

1 **APPORTIONMENT OF BUSINESS INCOME AND**
2 **DEDUCTION OF NET LOSSES BY AN**
3 **ACQUIRED CORPORATION**

4 2008 GENERAL SESSION

5 STATE OF UTAH

6 **Chief Sponsor: Wayne L. Niederhauser**

7 House Sponsor: John Dougall

8
9 **LONG TITLE**

10 **General Description:**

11 This bill amends the Corporate Franchise and Income Taxes chapter and the Individual
12 Income Tax Act relating to the apportionment of business income and the calculation of
13 a net loss deduction by an acquired corporation.

14 **Highlighted Provisions:**

15 This bill:

- 16 ▶ addresses the calculation of a net loss deduction by an acquired corporation;
- 17 ▶ for purposes of apportionment of business income, addresses the circumstances
18 under which certain receipts, rents, royalties, or sales are considered to be in this
19 state;
- 20 ▶ addresses the apportionment of business income for purposes of the individual
21 income tax; and
- 22 ▶ makes technical changes.

23 **Monies Appropriated in this Bill:**

24 None

25 **Other Special Clauses:**

26 This bill provides an effective date.

27 **Utah Code Sections Affected:**

28 AMENDS:

29 **59-7-110**, as last amended by Laws of Utah 1994, Chapter 83

30 **59-7-319**, as last amended by Laws of Utah 1992, Chapter 165

31 **59-10-118**, as last amended by Laws of Utah 1995, Chapter 311



33 *Be it enacted by the Legislature of the state of Utah:*

34 Section 1. Section **59-7-110** is amended to read:

35 **59-7-110. Utah net losses -- Carryforwards and carrybacks -- Deduction.**

36 (1) The amount of Utah net loss which shall be carried back or forward to offset income
37 of another taxable year shall be determined as provided in this section.

38 (2) (a) A Utah net loss from a taxable year beginning before January 1, 1994, shall be
39 carried back three taxable years preceding the taxable year of the loss and any remaining loss
40 shall be carried forward five taxable years following the taxable year of the loss, subject to the
41 limitations of this section.

42 (b) A Utah net loss from a taxable year beginning on or after January 1, 1994, may be
43 carried back three taxable years preceding the taxable year of the loss and carried forward 15
44 taxable years following the taxable year of the loss, subject to the limitations of this section. If
45 an election is made to forego the federal net operating loss carryback, the Utah net loss is not
46 eligible to be carried back unless an election is made for state purposes.

47 (3) The Utah net loss shall be carried to the earliest eligible year for which the Utah
48 taxable income before net loss deduction, minus Utah net losses from previous years which
49 were applied or required to be applied to offset income, is not less than zero.

50 (4) (a) Except as provided in Subsection (4)(a)(iii), the amount of Utah net loss which
51 shall be carried to the year identified in Subsection (3) shall be the lesser of:

52 (i) the remaining Utah net loss after deduction of any amounts of such loss which were
53 carried to previous years; or

54 (ii) the remaining Utah taxable income before net loss deduction of the year identified in
55 Subsection (3) after deduction of Utah net losses from previous years which were carried or
56 required to be carried to such year; and

57 (iii) in any event, the amount carried back from a taxable year beginning on or after

58 January 1, 1994, may not exceed \$1,000,000 in Utah taxable income for each corporate return
59 filed in a taxable year; any losses in excess of \$1,000,000 may be carried forward; and

60 (b) any remaining Utah net loss shall be available to be carried to one or more taxable
61 years in accordance with this section.

62 (5) (a) Corporations acquiring the assets or stock of another corporation may not
63 deduct any net loss incurred by the acquired corporation prior to the date of acquisition. This
64 subsection does not apply if the only change in the corporation is that of the state of
65 incorporation.

66 (b) An acquired corporation may deduct its net losses incurred before the date of
67 acquisition against its separate income as calculated under Subsection (6) if the acquired
68 corporation has continued to carry on a trade or business substantially the same as that
69 conducted before such acquisition.

