

Navigating Impact of New York Corporate Tax Overhaul: New Apportionment and Reporting Rules

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Navigating the Impact of New York Corporate Tax Overhaul: New Apportionment and Reporting Rules

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NYS Corporate Tax Reform

- Corporate Tax Reform went into effect for tax years beginning on or after January 1, 2015
- First returns filed or being filed under the new rules
- Draft regulations for nexus, apportionment, combined reporting, and discretionary adjustments
- FAQs and TSB-Ms on specific issues

Overview of the New Article 9-A Regime

- Article 32 (Bank Franchise Tax) merged into Article 9-A (Corporate Franchise Tax)
- Business income is primary tax base
- Investment income not subject to tax (BUT subject to a cap of 8% of entire net income)
- New economic nexus rules apply to corporations with \$1MM + in NY receipts
- Reduction in Article 9-A rate to 6.5% in 2016 and 0% for qualified NY manufacturers
- Still receipts-only apportionment (including former Article 32 corporations)
- Market-based sourcing for all receipts
- Mandatory water's edge combined reporting for unitary businesses with 50%+ common ownership
- PNOLC to calculate available net operating losses carried forward from pre-2015

Tax bases - Overview

Pre-1/1/2015, Taxpayers calculated four tax bases and paid tax on the base yielding the highest tax:

1. Business Capital and Investment Capital (separately apportioned)
 2. Entire Net Income: Business Income and Investment Income (separately apportioned)
 3. Fixed Dollar Minimum
 4. Minimum Taxable Income
- **plus** Subsidiary Capital Tax (separately apportioned)

On or after 1/1/2015, Taxpayers calculate three tax bases and pay tax on the base yielding the highest tax:

- ~~1. Business Capital and Investment Capital~~
 - ~~2. Entire Net Income: Business Income and Investment Income~~
 3. Fixed Dollar Minimum
 - ~~4. Minimum Taxable Income~~
- ~~• plus Subsidiary Capital Tax~~

Note: MTA Surcharge continues to apply after reform with a simplified calculation

Tax bases - Business Capital

On or after 1/1/2015, the taxable capital base includes only “Business Capital”

- Net “Business Capital” = All Net Capital - Net Investment Capital
- Investment Capital Defined
 - i. Capital asset (IRC 1221)
 - ii. 1 year or greater holding period (presumptions)
 - iii. Disposition would generate capital gain/loss
 - iv. If acquired on or after 1/1/15, taxpayer never held it for sale to customers
 - v. Properly identified on the acquisition date as an investment
 - vi. A debt obligation or security if US constitutional principles prohibit apportionment

Business Capital	Investment Capital
All assets minus “Investment Capital”	Generally: non-unitary stock, identified as held for investment, owned for more than 1 year
Stock of a unitary business (eliminated if included in combined report)	Debt obligation or security if the income or gain from it cannot be constitutionally apportioned to New York

Tax bases - Business Capital

Liabilities: Allocate liabilities to the Business and Investment Capital bases

- Direct liabilities: Liabilities specifically incurred to acquire or maintain Investment Capital are attributed directly against Investment Capital
- Indirect liabilities: Liabilities that cannot be directly attributed to any particular class of capital are attributed pursuant to an asset ratio:
 - $$\frac{\text{Total Indirect Liabilities} \times \text{Investment or Business Capital}}{\text{All Capital}}$$

Apportionment:

- The net Business Capital is apportioned to NYS/NYC using the same apportionment percentage used for the Business Income tax base
- NYS and NYC have different apportionment formulas

Rate amount for 2015 and thereafter:

- NYS: Rate is 0.15% - phasing out by 0.025% per year to 0% by 2021
- NYC: Rate is 0.15% - no phase out

Tax bases - Business Income

- Net Business Income = ENI - Net Investment Income - Net Other Exempt Income
 - Tax rate:
 - NYS: 7.1% for 2015; 6.5% starting in 2016 (0% for qualified manufacturers)
 - NYC: 8.85%
 - Corporate partners generally apply aggregate theory (i.e., full flow through)
 - Alien corporations are taxed on Effectively Connected Income, without regard to tax treaties
 - IRC 78 gross-up dividends are excluded from all income bases
 - Business Income includes income from qualified financial instruments (“QFI”) if “fixed percentage method” election
- ENI = Line 28, FTI before NOLs, with certain key modifications
- Investment Income comes from Investment Capital
 - Dividends and net gains from the sale of Investment Capital
 - Income that cannot be constitutionally apportioned to New York

