of personal services are attributable to this state to the extent such services are performed in this state. If services relating to a single item of income are performed partly within and partly without this state, the gross receipts for the performance of such services shall be attributable to this state only if a greater portion of the services were performed in this state, based on costs of performance. Usually where services are performed partly within and partly without this state the services performed in each state will constitute a separate income producing activity; in such case the gross receipts for the performance of services attributable to this state shall be measured by the ratio which the time spent in performing such services in this state bears to the total time spent in performing everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example, time expended in negotiating the contract, is excluded from the computations.

E. This section applies to taxable years beginning before January 1, 2020.

[1/15/74, 9/15/88, 9/20/93, 1/15/1997; 3.5.18.8 NMAC - Rn & A, 3 NMAC 5.18.8, 6/29/2001; A, xx/xx/xxxx]

3.5.18.9 SALES FACTOR - SALES OTHER THAN SALES OF TANGIBLE PERSONAL PROPERTY IN THIS STATE - APPLICABLE TO TAXABLE YEARS BEGINNING ON OR AFTER JANUARY 1, 2020:

A. Sales Factor: Sales Other Than Sales of Tangible Personal Property in this State: General Rules.

(1) Definitions. For the purposes of this section (3.5.18.9 NMAC) these terms have the following meanings:

(a) “Billing address” means 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.

(b) “Broadcast customer” means a person, corporation, partnership, limited liability company, or other entity, such as an advertiser or a platform distribution company, that has a direct connection or contractual relationship with the broadcaster under which revenue is derived by a broadcaster.

(c) “Broadcaster” means a taxpayer that is a television broadcast network, a cable program network, or a television distribution company.

~~(b)~~ **(d) “Business customer” means a customer that is a business or organization operating in any form and generally includes customers other than individual customers.**

(e) “Commercial domicile” means the principal place from which the trade or business of a business entity is directed or managed.

(b) **(f) “Customer” means the person with which the taxpayer has a contract for the transaction, regardless of who pays for or may benefit from the transaction.**

(g) “Film programming” means one or more performances, events, or productions (or segments of performances, events, or productions) intended to be distributed for visual and auditory perception, including but not limited to news, entertainment, sporting events, plays, stories, or other literary, commercial, educational, or artistic works.

(c) **(h) “IRC” means the Internal Revenue Code as currently written and subsequently amended.**

(d) (i) “Individual customer” means a customer that is a natural person **or who is not a business customer.**

(j) “Intangible property” means property that is not physical or whose

representation by physical means is merely incidental.

(e) **(k)** “Place of order” means the physical location from which a customer places an order resulting in a contract with the taxpayer.

(l) “Platform distribution company” means a cable service provider, a direct broadcast satellite system or an Internet content distributor or a unitary group with the majority of receipts derived from platform distribution activities.

(m) “Population” means the most recent population data maintained by the U.S. Census Bureau for the year in question as of the close of the taxable period.

(f) **(n)** “Related party” means any person who may exercise control of the taxpayer, or is generally controlled by the taxpayer, directly or indirectly, whether through ownership or agreement.

(g) **(o)** “Sale,” in the context of Section 7-4-18 NMSA 1978 means a transaction described in that section, including a lease or license and depending on the context also means the receipts from that transaction.

(h) **(p)** “Source” means, in general, attributing a sale to a state using the rules under Section 7-4-18 NMSA, 1978 and this regulation.

(i) **(q)** “State or location where a contract of sale is principally managed by the customer,” means the primary location from which a customer’s employee or agent interacts with the taxpayer and oversees the taxpayer’s activities under the contract.

(j) **(r)** “Use” means use for the intended purpose of the intangible property.

(2) Hierarchical Rules. Where a hierarchical rule applies under this regulation, a taxpayer must make a reasonable effort to apply each rule, in order, before defaulting to any subsequent rule.

(3) Rules of Reasonable Approximation as Provided for in Subsection B of Section 7-4-18 NMSA 1978. This regulation includes various rules of reasonable approximation for determining when a sale should be included in the New Mexico sales factor numerator. These rules apply when the proper inclusion of sales in sales factor numerator cannot be determined. The method of reasonable approximation should make use of reliable information and be applied consistently.