70 (6) For purposes of Subsection (5)(b), the amount of net loss an acquired corporation
71 that is acquired by a unitary group may deduct is calculated by:

72 (a) subject to Subsection (7), calculating the sum of:

73 (i) an amount determined by dividing the average value of the acquired corporation's
74 real and tangible personal property owned or rented and used in this state during the taxable
75 year by the average value of all of the unitary group's real and tangible personal property owned
76 or rented and used during the taxable year;

77 (ii) an amount determined by dividing the total amount paid in this state during the
78 taxable year by the acquired corporation for compensation by the total compensation paid
79 everywhere by the unitary group during the taxable year; and

80 (iii) an amount determined by:

81 (A) dividing the total sales of the acquired corporation in this state during the taxable
82 year by the total sales of the unitary group everywhere during the taxable year; and

83 (B) if the unitary group elects to apportion business income to this state using the
84 method described in Subsection 59-7-311(2)(b), multiplying the amount calculated under
85 Subsection (6)(a)(iii)(A) by two;

86 (b) dividing the amount calculated under Subsection (6)(a) by the denominator of the
 87 fraction for the unitary group to apportion business income to this state using the same election
 88 for calculating that denominator that the unitary group uses:

89 (i) for that taxable year; and

90 (ii) in accordance with Section 59-7-311;

91 (c) multiplying the amount calculated under Subsection (6)(b) by the business income of
 92 the unitary group for the taxable year that is subject to apportionment under Section 59-7-311;
 93 and

94 (d) calculating the sum of:

95 (i) the amount calculated under Subsection (6)(c); and

96 (ii) the following amounts allocable to the acquired corporation for the taxable year:

97 (A) nonbusiness income allocable to this state; or

98 (B) nonbusiness loss allocable to this state.

99 (7) The amounts calculated under Subsection (6)(a) shall be derived in the same manner
 100 as those amounts are derived for purposes of apportioning the unitary group's business income
 101 before deducting the net loss, including a modification made in accordance with Section
 102 59-7-320.

103 Section 2. Section **59-7-319** is amended to read:

104 **59-7-319. Receipt, rent, royalty, or sale in connection with other than tangible**
 105 **personal property -- When considered to be in this state.**

106 ~~[(1) Sales, other than sales of tangible personal property, are in this state if:]~~

107 ~~[(a) the income-producing activity is performed in this state; or]~~

108 ~~[(b) the income-producing activity is performed both in and outside this state and a~~
 109 ~~greater proportion of the income-producing activity is performed in this state than in any other~~
 110 ~~state, based on costs of performance.]~~

111 (1) (a) Subject to Subsection (1)(b), as used in this section, "regulated investment
 112 company" is as defined in Section 851(a), Internal Revenue Code, in effect for the taxable year.

113 (b) "Regulated investment company" includes a trustee or sponsor of an employee

114 benefit plan that has an account in a regulated investment company.

115 (2) The following are considered to be in this state:

116 (a) a rent in connection with real property if the real property is in this state;

117 (b) a royalty in connection with real property if the real property is in this state;

118 (c) a sale in connection with real property if the real property is in this state; or

119 (d) other income in connection with real property if the real property is in this state.

120 (3) (a) Subject to Subsection (3)(b), a receipt from the performance of a service is

121 considered to be in this state if the purchaser of the service receives a greater benefit of the

122 service in this state than in any other state.

123 (b) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the

124 commission may by rule prescribe the circumstances under which a purchaser of a service

125 receives a greater benefit of the service in this state than in any other state.

126 (4) (a) Subject to Subsection (4)(b), a receipt in connection with intangible property is

127 considered to be in this state if the intangible property is used in this state.

128 (b) If the intangible property described in Subsection (4)(a) is used in this state and

129 outside this state, a receipt in connection with the intangible property shall be apportioned to

130 this state in accordance with Subsection (4)(c).

131 (c) For purposes of Subsection (4)(b), for a taxable year the percentage of a receipt in

132 connection with intangible property that is considered to be in this state is the percentage of the

133 use of the intangible property that occurs in this state during the taxable year.

134 ~~[(2)]~~ (5) (a) Notwithstanding [Subsection (1), sales, other than sales] Subsections (2)

135 through (4), a sale, other than a sale of tangible personal property, derived, directly or

136 indirectly, from the sale of management, distribution, or administration services to, or on behalf

137 of a regulated investment company, [as defined in Section 851(a) of the Internal Revenue Code

138 of 1986, including trustees or sponsors of employee benefit plans which have accounts in a

139 regulated investment company, shall be assigned to] is considered to be in this state;

140 (i) to the extent that shareholders of the regulated investment company are domiciled in

141 the state [as follows: (a) by multiplying]; and

142 (ii) as provided in this Subsection (5).

143 (b) For purposes of Subsection (5)(a), the amount of a sale, other than a sale of tangible
144 personal property, that is considered to be in this state is calculated by determining the product
145 of:

146 (i) the taxpayer's total dollar amount of sales of ~~[such]~~ the services ~~[by]~~; and

147 (ii) a fraction, the numerator of which is the average of the sum of the beginning of the
148 year and the end of year balance of shares owned by the investment company shareholders
149 domiciled in this state~~;~~ and the denominator of which is the average of the sum of the
150 beginning of the year and end of year balance of shares owned by the investment company
151 shareholders.