Tax bases - Business Income

- Other Exempt Income:
 1. “Exempt CFC Income”
 - income received from a unitary foreign corporation
 - the foreign corporation is not included in a combined report
 - Taxpayer required to report the income in federal gross income pursuant to IRC 951(a)
 2. “Exempt Unitary Corporation Dividends” - dividends from stock of a unitary corporation that is not included in a combined report with the taxpayer for various reasons, such as:
 - the corporation is taxable under Article 9 or Article 33 of the New York tax law,
 - the corporation does not meet the more than 50% ownership requirement, or
 - the corporation is a foreign unitary subsidiary that is not considered a “domestic corporation” and has no ECI
- Note: Capital generating “other exempt income” is included in the Business Capital tax base

Tax bases - Business Income

Investment Income: Limitations and Interest Deductions

1. Investment Income (before deductions) cannot exceed 8% of Entire Net Income
2. Interest Deductions:
 - Investment Income is reduced by any interest deductions directly or indirectly attributable to investment capital or investment income
 - Example: Corporation P borrows \$100 and uses the proceeds to acquire stock of Corporation S. The \$100 loan constitutes indebtedness that is directly attributed to Investment Capital, and thus, the interest on that loan is not deductible from Corporation P's ENI
 - Indirect interest expense is allocated pursuant to the asset ratio:
 - $$\text{Total Indirect Liabilities} \times \frac{\text{Investment Capital}}{\text{All Capital}}$$
 - If interest deduction exceeds Investment Income, excess added to ENI
 - *40% Safe Harbor*: As an alternative to interest attribution, the taxpayer can make an annual, revocable election to reduce Investment Income by 40% (the election also applies to OEI)

Tax bases - Business Capital & Income

Business Capital		Investment Capital
All assets minus "Investment Capital"		Generally: non-unitary stock, identified as held for investment, owned for more than 1 year
Stock of a unitary business (eliminated if included in combined report)		Debt obligation or security if the income or gain from it cannot be constitutionally apportioned to NY
  		
Business Income	Other Exempt Income	Investment Income
Income apportionable under the U.S. Constitution, which is not OEI or II	Income from unitary CFCs and other unitary corporations not included on a combined return	Income from investment capital
Net income from the sale of stock in a unitary corporation	Income required to be included pursuant to IRC 951(a)	Net gains/losses from sale of non-unitary, non-combined corporate stock
Income from "qualified financial instruments" if "fixed percentage method" election	Dividends from unitary subsidiaries not on combined return: <ul style="list-style-type: none"> • Taxed under different Article • Less than 50% ownership • Foreign subsidiary with no ECI 	Dividends from non-unitary, non-combined corporations
Investment income in excess of the 8% limitation		Income that cannot be apportioned to NY pursuant to US Constitutional principles

NY's Investment Income Rules & U.S. Constitutional Issues

General U.S. Constitutional Principles:

- The U.S. Constitution prohibits a state from taxing the income of a non-domiciliary business arising from activities carried on outside the state, unless the requisite connection exists between the out-of-state activity and the taxpayer's activity in the taxing state.
- In addition to having taxing jurisdiction over the taxpayer, the state also must have "a connection to the activity itself, rather than a connection only to the actor the State seeks to tax." (Allied Signal)
- The unitary business principle is essential to identifying that requisite connection between the state and the income or activity of the taxpayer that the state seeks to tax.

Relevant NY rules:

- Investment income is apportionable in NY unless it is from "investment capital"
- Investment income cannot exceed 8% of the taxpayer's entire net income
- If income cannot be apportioned to NY under US constitutional principles, then the asset is investment capital

What's the problem?

