

**CHAPTER 57-38.1**  
**UNIFORM DIVISION OF INCOME TAX ACT**

**57-38.1-01. Definitions.**

As used in this chapter, unless the context otherwise requires:

1. "Business income" means income arising from transactions and activity in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.
2. "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.
3. "Compensation" means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services.
4. "Nonbusiness income" means all income other than business income.
5. "Public utility" means any business entity which owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, oil, oil products, or gas.
6. "Sales" means all gross receipts of the taxpayer not allocated under sections 57-38.1-04 through 57-38.1-08.
7. "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

**57-38.1-02. Taxpayers - Applicability.**

Any taxpayer having income from business activity which is taxable both within and without this state, including a public utility, shall allocate and apportion the taxpayer's net income as provided in this chapter.

**57-38.1-03. Nonresident taxpayer.**

For purposes of allocation and apportionment of income under this chapter, a taxpayer is taxable in another state if:

1. 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
2. That state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

**57-38.1-04. Certain items - Allocation.**

Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness income, must be allocated, net of related expenses, as provided in sections 57-38.1-05 through 57-38.1-08.

**57-38.1-05. Rents and royalties.**

1. Net rents and royalties from real property located in this state are allocable to this state.
2. Net rents and royalties from tangible personal property are allocable to this state:
  - a. If and to the extent that the property is utilized in this state; or
  - b. 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.
3. 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 the 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 the rental or royalty period 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.

**57-38.1-06. Property - Capital gains and losses.**

1. Capital gains and losses from sales of real property located in this state are allocable to this state.
2. Capital gains and losses from sales of tangible personal property are allocable to this state if:
  - a. The property had a situs in this state at the time of the sale; or
  - b. 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.
3. 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.

**57-38.1-07. Interest and dividends.**

Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

**57-38.1-08. Patents and copyrights.**

1. Patent and copyright royalties are allocable to this state:
  - a. If and to the extent that the patent or copyright is utilized by the payer in this state; or
  - b. 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.
2. 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.
3. A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

**57-38.1-09. Business income.**

1. Except as permitted under subsections 2 through 4, all business income must be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is three.
2. For the first two taxable years beginning after December 31, 2015, a taxpayer that is not a passthrough entity may elect to apportion business income to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus two times the sales factor, and the denominator of which is four.
  - a. The election must be made on the return as originally and timely filed in the form and manner prescribed by the tax commissioner.
  - b. The election is applicable for all companies in a unitary group and for all companies filing a consolidated North Dakota return.
  - c. The election is binding for five consecutive taxable years after making the election, at which time the election lapses. The election under this subsection

- also includes the election to use the sales factor under subsections 3 and 4 for the taxable years those subsections apply.
- d. Unless a taxpayer makes another election under subsection 4 in the taxable year immediately following the final year of the binding effect of the election under this subsection, the taxpayer must file under subsection 1 for a period of three taxable years before it may make a new election under subsection 4.
3. For the first taxable year beginning after December 31, 2017, a taxpayer that is not a passthrough entity may elect to apportion business income to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus six times the sales factor, and the denominator of which is eight.
    - a. The election must be made on the return as originally and timely filed in the form and manner prescribed by the tax commissioner.
    - b. The election is applicable for all companies in a unitary group and for all companies filing a consolidated North Dakota return.
    - c. The election is binding for five consecutive taxable years after making the election, at which time the election lapses. The election under this subsection also includes the election to use the sales factor under subsection 4 for the taxable years that subsection applies.
    - d. Unless a taxpayer makes another election under subsection 4 in the taxable year immediately following the final year of the binding effect of the election under this subsection, the taxpayer must file under subsection 1 for a period of three taxable years before it may make a new election under subsection 4.
  4. For taxable years beginning after December 31, 2018, a taxpayer that is not a passthrough entity may elect to apportion business income to this state by multiplying the income by the sales factor. A taxpayer electing to file using a single sales factor must comply with the following:
    - a. The election must be made on the return as originally and timely filed in the form and manner prescribed by the tax commissioner.
    - b. The election is applicable for all companies in a unitary group and for all companies filing a consolidated North Dakota return.
    - c. The election is binding for five consecutive taxable years after making the election, at which time the election lapses.
    - d. Unless a taxpayer makes another election under this subsection in the taxable year immediately following the final year of a prior single sales factor election, the taxpayer must file under subsection 1 for a period of three taxable years before it may make a new single sales factor election.

**57-38.1-10. Property factor.**

The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

**57-38.1-11. Property owned and rented.**

Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight 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.

**57-38.1-12. Average value of property.**

The average value of property must be determined by averaging the values at the beginning and ending of the tax period but the tax commissioner 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.

#### **57-38.1-13. Payroll factor.**

The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation and the denominator of which is the total compensation paid everywhere during the tax period.

#### **57-38.1-14. Compensation.**

Compensation is paid in this state if:

1. The individual's service is performed entirely within the state;
2. The individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or
3. Some of the service is performed in the state and:
  - a. The base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in the state; or
  - b. The base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

#### **57-38.1-15. Sales factor.**

The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

#### **57-38.1-16. Local tangible personal property sales.**

Sales of tangible personal property are in this state if:

1. 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
2. The property is shipped from an office, store, warehouse, factory, or other place of storage in this state and:
  - a. The purchaser is the United States government; or
  - b. The taxpayer is not taxable in the state of the purchaser.

#### **57-38.1-17. Other sales.**

Sales, other than sales of tangible personal property, are in this state if:

1. The income-producing activity is performed in this state; or
2. 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.

#### **57-38.1-17.1. Gain or loss on the sale of a partnership.**

Gain or loss on the sale of a partnership interest is allocable to this state in the ratio of the original cost of partnership tangible property in the state to the original cost of partnership tangible property everywhere, determined at the time of the sale. In the event that more than fifty percent of the value of the assets of the partnership consist of intangibles, gain or loss from the sale of the partnership interest is allocated to this state in accordance with the ratio of total North Dakota income to total income of the partnership for its first full tax period immediately preceding the tax period of the partnership during which the partnership interest was sold. This section applies to the extent, that prior to the sale of the partnership interest, the partnership's income or loss constituted nonbusiness income.

#### **57-38.1-17.2. Taxation of two or more member limited liability companies.**

For purposes of this chapter, a limited liability company having two or more members that is formed under either the laws of this state or under similar laws of another state and that is considered to be a partnership for federal income tax purposes is considered to be a partnership and the members must be considered to be partners. A limited liability company

having two or more members that is not treated as a partnership for federal income tax purposes must be treated as a corporation for state tax purposes.

**57-38.1-17.3. Taxation of single-member limited liability companies.**

For purposes of this chapter, a limited liability company having a single member that is formed under either the laws of this state or under similar laws of another state and that is considered to be a corporation for federal income tax purposes is considered to be a corporation for state tax purposes. A limited liability company having a single member that is not treated as a corporation for federal income tax purposes is disregarded as an entity separate from its owner for state tax purposes.

**57-38.1-18. Additional methods of determining business situs.**

If the allocation and apportionment provisions of this chapter do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the tax commissioner may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

1. Separate accounting;
2. The exclusion of any one or more of the factors;
3. The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
4. The employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

**57-38.1-19. Purpose.**

This chapter must be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

**57-38.1-20. Citation.**

This chapter may be cited as the "Uniform Division of Income for Tax Purposes Act".

**57-38.1-21. Effective date.**

The provisions of this chapter apply to all income accruing after January 1, 1965, for taxpayers operating on a calendar year basis, and apply to income accruing in 1965 after the beginning of their fiscal year for taxpayers operating on a fiscal year basis.