WEST VIRGINIA CODE: §11-23-5

§11-23-5. Apportionment of tax base.

(a) A taxpayer subject to the tax imposed by this article and also taxable in another state shall, for the purposes of this tax, apportion its tax base to this state by multiplying its tax base by a fraction, the numerator of which is the sum of the property factor, plus the payroll factor, plus two times the sales factor, all of which shall be determined as hereinafter provided in this section, and the denominator of which is four, reduced by the number of factors, if any, having no denominator, with the sales factor counting as two factors.

(b) 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 by it in this state during the taxable year, and the denominator of which is the average value of all real and tangible personal property owned or rented by the taxpayer and used by it during the taxable year, which is reported on Schedule L of Federal Form 1120 (or 1065 for partnerships), plus the average value of all real and tangible personal property leased and used by the taxpayer during the taxable year.

(c) Value of property. -- Property owned by the taxpayer shall be valued at its original cost, adjusted by subsequent capital additions or improvements thereto and partial disposition thereof, by reason of sale, exchange, abandonment, etc.: Provided, That where records of original cost are unavailable or cannot be obtained without unreasonable expense, property shall be valued at original cost as determined under regulations of the Tax Commissioner. Property rented by the taxpayer from others shall be valued at eight times the net annual rental rate. Net annual rental rate is the annual rental paid, directly or indirectly, by the taxpayer, or for its benefit, in money or other consideration for the use of the property and includes:

(1) Any amount payable for the use of real or tangible personal property, or any part thereof, whether designated as a fixed sum of money or as a percentage of sales, profits or otherwise.

(2) Any amount payable as additional rent or in lieu of rents, such as interest, taxes, insurance, repairs or any other items which are required to be paid by the terms of the lease or other arrangement, not including amounts paid as service charges, such as utilities, janitor services, etc. If a payment includes rent and other charges unsegregated, the amount of rent shall be determined by consideration of the relative values of the rent and the other items.

(d) Movable property. -- The value of movable tangible personal property used both within and without this state shall be included in the numerator to the extent of its utilization in this state. The extent of such utilization shall be determined by multiplying the original cost of such property by a fraction, the numerator of which is the number of days of physical

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location of the property in this state during the taxable period, and the denominator of which is the number of days of physical location of the property everywhere during the taxable year. The number of days of physical location of the property may be determined on a statistical basis or by such other reasonable method acceptable to the Tax Commissioner.

(e) Leasehold improvements. -- Leasehold improvements shall, for the purposes of the property factor, be treated as property owned by the lessee regardless of whether the lessee is entitled to remove the improvements or the improvements revert to the lessor upon expiration of the lease. Leasehold improvements shall be included in the property factor at their original cost.

(f) Average value of property. -- The average value of property shall be determined by averaging the values at the beginning and ending of the taxable year: Provided, That the Tax Commissioner may require the averaging of monthly values during the taxable year if substantial fluctuations in the values of the property exist during the taxable year, or where property is acquired after the beginning of the taxable year, or is disposed of, or whose rental contract ceases, before the end of the taxable year.

(g) Payroll factor. -- The payroll factor is a fraction, the numerator of which is the total compensation paid in this state during the taxable year by the taxpayer, and the denominator of which is the total compensation paid by the taxpayer during the taxable year as shown on the taxpayer's federal income tax return as filed with the Internal Revenue Service, as reflected in the schedule of wages and salaries and that portion of cost of goods sold which reflects compensation, or as shown on a pro forma return.

(h) Compensation. -- The term "compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services. Payments made to an independent contractor or to any other person not properly classifiable as an employee shall be excluded. Only the amounts paid directly to employees shall be included in the payroll factor. Amounts considered paid directly to employees include the value of board, rent, housing, lodging and other benefits or services furnished to employees by the taxpayer in return for personal services, provided such amounts constitute income to the recipient for federal income tax purposes.

(i) Employee. -- The term "employee" means:

(1) Any officer of a corporation; or

(2) Any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee.

(j) Compensation paid in this state. -- Compensation is paid in this state if:

(1) The employee's service is performed entirely within the state;

(2) The employee's service is performed both within and without the state, but the service

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performed without the state is incidental to the individual's service within the state. The word "incidental" means any service which is temporary or transitory in nature, or which is rendered in connection with an isolated transaction; or

(3) Some of the service is performed in the state and:

(A) The employee's 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 employee's residence is in this state.