- NY's regime may result in unconstitutional taxation of non-unitary income that doesn't meet the technical definition of investment income, and
- The unconstitutional taxation of non-unitary income that meets NY's definition of investment income, but exceeds the 8% limitation (Form CT-3.1, Schedule C, Line 3)

Repeal of Bank Franchise Tax

- Article 32 (Bank Franchise Tax) merged into Article 9-A (Corporate Franchise Tax)
 - Pre-2015 law
 - Banks used weighted 3-factor (payroll, receipts, deposits) apportionment for all income (including investment income); a deduction was permitted for 22.5% of interest income from federal/NY obligations; and exclusion was permitted for income/expenses from International Banking Facilities
 - A separate Bank Tax seen as unnecessary following Gramm-Leach-Bliley
 - Banks paid a disproportionately large share of corporate taxes under the old rules

Economic Nexus

- Pre-2015 law: Physical presence required with very limited exceptions (credit card companies; foreign corporate partners, combined entities)
- New law: Economic nexus rules can apply without physical presence
 - Fulfillment service nexus exception eliminated
 - Tax applies to any taxpayer with \$1M+ in NY gross receipts
 - For *unitary related group* members (amended in 2015-16 budget), threshold is met by aggregating all members of the unitary group with \$10,000+ NY receipts. New rules would exclude hypothetical combined reporting group members that are not unitary
 - Does not override PL 86-272

Economic Nexus (cont)

- Economic nexus applies to S corporations (Corporate Tax Reform FAQs)
- Draft nexus regulations issued and revised
 - ❖ Defines calculation of economic thresholds for combined groups and for corporate partners/members
 - ❖ Clarifies that economic nexus threshold met by combining corporate partner's NY receipts with NY receipts of partnership/LLC (limited partner must have some participation/control)
 - ❖ Threshold can be met by including receipts of combined PL 86-272 corporation

Will new rules hold constitutional water?

Alien Corporations

- Alien corporations are only subject to tax if there is ECI (effectively connected income)
- Treaty protections do not apply
- No clear application of ECI concept
- Unclear if alien corporations with ECI are subject to economic nexus rules based on \$1MM+ of ECI or \$1MM+ total

Overview of Apportionment Changes

- Still receipts only
 - Now applies to banks
- Market-based sourcing for all receipts
- Services: no longer based on where performed; now based on where the “benefit is received”
- Eliminates much of the controversy for “other business receipts” in the e-commerce realm?
- More specific framework/process for determining source
- May elect to apportion 8% of all QFI income in lieu of sourcing

Overview of Apportionment Changes

- Draft regulations issued by the Department
- Specific sourcing rules for 15 categories of receipts
- Clarify that business receipts for purposes of the apportionment factor do not include:
 - Receipts from investment capital or other exempt income, even if those receipts are included in business income as a result of the 8% limitation
 - Receipts from sales of property arising from “unusual events”
 - Reimbursement of expenses paid on behalf of a customer or under a cost-sharing arrangement
- S corporations include all items of income and gain in the receipts factor
- Is the proposed regulation consistent with the statute?? Maybe not.

NYS Market Sourcing for Services/Digital Products

1. General Rules
2. Flow chart for “Services and Other Business Receipts”
3. Flow chart for “Digital Products”
4. Definitions for key terms

GENERAL RULES

(1) Hierarchical Methodology. In computing the NYS income apportionment fraction for corporate tax purposes for tax years beginning on or after 1/1/2015, NYS requires taxpayers to apply a hierarchical methodology for the sourcing of gross receipts from the sales of “digital products,” “services,” and “other business receipts.”

