

**APPORTIONMENT OF BUSINESS INCOME, ATTRIBUTING
SALES TO THE STATE, AND DEDUCTION OF
NET LOSSES BY A UNITARY GROUP**

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Howard A. Stephenson

House Sponsor: Wayne A. Harper

LONG TITLE

Committee Note:

The Revenue and Taxation Interim Committee recommended this bill.

General Description:

This bill amends the Corporate Franchise and Income Taxes chapter and the Individual Income Tax Act relating to the apportionment of business income, the determination of when certain sales are considered to be made in this state, and the ability of a unitary group to deduct certain net losses.

Highlighted Provisions:

This bill:

- ▶ allows a taxpayer to elect to apportion business income to the state on the basis of a formula that weights the sales factor more heavily than the property or payroll factors;
- ▶ addresses a taxpayer's ability to make or revoke an election to use a particular method for apportioning business income to the state;
- ▶ addresses a taxpayer's ability to carry forward or carry back certain amounts;
- ▶ addresses the ability of a unitary group to deduct a net loss of an acquired corporation if the unitary group uses an apportionment method different than the apportionment method used by the acquired corporation prior to the date of



28 acquisition;

29 ▶ addresses the circumstances under which certain sales are considered to be made in
30 this state; and

31 ▶ makes technical changes.

32 **Monies Appropriated in this Bill:**

33 None

34 **Other Special Clauses:**

35 This bill has retrospective operation for taxable years beginning on or after January 1,
36 2008.

37 **Utah Code Sections Affected:**

38 AMENDS:

39 **59-7-110**, as last amended by Laws of Utah 1994, Chapter 83

40 **59-7-311**, as last amended by Laws of Utah 2005, Chapter 225

41 **59-7-318**, as last amended by Laws of Utah 1994, Chapter 83

42 **59-10-118**, as last amended by Laws of Utah 1995, Chapter 311



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

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

46 **59-7-110. Utah net losses -- Carryforwards and carrybacks.**

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

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

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

58 (3) The Utah net loss shall be carried to the earliest eligible year for which the Utah

59 taxable income before net loss deduction, minus Utah net losses from previous years which
60 were applied or required to be applied to offset income, is not less than zero.

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

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

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

68 (iii) in any event, the amount carried back from a taxable year beginning on or after
69 January 1, 1994, may not exceed \$1,000,000 in Utah taxable income for each corporate return
70 filed in a taxable year; any losses in excess of \$1,000,000 may be carried forward; and

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

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

77 (b) An acquired corporation may deduct its net losses incurred before the date of
78 acquisition against its separate income if the acquired corporation has continued to carry on a
79 trade or business substantially the same as that conducted before such acquisition.

80 (c) (i) Notwithstanding Subsection 59-7-311(5), a unitary group may deduct the net
81 losses of an acquired corporation described in Subsection (5)(b) as provided in Subsection
82 (5)(c)(ii) if:

83 (A) the acquired corporation described in Subsection (5)(b) is included on a combined
84 report as part of the unitary group; and

85 (B) the unitary group elects under Section 59-7-311 to calculate the fraction for
86 apportioning business income to this state using a method that is different than the method used
87 by the acquired corporation prior to the date of acquisition.

88 (ii) If the requirements of Subsection (5)(c)(i) are met, a unitary group may deduct the
89 net losses of an acquired corporation described in Subsection (5)(b) against the lesser of:

90 (A) the separate income of the acquired corporation calculated using the method of
91 apportioning business income to this state under Section 59-7-311 that the acquired corporation
92 used on the date the net losses were incurred; or

93 (B) the separate income of the acquired corporation calculated using the method of
94 apportioning business income to this state under Section 59-7-311 that the unitary group uses
95 for the current taxable year.

96 Section 2. Section **59-7-311** is amended to read:

97 **59-7-311. Method of apportionment of business income.**

98 (1) [AH] For a taxable year, all business income shall be apportioned to this state by
99 multiplying the business income by a fraction calculated as provided in Subsection (2).

100 [~~(2) The fraction described in Subsection (1) is calculated as follows:~~]

101 [~~(a) for a taxpayer that does not make an election authorized by Subsection (3):~~]

102 (2) Subject to the other provisions of this section, a taxpayer shall elect to calculate the
103 fraction for apportioning business income under this section for a taxable year using:

104 (a) the method described in Subsection (3)(a); or

105 (b) the method described in Subsection (3)(b) that is allowed for the taxable year.

106 (3) For purposes of Subsection (2):

107 (a) for any taxable year, a taxpayer may elect to calculate the fraction for apportioning
108 business income as follows:

109 (i) the numerator of the fraction is the sum of:

110 (A) the property factor as calculated under Section 59-7-312;

111 (B) the payroll factor as calculated under Section 59-7-315; and

112 (C) the sales factor as calculated under Section 59-7-317; and

113 (ii) the denominator of the fraction is three; [~~and~~] or

114 [~~(b) for a taxpayer that makes an election authorized by Subsection (3):~~]

115 (b) (i) for a taxable year beginning on or after January 1, 2006, but beginning on or
116 before December 31, 2008, a taxpayer may elect to calculate the fraction for apportioning
117 business income as follows:

118 [~~(i)~~] (A) the numerator of the fraction is the sum of:

119 [~~(A)~~] (I) the property factor as calculated under Section 59-7-312;

120 [~~(B)~~] (II) the payroll factor as calculated under Section 59-7-315; and

121 ~~[(C)] (III)~~ the product of:

122 ~~[(F)] (Aa)~~ the sales factor as calculated under Section 59-7-317; and

123 ~~[(H)] (Bb)~~ two; and

124 ~~[(i)] (B)~~ the denominator of the fraction is four[-];

125 ~~[(3)-(a)]~~ For purposes of Subsection (2) and subject to Subsection (3)(b), for taxable

126 years beginning on or after January 1, 2006, a taxpayer may elect to calculate the fraction for

127 apportioning business income under this section in accordance with Subsection (2)(b).]