(4) Exclusion of Sales from the Sales Factor. As provided in Subsection C of Section 7-4-18 NMSA 1978, sales should be excluded from the sales factor if:

(a) Using the same rules applicable under Subsection A of Section 7-4-19 NMSA 1978 or a method of reasonable approximation under Subsection B of Section 7-4-18 NMSA 1978 used by the taxpayer to determine if sales are included in the New Mexico sales factor numerator, the sales would be sourced to a state in which the taxpayer is not taxable, as defined under Section 7-4-4 NMSA 1978 and applicable regulations; or

(b) The taxpayer is unable to determine where sales are sourced under Section 7-4-18(A) NMSA 1978 or a proper method of reasonable approximation under Subsection B of Section 7-4-18 NMSA 1978.

(5) Related-Party Transactions – Information Imputed from Customer to Taxpayer. Where a taxpayer has receipts subject to this section (3.5.18.9 NMAC) from transactions with a related-party customer, any information necessary to apply the rules under Subsection A Section 7-4-18 NMSA 1978. will be imputed to the taxpayer and the taxpayer may not use a rule of reasonable approximation to determine if those sales should be included in the New Mexico sales factor numerator or should be excluded from the sales factor under Subsection C Section 7-4-18 NMSA 1978.

(6) No Limitation on Section 7-4-19 NMSA 1978. Nothing in this regulation limits the authority granted to the department under Section 7-4-19 NMSA 1978. Regulations adopted pursuant to Section 7-4-

19 NMSA 1978 control to the extent they conflict with provisions of this regulation.

B. Sale, Rental, Lease or License of Real Property. In the case of a sale, rental, lease or license of real property, the receipts from the sale are in New Mexico if and to the extent that the property is in New Mexico.

C. Rental, Lease or License of Tangible Personal Property. In the case of a rental, lease or license of tangible personal property, the receipts are from the sale of tangible personal property in New Mexico if and to the extent that the tangible personal property is located in New Mexico. If property is mobile property that is located both within and without New Mexico during the period of the lease or other contract, the receipts are assigned to New Mexico in the same percentage as the time the property is used in the state.

D. Sale of a Service. General Rule – Determining the Category of a Service. The receipts are from a sale of a service in New Mexico if and to the extent that the product of the service or the service is delivered to a location in New Mexico. These rules in this subsection define three general categories of services and set out rules for when a service in that category is delivered in New Mexico. A service may fall into more than one category. If a service could be characterized as both an in-person service and a professional service, it will be deemed an in-person service. The third category of service—other services—excludes services that can be categorized and assigned based on the rules for in-person or professional services.

(1) In-Person Services. An in-person service is a service that is physically performed by the taxpayer, whether through employees, agents, or by third parties on behalf of the taxpayer, while in the same location as the customer or on the customer's real or tangible personal property. Examples include: health care services; in-person training or entertainment; child care services; repair, installation, cleaning or maintenance services; and construction and similar services.

(a) Determining the New Mexico Sales Factor Numerator. Sales of in-person services are included in the New Mexico sales factor numerator if those services are performed on a customer or the customer's property in the state.

(b) Reasonable Approximation. If the taxpayer has insufficient information to determine where its in-person services are performed, the taxpayer shall reasonably approximate where those sales are sourced using general information on customers' locations or other similar information.

(2) Professional Services. In General. Professional services are services performed for customers by the taxpayer's employees or agents, or by third parties on behalf of the taxpayer, which require the application of specialized knowledge or skill to the customer's particular facts and circumstances, but exclude in-person services. Examples include: management, consulting and similar services; financial and investment services not subject to 3.5.19.17 NMAC; technology and data processing services; legal services; and architectural, engineering and design services.

(a) Determining the New Mexico Sales Factor Numerator. The following hierarchy of rules apply:

(i) Architectural and Engineering Services with respect to Real or Tangible Personal Property. If the service is an architectural or engineering service, it is included in the New Mexico sales factor numerator if the service relates to real estate improvements or tangible personal property located, or expected to be located, in the state.

(ii) Related Party Transactions. If the customer is a related party, then the taxpayer's sale of the services to that customer are included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations.