152 ~~[(b)]~~ (c) A separate computation shall be made to determine the sales for each
153 investment company.

154 ~~[(3)]~~ (6) (a) Notwithstanding ~~[Subsection (1)]~~ Subsections (2) through (4) and subject
155 to Subsection (6)(b), the following sales ~~[shall be assigned to the]~~ are considered to be in this
156 state to the extent that customers of a securities brokerage business are domiciled in the state:

157 (i) ~~[sales, other than sales]~~ a sale, other than a sale of tangible personal property,
158 derived, directly or indirectly, from the sale of a securities brokerage ~~[services]~~ service by a
159 taxpayer ~~[which in this state is]~~ if that taxpayer is primarily engaged in providing ~~[services]~~ a
160 service in this state to a regulated investment company ~~[as described in Subsection (2)]; or~~

161 (ii) ~~[sales, other than sales]~~ a sale, other than a sale of tangible personal property,
162 derived, directly or indirectly, from the sale of a securities brokerage ~~[services]~~ service by a
163 taxpayer ~~[which]~~ that is an affiliate of a taxpayer ~~[which, in this state,]~~ that provides ~~[services]~~ a
164 service in this state to a regulated investment company ~~[as described in Subsection (2)].~~

165 ~~[(b) This assignment of sales shall be determined as follows: by multiplying]~~

166 (b) For purposes of Subsection (6)(a), the amount of a sale, other than a sale of tangible
167 personal property, that is considered to be in this state is calculated by determining the product
168 of:

169 (i) the taxpayer's total dollar amount of sales of securities brokerage services ~~[by]~~; and

170 (ii) a fraction, the numerator of which is the receipts from securities brokerage services
171 from customers of the taxpayer domiciled in this state, and the denominator of which is the
172 receipts from securities brokerage services from all customers of the taxpayer.

173 Section 3. Section **59-10-118** is amended to read:

174 **59-10-118. Division of income for tax purposes.**

175 (1) As used in this section [~~unless the context otherwise requires~~]:

176 (a) "Business income" means income arising from transactions and activity in the
177 regular course of [~~the~~] a taxpayer's trade or business and includes income from tangible and
178 intangible property if the acquisition, management, and disposition of the property constitutes
179 integral parts of the taxpayer's regular trade or business operations.

180 (b) "Commercial domicile" means the principal place from which the trade or business
181 of [~~the~~] a taxpayer is directed or managed.

182 [~~(c) "Compensation" means wages, salaries, commissions, and any other form of~~
183 ~~remuneration paid to employee for personal services.~~]

184 [~~(d)~~] (c) "Nonbusiness income" means all income other than business income.

185 [~~(e)~~] (d) "Sales" means all gross receipts of [~~the~~] a taxpayer not allocated under
186 Subsections (3) through (7).

187 [~~(f)~~] (e) "State" means any state of the United States, the District of Columbia, the
188 commonwealth of Puerto Rico, [~~and~~] or any possession of the United States.

189 (2) [~~Any~~] A taxpayer having business income [~~which~~] that is taxable both within and
190 without this state, shall allocate and apportion [~~his~~] the taxpayer's net income as provided in this
191 section.

192 (3) Rents and royalties from real or tangible personal property, capital gains, interest,
193 dividends, or patent or copyright royalties, to the extent that they constitute nonbusiness
194 income, shall be allocated as provided in Subsections (4) through (7).

195 (4) (a) Net rents and royalties from real property located in this state are allocable to
196 this state.

197 (b) Net rents and royalties from tangible personal property are allocable to this state:

198 (i) if and to the extent that the property is utilized in this state; or
199 (ii) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer
200 is not organized under the laws of or taxable in the state in which the property is utilized.

201 (c) The extent of utilization of tangible personal property in a state is determined by
202 multiplying the rents and royalties by a fraction, the numerator of which is the number of days
203 of physical location of the property in the state during the rental or royalty period in the taxable
204 year and the denominator of which is the number of days of physical location of the property
205 everywhere during all rental or royalty periods in the taxable year. If the physical location of the
206 property during the rental or royalty period is unknown or unascertainable by the taxpayer,
207 tangible personal property is utilized in the state in which the property was located at the time
208 the rental or royalty payer obtained possession.

209 (5) (a) Capital gains and losses from sales of real property located in this state are
210 allocable to this state.

