

§5206-E. Apportionment

Except as otherwise specifically provided, a financial institution that is taxable both in and outside this State shall apportion its net income and end-of-year assets as provided in this section. A financial institution is considered taxable in a state if in that state the financial institution is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business or a corporate stock tax or that state has jurisdiction to subject the financial institution to a net income tax regardless of whether, in fact, the state does or does not tax the financial institution. [PL 2005, c. 608, §2 (AMD); PL 2005, c. 608, §5 (AFF).]

1. Formula applicable. All of a financial institution's net income and end-of-year assets are apportioned to this State by multiplying the income and the assets by a fraction, the numerator of which is the property factor plus the payroll factor plus 2 times the receipts factor and the denominator of which is 4.

[PL 2005, c. 608, §3 (AMD); PL 2005, c. 608, §5 (AFF).]

2. Receipts factor. The receipts factor is a fraction, the numerator of which is the receipts of the taxpayer in this State during the taxable year and the denominator of which is the receipts of the taxpayer in and outside this State during the taxable year. The method of calculating receipts for purposes of the denominator is the same as the method used in determining receipts for purposes of the numerator. The receipts factor includes only those receipts described in this subsection that are included in the computation of the apportionable income base for the taxable year.

A. The numerator of the receipts factor includes receipts from the lease, sublease or rental of real property if the property is located in the State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

B. Except as described in this paragraph, the numerator of the receipts factor includes receipts from the lease or rental of tangible personal property owned by the taxpayer if the property is located in this State when it is first placed in service by the lessee.

Receipts from the lease or rental of transportation property owned by the taxpayer are included in the numerator of the receipts factor to the extent that the property is located in the State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

C. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from loans located in the State.

The determination of whether the real property securing a loan is located in the State must be made at the time the original agreement was made and any and all subsequent substitutions of collateral are disregarded. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

D. The numerator of the receipts factor includes net gains from the sale of loans. Net gains from the sale of loans includes income recorded under the stripped coupon rules of the Code, Section 1286.

The amount of net gains greater than zero from the sale of loans is determined by multiplying the net gains by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph C and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

E. The numerator of the receipts factor includes interest and fees or penalties in the nature of interest from credit card receivables and receipts from fees charged to credit card holders, such as annual fees, if the billing address of the credit card holder is in this State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

F. The numerator of the receipts factor includes net gains greater than zero from the sale of credit card receivables multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph E and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to credit card holders. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

G. The numerator of the receipts factor includes all credit card issuer's reimbursement fees multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph E and the denominator of which is the taxpayer's total amount of interest and fees or penalties in the nature of interest from credit card receivables and fees charged to credit card holders. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

H. The numerator of the receipts factor includes receipts from merchant discount if the commercial domicile of the merchant is in this State. The receipts are computed net of any credit card holder charge-backs, but are not reduced by any interchange transaction fees or by any issuer's reimbursement fees paid to another for charges made by its credit card holders. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

I. The numerator of the receipts factor includes loan servicing fees derived from loans multiplied by a fraction, the numerator of which is the amount included in the numerator of the receipts factor pursuant to paragraph C and the denominator of which is the total amount of interest and fees or penalties in the nature of interest from loans.

In circumstances in which the taxpayer receives loan servicing fees for servicing either the secured or the unsecured loans of another, the numerator of the receipts factor includes the fees if the borrower is located in this State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

J. The numerator of the receipts factor includes receipts from services not otherwise apportioned under this section if the service is performed in this State. If the service is performed both in and outside this State and a greater proportion of the income or producing activity is performed in this State than in any other state based on cost of performance, then the numerator of the receipts factor includes receipts from services not otherwise apportioned under this section. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

K. Interest, dividends, net gains greater than zero and other income from investment assets and activities and from trading assets and activities must be included in the receipts factor. Investment assets and activities and trading assets and activities include but are not limited to investment securities; trading account assets; federal funds; securities purchased and sold under agreements to resell or repurchase; options, futures contracts; forward contracts; notional principal contracts such as swaps; equities; and foreign currency transactions. With respect to federal funds, the receipts factor includes only the amount by which interest from federal funds sold and securities purchased under resale agreements exceeds interest expense on federal funds purchased and securities sold under repurchase agreements. With respect to trading assets and securities, the receipts factor includes only the amount by which interest, dividends, gains and other income from trading assets and activities, including, but not limited to, assets and activities in the matched books, in the arbitrage book or in foreign currency transactions, exceed amounts paid in lieu of interest, amounts paid in lieu of dividends and losses from the assets and activities.