(iii) Large Individual or Business Customers: If the sale is to an individual or business customer to which the taxpayer sells five percent or more of its total professional services in a single year, then the sale is included in the New Mexico sales factor numerator: (1) if the customer is an individual customer whose residence is New Mexico, or (2) if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico.

(iv) Other Individual Customers: If the taxpayer has information to accurately determine where an individual customer takes delivery of the sale of the professional service, then that

sale is included in the New Mexico sales factor numerator if the customer took delivery of the service in New Mexico. Otherwise, the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(v) Other Business Customers: If the taxpayer has information to accurately determine the location from which the contract for professional services is principally managed by a business customer, then the sale is included in the New Mexico sales factor numerator if that location is in New Mexico. Otherwise, the sale is included in the sales factor numerator if the customer's billing address is in New Mexico.

(b) Reasonable Approximation: If, in applying the rules under (iv) and (v) above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Section 7-4-18(C) NMSA 1978.

(3) Other Services. Services other than in-person or professional services are sourced under this Paragraph 3 of Subsection D of 3.5.18.9 NMAC. The rules in this paragraph may distinguish services based on whether they are delivered physically or electronically, whether they are delivered to a customer or to a third party (including the customer's customer), and whether the customer is an individual or business customer. If a rule depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer.

(a) Services Delivered by Physical Means to a Customer or a Third Party. Services delivered by physical means to a customer or third party exclude in-person and professional services, but generally include delivery services, themselves, and services that produce a physical product which is then delivered by the taxpayer. In addition to delivery services, examples include: items designed and printed by the taxpayer to the order of the customer that are delivered to the customer's customers by mail; and customized software services where the software is physically installed on the customer's computer.

(i) Determining the New Mexico Sales Factor Numerator. The sale of services delivered by physical means to a customer or third party are delivered are included in the New Mexico sales factor numerator if the delivery takes place in New Mexico.

(ii) Rule of Reasonable Approximation. If the taxpayer cannot determine where services are actually delivered, the taxpayer may use a method of reasonable approximation determine sales that will be included in the New Mexico sales factor, and for purposes of 7-4-18(C) NMSA 1978, including the use of population or other information.

(b) Services Delivered Electronically to a Customer. Services delivered electronically include services that are transmitted by any electronic medium whether or not the service provider owns, leases or otherwise controls medium.

(i) Determining the New Mexico Sales Factor Numerator. In the case of the sale of a service delivered electronically, the following hierarchy of rules apply:

(I.) If the sale is to a related party, the sale is included in the New Mexico sales factor numerator to the extent of that customer's New Mexico apportionment factor as properly determined under Section 7-4-1, et seq. NMSA 1978 and applicable regulations;

(II.) If the sale is to an individual or business customer to which the taxpayer sells five percent or more of its total other services in a single year, the sale is included in the New Mexico sales factor numerator: (1) if the customer is an individual customer whose residence is New Mexico, or (2) if the customer is a business customer and the place where the contract for professional services is primarily managed by the customer is in New Mexico; and

(III.) If the sale is to a customer other than a customer described in I or II, the sale is included in the New Mexico sales factor numerator if the customer's primary billing address is in the state.

(ii) Reasonable Approximation: If, in applying the rule under III above, the taxpayer lacks information to determine the customer's primary billing address (for example, if someone other than the customer is paying for the service) the taxpayer may use a method of reasonable approximation to determine whether the sales for which the information is lacking are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

(c) Services Delivered Electronically On Behalf of a Customer to a Third Party. A service delivered electronically "on behalf of" a customer is one in which a customer contracts for the service to be delivered electronically directly by the taxpayer or through one or more intermediaries, provided the service does not change its form, to one or more third parties who are the customer's intended recipients of the service. Examples include: delivery of electronic advertising to a customer's intended audience and subcontracted services performed electronically for the customer's customers.

(i) Determining the New Mexico Sales Factor Numerator. The sale of a service delivered electronically to third-party recipients on behalf of the customer is delivered in New Mexico if and to the extent that the third-party recipients are in New Mexico.

(ii) Rule of Reasonable Approximation. If the taxpayer cannot determine the state or states where the sales of a service delivered electronically are actually delivered to the customer's intended third-party recipients, the taxpayer may use a method of reasonable approximation to determine whether the sales are included in the New Mexico sales factor numerator and to determine the sourcing of those sales for purposes of Subsection C of Section 7-4-18 NMSA 1978.