211 (b) Capital gains and losses from sales of tangible personal property are allocable to this
212 state if:

213 (i) the property [~~had~~] has a situs in this state at the time of the sale; or
214 (ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in
215 the state in which the property had a situs.

216 (c) Capital gains and losses from sales of intangible personal property are allocable to
217 this state if the taxpayer's commercial domicile is in this state.

218 (6) Interest and dividends are allocable to this state if the taxpayer's commercial
219 domicile is in this state.

220 (7) (a) Patent and copyright royalties are allocable to this state:

221 (i) if and to the extent that the patent or copyright is utilized by the payer in this state;
222 or

223 (ii) if and to the extent that the patent or copyright is utilized by the payer in a state in
224 which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

225 (b) A patent is utilized in a state to the extent that it is employed in production,

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

230 (8) All business income shall be apportioned to this state [~~by multiplying the income by~~
231 ~~a fraction, the numerator of which is the property factor plus the payroll factor plus the sales~~
232 ~~factor, and the denominator of which is three]~~ using the same methods, procedures, and
233 requirements of Sections 59-7-311 through 59-7-320.

234 [~~(9) The property factor is a fraction, the numerator of which is the average value of the~~
235 ~~taxpayer's real and tangible personal property owned or rented and used in this state during the~~
236 ~~tax period and the denominator of which is the average value of all the taxpayer's real and~~
237 ~~tangible personal property owned or rented and used during the tax period.]~~

238 [~~(10) Property owned by the taxpayer is valued at its original cost. Property rented by~~
239 ~~the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the~~
240 ~~annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from~~
241 ~~subrentals.]~~

242 [~~(11) The average value of property shall be determined by averaging the values at the~~
243 ~~beginning and ending of the tax period but the commission may require the averaging of~~
244 ~~monthly values during the tax period, if reasonably required to reflect properly the average~~
245 ~~value of the taxpayer's property.]~~

246 [~~(12) The payroll factor is a fraction, the numerator of which is the total amount paid in~~
247 ~~this state during the tax period by the taxpayer for compensation, and the denominator of which~~
248 ~~is the total compensation paid everywhere during the tax period.]~~

249 [~~(13) Compensation is paid in this state if:~~

250 [~~(a) the individual's service is performed entirely within the state; or]~~

251 [~~(b) the individual's service is performed both within and without the state, but the~~
252 ~~service performed without the state is incidental to the individual's service within the state; or]~~

253 [~~(c) some of the service is performed in the state and:]~~

254 ~~[(i) the base of operations or, if there is no base of operations, the place from which the~~
255 ~~service is directed or controlled is in the state; or]~~

256 ~~[(ii) the base of operations or the place from which the service is directed or controlled~~
257 ~~is not in any state in which some part of the service is performed, but the individual's residence~~
258 ~~is in this state.]~~

259 ~~[(14) The sales factor is a fraction, the numerator of which is the total sales of the~~
260 ~~taxpayer in this state during the tax period, and the denominator of which is the total sales of~~
261 ~~the taxpayer everywhere during the tax period.]~~

262 ~~[(15) Sales of tangible personal property are in this state if the property is delivered or~~
263 ~~shipped to a purchaser within this state regardless of the f.o.b. point or other conditions of the~~
264 ~~sale.]~~

265 ~~[(16) Sales, other than sales of tangible personal property, are in this state if:]~~

266 ~~[(a) the income-producing activity is performed in this state; or]~~

267 ~~[(b) the income-producing activity is performed both in and outside this state and a~~
268 ~~greater proportion of the income-producing activity is performed in this state than in any other~~
269 ~~state, based on costs of performance.]~~

270 ~~[(17) If the allocation and apportionment provisions of this chapter do not fairly~~
271 ~~represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for~~
272 ~~or the commission may require, in respect of all or any part of the taxpayer's business activity, if~~
273 ~~reasonable:]~~

274 ~~[(a) separate accounting;]~~

275 ~~[(b) the exclusion of any one or more of the factors;]~~

276 ~~[(c) the inclusion of one or more additional factors which will fairly represent the~~
277 ~~taxpayer's business activity in this state; or]~~

278 ~~[(d) the employment of any other method to effectuate an equitable allocation and~~
279 ~~apportionment of the taxpayer's income.]~~

280 Section 4. **Effective date.**

281 (1) Except as provided in Subsection (2), this bill takes effect for taxable years

282 beginning on or after January 1, 2009.

283 (2) The amendments to Section 59-7-110 have retrospective operation for taxable years

284 beginning on or after January 1, 2008.