The numerator of the receipts factor includes receipts from investment assets and activities and from trading assets and activities described in this paragraph that are attributable to this State. Receipts attributable to this State and included in the numerator are determined by multiplying all the receipts from the assets and activities by a fraction, the numerator of which is the gross income from the assets and activities that are properly assigned to a regular place of business of the taxpayer in this State and the denominator of which is the gross income from all the assets and activities.

Assets are properly assigned to a regular place of business in the State if the day-to-day decisions regarding the asset or activity occurred at a regular place of business in this State. When the day-to-day decisions regarding an investment asset or activity or trading asset or activity occur at more than one regular place of business, the asset or activity is considered to be located at the regular place of business of the taxpayer where the investment or trading policies or guidelines with respect to the asset or activity are established. Unless the taxpayer demonstrates to the contrary, those policies and guidelines are presumed to be established at the commercial domicile of the taxpayer.

[PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

[PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

3. Property factor. The property factor is a fraction, the numerator of which is the average value of real property and tangible personal property rented to the taxpayer that is located in the State during the taxable year, the average value of the taxpayer's real and tangible personal property owned that is located in the State during the taxable year and the average value of the taxpayer's loans and credit card receivables that are located in the State during the taxable year, and the denominator of which is the average value of all such property located in and outside this State during the taxable year.

A. Real and tangible personal property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at 8 times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from subrentals.

(1) The average value of property is determined by averaging the values at the beginning and ending of the tax period, but the State Tax Assessor may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

(2) Loans are valued at their outstanding principal balance without regard to any reserve for bad debts. If a loan is charged off in whole or in part for federal income tax purposes, the portion of the loan charged off is not outstanding. A specifically allocated reserve established pursuant to regulatory or financial accounting guidelines that is treated as charged off for federal income tax purposes is treated as charged off for purposes of this section.

(3) Credit card receivables are valued at their outstanding principal balance without regard to any reserve for bad debts. If a credit card receivable is charged off in whole or in part for federal income tax purposes, the portion of the receivable charged off is not outstanding. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

B. A loan is considered to be located within this State if it is properly assigned to a regular place of business of the taxpayer in this State. A loan is properly assigned to the regular place of business with which it has a preponderance of substantive contacts. A loan assigned by the taxpayer to a regular place of business outside the State is presumed to have been properly assigned if:

(1) The taxpayer has assigned, in the regular course of its business, the loan on its records to a regular place of business consistent with federal or state requirements;

(2) The assignment on its records is based upon substantive contacts of the loan to a regular place of business; and

(3) The taxpayer uses the records reflecting assignment of loans for the filing of all state and local tax returns for which an assignment of loans to a regular place of business is required.

The presumption of proper assignment of a loan provided in this paragraph may be rebutted upon a showing by the State Tax Assessor, supported by a preponderance of the evidence, that the preponderance of substantive contacts regarding the loan did not occur at the regular place of business to which it was assigned on the taxpayer's records. When the presumption has been rebutted, the loan is then located within this State if the taxpayer had a regular place of business in

this State at the time the loan was made and the taxpayer fails to show, by a preponderance of the evidence, that the preponderance of substantive contacts regarding the loan did not occur in this State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

C. In the case of a loan that is assigned by the taxpayer to a place outside this State that is not a regular place of business, it is presumed, subject to rebuttal by the taxpayer on a showing supported by the preponderance of evidence, that the preponderance of substantive contacts regarding the loan occurred in this State if, at the time the loan was made, the taxpayer's commercial domicile was in this State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

D. To determine the state in which the preponderance of substantive contacts relating to the loan has occurred, the facts and circumstances regarding the loan at issue are reviewed on a case-by-case basis and consideration is given to activities as the solicitation, investigation, negotiation, approval and administration of the loan. For purposes of the paragraph, the following terms have the following meanings.

(1) "Solicitation" is either active or passive. Active solicitation occurs when an employee of the taxpayer initiates the contact with the customer. The activity is located at the regular place of business with which the taxpayer's employee is regularly connected or out of which the employee is working, regardless of the where the services of the employee are actually performed. Passive solicitation occurs when the customer initiates the contact with the taxpayer. If the customer's initial contact was not at a regular place of business of the taxpayer, the regular place of business, if any, where the passive solicitation occurred is determined by the facts in each case.