E. Sale, Lease, or License of Intangible Property. General Rule. Sourcing of receipts from the sale, lease or license of intangible property depends primarily on the nature of the intangible property and the method by which receipts are determined, rather than on whether the transaction is a true sale, lease or license.

(1) Contract Right or Government License that Authorizes Activity in Specific Geographic Area. In the case of a sale, lease or license of a contract right, government license or similar intangible property that authorizes the holder to conduct a activity in a specific geographic area, the receipts from the sale are included in the New Mexico sales factor numerator to the extent that the intangible property is used or is authorized to be used within the state.

(2) Marketing Intangible. The receipts from granting a right to use intangible property in connection with the sale, lease, license, or other marketing of goods or services to a consumer are included in the New Mexico sales factor numerator to the extent of the sale or provision of those goods or services is located or occurs in New Mexico. Examples of marketing intangibles include trademarks, service marks and trade names.

(3) Production Intangible. The receipts from granting a right to use intangible property, other than a marketing intangible, used in manufacturing (a "production intangible") are included in the New Mexico sales factor numerator to the extent that the use for which the fees are paid takes place in New Mexico.

(4) Mixed Intangible. The receipts from a sale, lease or license transaction that involves a mixture of a marketing and production intangible may be included in the New Mexico sales factor as provided in Subsection E of Paragraphs 2 or 3 of 3.5.18.9 NMAC on the basis of the taxpayer's separate statement of these rights, and the related receipts, to the customer as part of the contract with the customer. Otherwise, the receipts will be treated as receipts from a marketing intangible.

(5) Intangible Property that Resembles a Sale of Goods or Services, Including Digital Goods and Services. If receipts from the sale, lease or license of intangible property resembles the sale of a goods or services such that other rules under Section 7-4-17-18 NMSA 1978, or these or other regulations of the department can accurately and appropriately be used to source those receipts, including rules of reasonable approximation, the receipts are included in the New Mexico sales factor numerator as provided in those rules.

(6) Sublicenses. If the receipts from the sale, lease or license of intangible property is to a customer that the taxpayer is aware will grant a sublicense to others, regardless of the form that sublicense may take, and if the taxpayer's own receipts are determined based on its customer's sublicensing of the intangible property, then the taxpayer shall use the rules under this regulation, including rules of reasonable approximation, that would apply to the sourcing of its customer's receipts to determine the sales to be included in the New Mexico sales factor

numerator. It is not necessary for the application of this paragraph for the taxpayer to use the same method actually used by its customer to source the sublicensing receipts.

(7) Software Transactions - Generally. Receipts from the sale, lease or license of software, whether “canned” or custom, is treated as the sale, lease or license of tangible personal property, rather than intangible property or the performance of a service, except that, to the extent necessary, the taxpayer may use a method of reasonable approximation under these rules if the taxpayer lacks information to determine where the software is delivered.

(8) Broadcast Advertising Services. Notwithstanding anything herein to the contrary, N.M. Code R. § 3.5.19.18, receipts from a broadcaster’s sale of advertising services to a broadcast customer are assigned to New Mexico if the commercial domicile of the broadcast customer is in New Mexico. For purposes of this provision, “advertising services” means an agreement to include the broadcast customer's advertising content in the broadcaster’s film programming.

License of a Broadcasting Intangible. Where a broadcaster grants a license to a broadcast customer for the right to use film programming, the licensing fees paid by the licensee for such right are assigned to New Mexico to the extent that the broadcast customer is located in New Mexico. In the case of business customers, the broadcast customer's location shall be determined using the broadcast customer's commercial domicile. In the case of individual customers, the broadcast customer's location shall be determined using the address of the broadcast customer listed in the broadcaster’s records.

(9) Platform Distribution Company Receipts. Notwithstanding anything herein to the contrary, receipts from a platform distribution company’s sales are assigned to New Mexico based on the population of the state for the year in question as of the close of the taxable period.

F Mediation: Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the department and one or more other state taxing authorities, the taxpayer may petition for, and the department may participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution rules promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

[3.5.18.9 NMAC – N, xx/xx/xxxx]