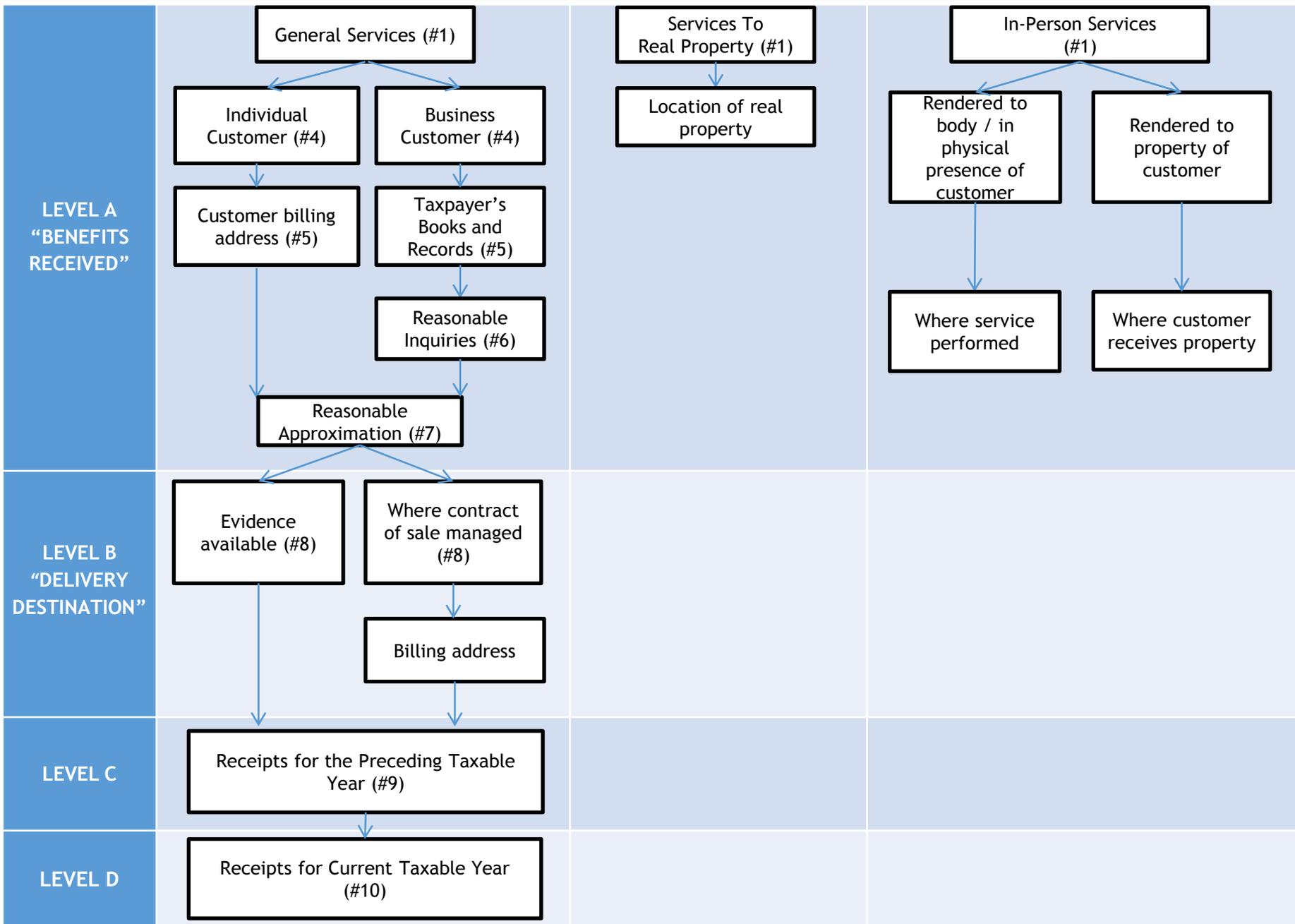
(2) Due Diligence. A taxpayer must annually exercise due diligence in attempting to apply each level of the hierarchy. A taxpayer may abandon a level of the hierarchy only if it lacks sufficient information to apply that rule after exercising due diligence.

(3) Presumptions & Burdens. The application of each component of the hierarchy is generally presumed accurate, however, such presumptions may be overcome by either the taxpayer or the Department, by a preponderance of the evidence.

(4) Intermediary Transactions. Application of the hierarchy in the context of intermediary sales focuses on the consumer (or end-user), which is not necessarily the taxpayer’s customer.

SERVICES / OTHER BUSINESS RECEIPTS

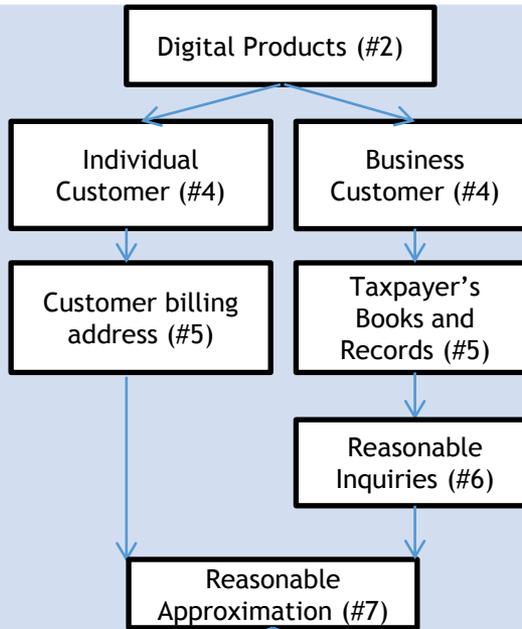
*Numbers on chart correspond to Definitions



