

141.120 Division of income of interstate business for tax purposes -- Apportionment.

This section applies to taxable years beginning on or after January 1, 2018.

(1) As used in this section:

(a) "Apportionable income" means:

1. All income that is apportionable under the Constitution of the United States and is not allocated under this section, including:
 - a. Income arising from transactions and activity in the regular course of the taxpayer's trade or business; and
 - b. Income arising from tangible and intangible property if the acquisition, management, employment, development, or disposition of the property is or was related to the operation of the taxpayer's trade or business; and
2. Any income that would be allocable to this state under the Constitution of the United States, but that is apportioned rather than allocated pursuant to this section;

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed;

(c) "Financial organization" means any bank, trust company, savings bank, industrial bank, land bank, safe deposit company, private banker, savings and loan association, cooperative bank, small loan company, sales finance company, investment company, or any similar type of entity;

(d) "Non-apportionable income" means all income other than apportionable income;

(e) "Receipts" means all gross receipts of the taxpayer that are not allocated under this section, and that are received from transactions and activity in the regular course of the taxpayer's trade or business, except that receipts of a taxpayer from:

1. Hedging transactions; and
 2. The maturity, redemption, sale, exchange, loan, or other disposition of cash or securities;
- shall be excluded; and

(f) "This state" means the Commonwealth of Kentucky.

(2) Any taxpayer having income from business activity which is taxable both within and without this state, other than activity as a provider as defined in KRS 136.602, a financial organization, or a public service company, shall allocate and apportion net income as provided in this section.

(3) For purposes of allocation and apportionment of income under this section, a taxpayer is taxable in another state if:

(a) In that state the taxpayer 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
- (b) That state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not do so.
- (4) Rents and royalties from real or tangible personal property, capital gains, interest, or patent or copyright royalties, to the extent that they constitute nonapportionable income, shall be allocated as provided in subsections (5) to (8) of this section.
- (5) (a) Net rents and royalties from real property located in this state are allocable to this state.
- (b) Net rents and royalties from tangible personal property are allocable to this state:
- 1. If and to the extent that the property is utilized in this state; or
 - 2. In their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.
- (c) The extent of utilization of tangible personal property in a state is determined by multiplying the rents and royalties by a fraction the numerator of which is the number of days of physical location of the property in this state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during all rental or royalty periods is unknown or unascertainable by the taxpayer, tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.
- (6) (a) Capital gains and losses from sales of real property located in this state are allocable to this state.
- (b) Capital gains and losses from sales of tangible personal property are allocable to this state if:
- 1. The property had a situs in this state at the time of the sale; or
 - 2. The taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.
- (c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.
- (7) Interest is allocable to this state if the taxpayer's commercial domicile is in this state.
- (8) (a) Patent and copyright royalties are allocable to this state:
- 1. If and to the extent that the patent or copyright is utilized by the payer in this state; or
 - 2. If and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.
- (b) A patent is utilized in a state to the extent that it is employed in production,

fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

- (9) All apportionable income shall be apportioned to this state by multiplying the income by a fraction the numerator of which is the total receipts of the taxpayer in this state during the taxable year and the denominator of which is the total receipts of the taxpayer everywhere during the taxable year.
- (10) Receipts from the sale of tangible personal property are in this state if:
 - (a) The property is delivered or shipped to a purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or
 - (b) The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and the purchaser is the United States government.
- (11) (a) Receipts, other than receipts described in subsection (10) of this section, are in this state if the taxpayer's market for the sales is in this state. The taxpayer's market for sales is in this state:
 1. In the case of sale, rental, lease, or license of real property, if and to the extent the property is located in this state;
 2. In the case of rental, lease, or license of tangible personal property, if and to the extent the property is located in this state;
 3. In the case of sale of a service, if and to the extent the service is delivered to a location in this state; and
 4. In the case of intangible property:
 - a. That is rented, leased, or licensed, if and to the extent the property is used in this state, provided that intangible property utilized in marketing a good or service to a consumer is used in this state if that good or service is purchased by a consumer who is in this state; and
 - b. That is sold, if and to the extent the property is used in this state, provided that:
 - i. A contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area is used in this state if the geographic area includes all or part of this state;
 - ii. Receipts from intangible property sales that are contingent on the productivity, use, or disposition of the intangible property shall be treated as receipts from the rental, lease, or licensing of the intangible property under subdivision a. of this subparagraph; and