(2) "Investigation" is the procedure by which employees of the taxpayer determine the creditworthiness of the customer as well as the degree of risk involved in making a particular agreement. The activity is located at the regular place of business with which the taxpayer's employees are regularly connected or out of which the employees are working, regardless of where the services of the employees are actually performed.

(3) "Negotiation" is the procedure by which employees of the taxpayer and its customer determine the terms of the agreement, such as the amount, duration, interest rate, frequency of repayment, currency denomination and security required. The activity is located at the regular place of business at which the employees are working, regardless of where the services of the employees are actually performed.

(4) "Approval" is the procedure by which employees or the board of directors of the taxpayer make the final determination of whether to enter into an agreement. The activity is located at the regular place of business with which the taxpayer's employees are regularly connected or out of which the employees are working, regardless of where the services of the employees are actually performed. If the board of directors makes the final determination, the activity is located at the commercial domicile of the taxpayer.

(5) "Administration" is the process of managing the account. This process includes bookkeeping, collecting payments, corresponding with the customer, reporting to management regarding the status of the agreement and proceeding against the borrower or the security interest if the borrower is in default. The activity is located at the regular place of business that oversees this activity. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

E. For purposes of determining the location of credit card receivables, those receivables are treated as loans and are subject to the provisions of paragraph C. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

F. A loan that has been properly assigned to a state, absent any change of material fact, remains assigned to that state for the length of the original term of the loan. After the length of time of the

original term of the loan has expired, the loan may be properly assigned to another state if the loan has a preponderance of substantive contact with a regular place of business in that state. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

G. Real and tangible personal property is located in this State as provided in section 5206-D, subsection 11, paragraph D. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]
[PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

4. Payroll factor. The payroll factor is a fraction, the numerator of which is the total amount paid in this State during the taxable year by the taxpayer for compensation and the denominator of which is the total compensation paid both in and outside this State during the taxable year. The payroll factor includes only that compensation that is included in the computation of the apportionable income tax base for the taxable year. Eighty-five percent of any amounts paid pursuant to a contract by the taxpayer to an employee-leasing company for leased employees, and 100% of the amount paid pursuant to a contract to a temporary services company for temporary employees, must be included in the taxpayer's payroll factor. The payroll factor of an employee-leasing company or a temporary services company must exclude compensation paid to leased or temporary employees who are providing personal services to client companies.

A. The compensation of any employee for services or activities that are connected with the production of income that is not includable in the apportionable income base and payments made to any independent contractor or any other person not properly classifiable as an employee are excluded from both the numerator and denominator of the factor. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

B. Compensation is paid in this State if any one of the following tests, applied consecutively, is met.

(1) The employee's services are performed entirely in this State.

(2) The employee's services are performed both in and outside the State, but the service performed outside the State is incidental to the employee's service in the State. For the purposes of this subsection, "incidental" means any service that is temporary or transitory in nature or that is rendered in connection with an isolated transaction.

(3) If the employee's services are performed both in and outside the State, the employee's compensation is attributed to this State:

(a) If the employee's principal base of operations is in this State;

(b) If there is no principal base of operations in any state in which some part of the services are performed, but the place from which the services are directed or controlled is in this State; or

(c) If the principal base of operations and the place from which the services are directed or controlled are not in any state in which some part of the service is performed, but the employee's residence is in this State. [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

[PL 2001, c. 439, Pt. D, §5 (AMD); PL 2001, c. 439, Pt. D, §9 (AFF).]

5. Variations. If the apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for, or the State Tax Assessor may require, in respect to all or any part of the taxpayer's business activity:

A. Separate accounting; [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

B. The exclusion of any one or more of the factors; [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

C. The inclusion of one or more additional factors that will fairly represent the taxpayer's business activity in this State; or [PL 1997, c. 404, §5 (NEW); PL 1997, c. 404, §10 (AFF).]

D. The employment of any other method to effectuate an equitable apportionment of the taxpayer's income or assets. [PL 2005, c. 608, §4 (AMD); PL 2005, c. 608, §5 (AFF).]
[PL 2005, c. 608, §4 (AMD); PL 2005, c. 608, §5 (AFF).]

SECTION HISTORY

PL 1997, c. 404, §5 (NEW). PL 1997, c. 404, §10 (AFF). PL 1997, c. 746, §18 (AMD). PL 1997, c. 746, §24 (AFF). PL 2001, c. 439, §D5 (AMD). PL 2001, c. 439, §D9 (AFF). PL 2005, c. 608, §§2-4 (AMD). PL 2005, c. 608, §5 (AFF).

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