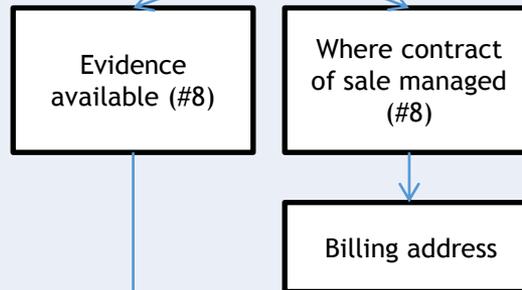
DIGITAL PRODUCTS

*Numbers on chart correspond to Definitions

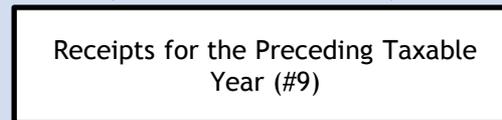
LEVEL A
"PRIMARY USE
LOCATION"



LEVEL B
"WHERE
DIGITAL
PRODUCT IS
RECEIVED"



LEVEL C



LEVEL D



DEFINITIONS

1. **Services:** *General services* are all services that are not specifically defined as services to real property or in-person services (e.g., legal, accounting, financial and consulting services).

- *In-person services* are those services physically provided by the taxpayer:
 1. services rendered to the body of an individual or in the physical presence of an individual (e.g., medical testing; child care; hair cutting; live entertainment); and
 2. services rendered on the customer's tangible personal property (e.g., repairs; dry cleaning).
- *Services to real property* include landscaping, architectural, and mortgage servicing

2. **Digital Product:** Any property or service of whatever nature delivered, furnished, or provided to the customer through the use of wire, cable, fiber-optic, satellite or similar successor media

- an audio work, audiovisual work, visual work, book or literary work, graphic work;
- electronic database, game, information or entertainment service;
- storage of digital products; computer software.

3. **Due Diligence:**

- A taxpayer's sourcing method must be determined in good faith, applied in good faith, and applied consistently with respect to similar transactions.
- A taxpayer must retain contemporaneous records that explain the determination and application of its method of sourcing its receipts, including its underlying assumptions, and must provide such records to the Commissioner upon request.
- Records must also document the steps taken before abandoning each level of the hierarchy.

DEFINITIONS

4. **Customer:** A customer is the party who enters into a transaction with the taxpayer. A customer can be an individual customer, a business customer, or an intermediary.
- **Individual Customer:** A customer whose purchase from the taxpayer is for personal use, and not for a business purpose. If a taxpayer cannot reasonably determine whether the customer is an individual customer, the taxpayer must treat the customer as a business customer.
 - **Business Customer:** A customer that is not an individual customer, including but not limited to:
 - a sole proprietor, C corporation and S corporation;
 - limited liability company, limited partnership, limited liability partnership, and general partnership;
 - non-profit organization, trust; and
 - the U.S. Government, any foreign, state, or local government, or any agency or instrumentality of such government.
5. **Level A: “Benefits Received” and “Primary Use Location”**
- **Billing Address of Individual:** The location indicated in the books and records of the taxpayer as the primary address with respect to a customer’s account as kept in good faith in the normal course of business.
 - **Taxpayer Books and Records:** A business customer is presumed to receive the benefit (or use the product) in New York to the extent the taxpayer’s books and records indicate the customer receives the benefit, or primarily uses the product, in New York.

DEFINITIONS

6. *Level A: “Reasonable Inquiries” For Business Customers*

- General Rule: If the taxpayer cannot determine where the benefit or product is received based upon books and records, the taxpayer must, in exercising due diligence, make reasonable inquiries to the customer to determine where the benefit of the service or product is received.
- Safe Harbor: Reasonable inquiries are not required if the taxpayer has more than 250 business customers purchasing substantially similar services or products that would be sourced under this section and no more than 5% of receipts from such services or products are from one customer.