The term "base of operations" is the place of more or less permanent nature from which the employee starts his work and to which he customarily returns in order to receive instructions from the taxpayer or communications from his customers or other persons or to replenish stock or other materials, repair equipment, or perform any other functions necessary to the exercise of his trade or profession at some other point or points. The term "place from which the service is directed or controlled" refers to the place from which the power to direct or control is exercised by the taxpayer.

(k) Sales factor. -- The sales factor is a fraction, the numerator of which is the gross receipts of the taxpayer derived from transactions and activity in the regular course of its trade or business in this state during the taxable year (business income), less returns and allowances. The denominator of the fraction shall be the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business during the taxable year (business income), and reflected in its gross income reported and as appearing on the taxpayer's Federal Form 1120 or 1065, and consisting of those certain pertinent portions of the (gross income) elements set forth: Provided, That if either the numerator or the denominator includes interest or dividends from obligations of the United States government which are exempt from taxation by this state, the amount of such interest and dividends, if any, shall be subtracted from the numerator or denominator in which it is included.

(l) Allocation of sales of tangible personal property. --

(1) Sales of tangible personal property are in this state if:

(i) The property is received in this state by the purchaser, other than the United States government, regardless of the f.o.b. point or other conditions of the sale. In the case of delivery by common carrier or other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered as the place at which such property is received by the purchaser. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by the purchaser, constitutes delivery to the purchaser in this state, and direct delivery outside this

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state to a person or firm designated by the purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale; or

(ii) 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.

(2) All other sales of tangible personal property delivered or shipped to a purchaser within a state in which the taxpayer is not taxed as defined in subsection (b), section seven, article twenty-four of this chapter shall be excluded from the denominator of the sales factor.

(m) Allocation of 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;

(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; or

(3) The sale constitutes business income to the taxpayer, or the taxpayer is a financial organization not having its commercial domicile in this state, and in either case the sale is a receipt described as attributable to this state in section five-a of this article.

(n) Income-producing activity. -- 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 trade or business for the ultimate purpose of obtaining gain or profit. Such activity does not include transactions and activities performed on behalf of the taxpayer, such as those conducted on its behalf by an independent contractor. "Income-producing activity" includes, but is not limited to, the following:

(1) The rendering of personal services by employees with utilization of tangible and intangible property by the taxpayer in performing a service;

(2) The sale, rental, leasing, licensing or other use of real property;

(3) The sale, rental, leasing, licensing or other use of tangible personal property; or

(4) The sale, licensing or other use of intangible personal property. The mere holding of intangible personal property is not, in itself, an income-producing activity: Provided, That the conduct of the business of a financial organization shall constitute an income-producing activity.

(o) Cost of performance. -- The term "cost of performance" means direct costs 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.

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(p) Other methods of allocation. --

(1) General. -- If the allocation and apportionment provisions of subsection (a) do not fairly represent the extent of the taxpayer's business activities 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 activities, if reasonable:

(A) Separate accounting;

(B) The exclusion of one of the factors;

(C) The inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(D) The employment of any other method to effectuate an equitable allocation or apportionment of the taxpayer's tax base. Such petition shall be filed no later than the due date of the annual return for the taxable year for which the alternative method is requested, determined without regard to any extension of time for filing such return, and the petition shall include a statement of the petitioner's objections and of such alternative method of allocation or apportionment as it believes to be proper under the circumstances with such detail and proof as the Tax Commissioner may require.

(2) Burden of proof. -- In any proceeding before the Tax Commissioner or in any court in which employment of one of the methods of allocation or apportionment provided for in subdivision (1) of this subsection is sought, on the ground that the allocation and apportionment provisions of subsection (a) do not fairly represent the extent of the taxpayer's business activities in this state, the burden of proof shall:

(A) If the Tax Commissioner seeks employment of one of such methods, be on the Tax Commissioner; or

(B) If the taxpayer seeks employment of one of such other methods, be on the taxpayer.

(3) Notwithstanding any other provisions of this section, financial organizations shall use only the special apportionment rules set forth in section five-a of this article.

(q) Effective date. -- The amendments to this section made by this article shall apply to all taxable years ending after the effective date of this article. The provisions of paragraph (3), subsection (p) of this section shall apply to all taxable years beginning on or after January 1, 1991.

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