- iii. All other receipts from a sale of intangible property shall be excluded from the numerator and denominator of the receipts factor.
 - (b) If the state or states of assignment under paragraph (a) of this subsection cannot be determined, the state or states of assignment shall be reasonably approximated.
 - (c) If the taxpayer is not taxable in a state to which a receipt is assigned under paragraph (a) or (b) of this subsection, or if the state of assignment cannot be determined under paragraph (a) of this subsection or reasonably approximated under paragraph (b) of this subsection, the receipt shall be excluded from the denominator of the receipts factor.
 - (d) The department may promulgate administrative regulations necessary to carry out the purposes of this section.
- (12) (a) If the allocation and 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 department may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
- 1. Separate accounting;
 - 2. The inclusion of one (1) or more additional factors which will fairly represent the taxpayer's business activity in this state; or
 - 3. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
- (b) 1. If the allocation and apportionment provisions of this section do not fairly represent the extent of business activity in this state of taxpayers engaged in a particular industry or in a particular transaction or activity, the department may, in addition to the authority provided in paragraph (a) of this subsection, promulgate administrative regulations for determining alternative allocation and apportionment methods for those taxpayers.
2. An administrative regulation promulgated pursuant to this paragraph shall be applied uniformly, except that with respect to any taxpayer to whom the administrative regulation applies, the taxpayer may petition for or the department may require adjustment according to paragraph (a) of this subsection.
- (c) 1. The party petitioning for or the department requiring the use of any method to effectuate an equitable allocation and apportionment of the taxpayer's income pursuant to paragraph (a) of the subsection shall prove by clear and convincing evidence:
- a. That the allocation and apportionment provisions of this section do not fairly represent the extent of the taxpayer's business activity in this state; and
 - b. That the alternative to the provisions is reasonable.
2. The same burden of proof shall apply whether the taxpayer is petitioning

for, or the department is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income. Notwithstanding the previous sentence, if the department can show that in any two (2) of the prior five (5) taxable years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for the other taxable years, then the department shall not bear the burden of proof in imposing a different method provided by paragraph (a) of this subsection.

- (d) If the department requires any method to effectuate an equitable allocation and apportionment of the taxpayer's income, the department cannot impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer's reasonable reliance solely on the allocation and apportionment provisions of this subsection.
- (e) A taxpayer that has received written permission from the department to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the department reasonably relied.

Effective: April 27, 2018

History: Repealed and reenacted 2018 Ky. Acts ch. 171, sec. 60, effective April 14, 2018; and ch. 207, sec. 60, effective April 27, 2018. -- Amended 2008 Ky. Acts ch. 18, sec. 2, effective July 15, 2008. -- Amended 2006 (1st Extra. Sess.) Ky. Acts ch. 2, sec. 6, effective June 28, 2006. -- Amended 2005 Ky. Acts ch. 85, sec. 481, effective June 20, 2005; and ch. 168, sec. 11, effective March 18, 2005. -- Amended 2000 Ky. Acts ch. 543, sec. 2, effective July 1, 2000. -- Amended 1996 Ky. Acts ch. 239, sec. 1, effective July 15, 1996. -- Amended 1992 Ky. Acts ch. 165, sec. 2, effective July 14, 1992. -- Amended 1985 (1st Extra. Sess.) Ky. Acts ch. 6, Pt. VII, sec. 19, effective July 29, 1985. -- Amended 1984 Ky. Acts ch. 264, sec. 6, effective July 13, 1984. -- Amended 1976 Ky. Acts ch. 155, sec. 10. -- Amended 1974 Ky. Acts ch. 137, sec. 4; and ch. 163, sec. 4. -- Amended 1966 Ky. Acts ch. 176, Part I, sec. 6. -- Amended 1962 Ky. Acts ch. 124, sec. 3. -- Amended 1954 Ky. Acts ch. 79, sec. 10. -- Amended 1950 Ky. Acts ch. 73, sec. 1. -- Recodified 1942 Ky. Acts ch. 208, sec. 1, effective October 1, 1942, from Ky. Stat. sec. 4281b-32.

Legislative Research Commission Note (4/27/2018). This statute was repealed and reenacted by 2018 Ky. Acts ch. 171, sec. 60 and ch. 207, sec. 60, which are nearly identical and have been codified together.

Legislative Research Commission Note (4/27/2018). Pursuant to 2018 Ky. Acts ch. 207, sec. 153, the revisions made to this statute in that Act apply to taxable years beginning on or after January 1, 2018.

Legislative Research Commission Note (7/15/2008). 2008 Ky. Acts ch. 18, sec. 4 provides that the amendments made to this section by that Act "shall apply to taxable periods beginning after December 31, 2007."

Legislative Research Commission Note (6/28/2006). 2005 Ky. Acts ch. 85, sec. 701, instructs the Reviser of Statutes to correct statutory references to agencies and officers whose names have been changed in the Act, as it confirms the reorganization of the Finance and Administration Cabinet. Such a correction has been made in this

section.

Legislative Research Commission Note (6/28/2006). 2006 (1st Extra. Sess.) Ky. Acts ch. 2, sec. 73, provides that "unless a provision of this Act specifically applies to an earlier tax year, the provisions of this Act shall apply to taxable years beginning on or after January 1, 2007."

Legislative Research Commission Note (3/18/2005). 2005 Ky. Acts ch. 168, sec. 165, provides that this section shall apply to tax years beginning on or after January 1, 2005.