7. *Level A: “Reasonable Approximation”*

- An alternative method used to determine where a customer receives the benefit or product when:
 - the actual location cannot be determined or would require undue effort and expense beyond the standard amount of due diligence, and
 - the taxpayer has sufficient information to reasonably approximate such location.
- A taxpayer may use reasonable approximation to source certain receipts when it can ascertain the location where a substantial portion of similar receipts are sourced, and the taxpayer reasonably believes that the geographic distribution of such receipts is substantially similar to that of the sourced receipts.
- The taxing authorities may require the method of approximation to remain consistent, and may determine that the method of approximation employed by the taxpayer is not reasonable and substitute an alternative method.
- The taxpayer may *not* use reasonable approximation based on general population data to determine the location at which a customer primarily receives the benefit of a service or other business receipt, or uses the digital product.

DEFINITIONS

8. *Level B: “Delivery Destination” and “Where Digital Product is Received”*

- ***For Individual Customer:***
 - Delivery/Receipt location is determined based on evidence available to the taxpayer, including, but not limited to, sales records and IP address.
 - The Department may examine the taxpayer’s evidence and other evidence the Department deems to be relevant to determine whether such evidence reasonably reflects the delivery destination and whether the method was applied in a consistent manner.
- ***For Business Customer:***
 - Delivery/Receipt location is presumed to be the location at which the contract of sale is managed by the customer (i.e., the primary location at which an employee or other representative of a customer serves as the person with responsibility for monitoring or managing the contract of sale with the taxpayer).
 - If the taxpayer cannot determine the location where the contract of sale is managed by the customer, then the delivery/receipt location is presumed to be the billing address of the customer.

DEFINITIONS

9. *Level C: Receipts for the Preceding Taxable Year*

- This level of the hierarchy cannot apply in 2015 or in the taxpayer's first taxable year in NYS.
- A method requiring a taxpayer to source its receipts from an activity to NYS using the apportionment fraction determined for receipts from the sales of that type of digital product, service, or other business activity for the preceding taxable year to the extent the factors that produced the preceding year's fraction remain substantially similar in the current year.
- Current year NYS receipts are determined pursuant to the following calculation:

$$\text{Current Year NYS Sourced Receipts} = \text{Current Year Total Receipts} \times \frac{\text{NYS sourced receipts from preceding taxable year}}{\text{Total receipts from the preceding taxable year}}$$

10. *Level D: Receipts for Current Taxable Year:*

- A method requiring a taxpayer to source the receipt from that digital product, service, or other business activity to NYS using the apportionment fraction determined for the current taxable year for all those receipts that can be sourced using the methods in Level A and Level B.
- Current year NYS receipts are determined pursuant to the following calculation:

$$\text{Current Year NYS Sourced Receipts} = \text{Current Year Total Receipts} \times \frac{\text{NYS sourced receipts using Level A and Level B}}{\text{All receipts sourced using the Level A and Level B}}$$

DEFINITIONS

11. Intermediary: The business customer of a taxpayer that indicates, as part of its contract or other agreement with the taxpayer, that the digital product, service, or other business activity will be primarily utilized by a consumer.

12. Intermediary Transactions:

- The taxpayer sources receipts from intermediary transactions by:
 1. Applying Level A and/or Level B with respect to the consumer, then
 2. Applying Level A and/or B with respect to the intermediary, then
 3. Applying Level C and/or Level D.
- There are two types of intermediary transactions:
 - a) “On behalf of”: A digital product, service, or other business activity is provided **“on behalf of”** an intermediary when the taxpayer provides the activity directly to a consumer at the direction of the intermediary pursuant to terms of a contract or other agreement.
 - b) “Through”: A digital product, service, or other business activity is provided **“through”** an intermediary when the taxpayer provides the activity directly to the intermediary, who then passes on the activity to the consumer. Although the intermediary is the taxpayer’s customer, the activity is sold pursuant to a contract or other agreement stipulating that the activity will be passed on to the consumer.

13. Consumer: A party, other than the intermediary, primarily utilizing the digital product, service, or other business activity provided by the taxpayer either “through” an intermediary or “on behalf of” an intermediary.

Apportionment - Financial Instruments

- A financial instruments are categorized as follows:
 - A. Loans
 - B. Federal, state or municipal debt
 - C. Asset-backed securities and other government agency debt
 - D. Corporate bonds
 - E. Reverse repurchase agreements, securities borrowing agreements
 - F. Federal funds
 - G. Stock or partnership interests
 - H. Other financial instruments as defined under NY Tax Law §210-A.5(a)(2)(H)
 - I. Physical commodities

Apportionment - Financial Instruments

Rules For Qualified Financial Instruments

- Financial instruments can be “qualified” or “nonqualified”, except for types E and F which can be nonqualified only
- A qualified financial instrument (QFI) is generally defined as a financial instrument that is marked to market under IRC §475 or §1256
- QFI shall *not include*
 - (i) a loan secured by real property
 - (ii) stock that is investment capital
 - (iii) stock that generates other exempt income and is not MTM
 - (iv) partnership interests that do not meet the definition of security in IRC 475(c).
- If a taxpayer has marked to market a financial instrument (e.g., corporate stock), then any financial instrument within that type (i.e., all corporate stock) is a QFI even though it has not been marked to market.
 - This rule does not apply if the only loans that are MTM are loans secured by real property
 - This rule is applied narrowly with respect to type “H” financial instruments

Apportionment - Financial Instruments

- Customer Sourcing Method
 - The location of the payor/purchaser generally controls sourcing
 - For an individual, *billing address* controls location
 - For a business entity, *commercial domicile* controls location, determined by:
 1. Location of management and control; then
 2. Billing address of business entity
- Fixed Percentage Election, for QFI only
 - 8% of net income from all QFIs is included in the apportionment factor numerator; all net income for QFIs is included in the denominator
 - Election is made annually, applies to all QFIs, and is irrevocable for the year of the election
 - As a result of the election, all income from QFIs is business income
 - QFI income could not be investment income, by statute
 - Stock generating other exempt income could constitute a QFI if it is MTM

Apportionment - Financial Instruments

(A) Loans

- Interest and net gains from sale of loans secured by real property → *location of property*
- Interest from other loans → *location of borrower*
- Net gains from sale of non-real estate loans → *location of purchaser*

(B) Federal, state or municipal debt:

- ***NY Numerator***: Exclude all interest and net gains from sales of such debt instruments
- ***Everywhere Denominator***:
 - Include 100% of interest and net gains if issuer is US or NY
 - Include 50% of interest and net gain if issued by other states or political subdivisions

(C) Asset-backed securities (other than government agency debt):

- ***NY Numerator***: 8% of interest income and 8% of net gains from sales of asset-backed securities and other securities issued by government agencies

(D) Corporate bonds:

- ***Interest***: Sourced to NY if the issuing corporation's commercial domicile is in NY
- ***Net Gain - Broker/Dealer Sales***: 8% of net gain is sourced to NY
- ***Net Gain - Other Sales***: location of payor

Apportionment - Financial Instruments

(E) Reverse repurchase agreements, securities borrowing agreements:

- **NY Numerator:** 8% of net interest income

(F) Federal Funds

- **NY Numerator:** 8% of net interest income

(G) Dividends and net gains from sales of stock or partnership interests:

- **NY Numerator:** Excluded, generally
- **NY Denominator:** Excluded, generally
- **Caveat:** The commissioner may require (or the taxpayer may request) alternative apportionment to properly reflect the business income or capital of the taxpayer. The moving party has the burden of proof.

(H) Other financial instruments:

- **Interest:** location of payor
- **Net Gain - Broker/Dealer Sales:** 8% of net gain is sourced to NY
- **Net Gain - Other Sales:** location of purchaser/payor

(I) Physical commodities:

- **NY Numerator:** Commodities delivered in state + commodities sold to NY purchasers

Due Diligence: How much information is enough?

- Taxpayers are required to exercise “due diligence” in obtaining information in order to properly source receipts
- Standard requires good faith and consistency
- Taxpayer must:
 - Retain contemporaneous records explaining its sourcing methodology
 - Document steps taken before abandoning a level in the hierarchy
- Due diligence is not satisfied if taxpayer abandons a level in the hierarchy because an existing data system does not capture the information required.

Discretionary Adjustments

- The Department may, in its discretion or, at the request of the taxpayer, adjust the apportionment fraction to more accurately reflect the taxpayer's business activity in New York.
- Draft regulations apply a “fairness” standard (i.e. if the statutory apportionment fraction does “not reach a fair result”)
- Department's consent required under the draft reg for a taxpayer to alter the statutory formula. Must request variance in writing prior to filing return using alternate apportionment method.

Combined Reporting

- Unitary water's edge combined reporting
- Test is unitary business + >50% stock ownership
- Election is made on the original return of the combined group (FAQs)

Say goodbye to substantial inter-corporate transactions test

The end of decombination audits?

The beginning of unitary business audits?

Combined Reporting (cont)

- Corporations prohibited from filing a combined report:
 - Article 9 or Article 33 taxpayers
 - REITs or RICs that are not captive
 - NY S corporations
 - Alien corporation not treated as a domestic corporation with no ECI
 - A corporation subject to tax based solely on its limited partnership or LLC ownership interest is not required to file a combined report with related corporations not subject to tax in NY
- 7-year combined group election for corporations meeting the 50% ownership requirement
- Election does not require Commissioner's consent but Commissioner may "disregard the tax effects of such an election, where it appears, at the time of the election, that the election will not have meaningful continuing application," for example, if it is made in anticipation of the sale of substantially all of a NY business, the election would reduce the apportioned gain to NY, and then would have no meaningful effect.

Combined Reporting: Draft Regulations

- 50% ownership requirement:
 - Triggered when taxpayer owns or controls directly or indirectly more than 50% of the voting power of the capital stock in one or more other corps.; more than 50% of the voting power of the capital stock of the taxpayer is owned by one or more other corps.; or more than 50% of the voting power of the capital stock of the taxpayer and one or more other corps. are owned directly or indirectly by the same interests
- Unitary business requirement:
 - To be interpreted to the broadest extent permissible under the Constitution
 - Establishes presumption of unitary business in the following circumstances:
 - ❖ Horizontal (same general line of business) or vertical integration
 - ❖ Strong centralized management evidenced by centralized administrative departments or affiliates
 - ❖ Newly-formed corporation and its forming corporation(s)
 - Passive holding company will be deemed engaged in a unitary business with operating company(s) if capital stock requirement met

Net Operating Losses

- Pre-2015 law:
 - Based on federal NOLs
 - Computation of NOLs is pre-apportionment
 - Resulted in “double tracking” of NOLs

PNOLC Subtraction

- **NOLs incurred beginning on or after 2015**
 - Post-apportionment computation
 - 3-year carryback (but not before 2015)
 - 20 year carryforward
 - Not limited by federal source year or amount
- **Prior Net Operating Loss Conversion (PNOLC) Subtraction**
 - All unabsorbed NOLs incurred before 2015
 - **PNOLC Subtraction Pool = [(2014 BAP) x (2014 tax rate) x (unabsorbed NOLs)] / 6.5**
 - Use 1/10 of pool per year over 20 years; OR
 - Use ½ of pool in 2015 and ½ in 2016

NYC Conformity

- New corporate tax provisions in new subch. 3-A of chapter 6 under title 11 of NYC Admin. Code
- Applies generally for all years beginning on/after January 1, 2015
- NYC corporate tax now largely conforms to NYS (watch out for the exceptions!)



NYC Conforming Provisions

- Merger of the bank tax into the general corporation tax
- Modification of the classifications of income (business, investment, and other exempt income)
- Elimination of the tax on subsidiary capital
- Addition of an exemption from tax for investment income and other exempt income
- New treatment for net operating losses
- Adoption of combined reporting for unitary groups
- Customer-based sourcing

NYC Non-conforming provisions

- NYC continues to disregard federal & NYS S-corp elections
- New subchapter does not apply to federal S corporations
 - C corporations subject to new GCT rules
 - Federal S corporations subject to pre-2015 GCT rules
- UBT still in effect
- No economic nexus standard
- Increased business income tax rate for major financial institutions
 - 9% rate for financial corps with > \$100B assets
 - 8.85% rate applies to most other corps

NYC Non-conforming provisions

- Reduced tax rates for qualified manufacturing corps → NYC did not adopt 0% rate
 - Rate reduced from 8.85% to 4.425% for manufacturing corporations with less than \$10M of NYC business income
- In 2018 (end of phase-in) there will be a single receipts factor for income allocation - But taxpayers with less than \$50 million of receipts allocated to the City have one-time election to continue using three-factor formula (93% sales, 3.5% property, 3.5% payroll)

QUESTIONS?

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