128 ~~[(b)]~~ If a taxpayer makes the election described in Subsection (3)(a), the taxpayer may

129 not revoke the election for a period of five taxable years.]:

130 ~~(ii)~~ for the taxable year beginning on or after January 1, 2009, but beginning on or

131 before December 31, 2009, a taxpayer may elect to calculate the fraction for apportioning

132 business income as follows:

133 ~~(A)~~ the numerator of the fraction is the sum of:

134 ~~(I)~~ the property factor as calculated under Section 59-7-312;

135 ~~(II)~~ the payroll factor as calculated under Section 59-7-315; and

136 ~~(III)~~ the product of:

137 ~~(Aa)~~ the sales factor as calculated under Section 59-7-317; and

138 ~~(Bb)~~ four; and

139 ~~(B)~~ the denominator of the fraction is six;

140 ~~(iii)~~ for the taxable year beginning on or after January 1, 2010, but beginning on or

141 before December 31, 2010, a taxpayer may elect to calculate the fraction for apportioning

142 business income as follows:

143 ~~(A)~~ the numerator of the fraction is the sum of:

144 ~~(I)~~ the property factor as calculated under Section 59-7-312;

145 ~~(II)~~ the payroll factor as calculated under Section 59-7-315; and

146 ~~(III)~~ the product of:

147 ~~(Aa)~~ the sales factor as calculated under Section 59-7-317; and

148 ~~(Bb)~~ ten; and

149 ~~(B)~~ the denominator of the fraction is 12; and

150 ~~(iv)~~ for taxable years beginning on or after January 1, 2011, a taxpayer may elect to

151 calculate the fraction for apportioning business income as follows:

152 (A) the numerator of the fraction is the sales factor as calculated under Section
153 59-7-317; and

154 (B) the denominator of the fraction is one.

155 (4) (a) If a taxpayer elects to calculate the fraction for apportioning business income
156 using a method described in Subsection (3)(b):

157 (i) the election shall be made on or before the due date for filing the return for the
158 taxable year, including extensions; and

159 (ii) (A) for an election made in accordance with Subsections (3)(b)(i) through (iii), a
160 taxpayer may not revoke the election for that taxable year; or

161 (B) except as provided in Subsection (4)(b), for an election made in accordance with
162 Subsection (3)(b)(iv), a taxpayer may not revoke the election for a period of five taxable years.

163 (b) (i) If a taxpayer shows good cause, the commission may allow the taxpayer to
164 revoke an election made in accordance with Subsection (3)(b)(iv) before the five taxable year
165 period described in Subsection (4)(a)(ii)(B) expires.

166 (ii) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act,
167 the commission may make rules prescribing the circumstances under which a taxpayer may
168 revoke an election made in accordance with Subsection (3)(b)(iv) before the five taxable year
169 period described in Subsection (4)(a)(ii)(B) expires.

170 (5) If a taxpayer is allowed to carry forward or carry back an amount under any other
171 provision of this chapter, the taxpayer may carry forward or carry back that amount only if the
172 taxpayer's business income for the taxable year to which the amount is carried forward or
173 carried back is calculated using the same method described in Subsection (3) that the taxpayer
174 uses to calculate the amount that the taxpayer seeks to carry forward or carry back.

175 ~~[(c)]~~ (6) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking
176 Act, the commission may make rules:

177 (a) providing procedures for a taxpayer to make ~~the~~ an election described in
178 Subsection (3)(a)[-]; or

179 (b) to administer this section.

180 Section 3. Section **59-7-318** is amended to read:

181 **59-7-318. Sales considered to be in this state.**

182 ~~[Sales]~~ (1) (a) Subject to Subsection (1)(b) and except as provided in Subsection (2), a

183 sale of tangible personal property [are] is considered to be in this state if:

184 ~~[(+) (i) the tangible personal property is delivered or shipped to a purchaser[, other~~
185 ~~than the United States Government,]; and~~

186 (ii) the purchaser described in Subsection (1)(a)(i) is within this state [regardless of the
187 f.o.b. point or other conditions of the sale; or].

188 ~~[(2) the property is shipped from an office, store, warehouse, factory, or other place of~~
189 ~~storage in this state, and:]~~

190 ~~[(a) the purchaser is the United States Government; or]~~

191 ~~[(b) the taxpayer is not taxable in the state of the purchaser.]~~

192 (b) For purposes of Subsection (1)(a), the determination of whether a purchaser is
193 within this state shall be determined without regard to the free on board point or other
194 conditions of the sale.

195 (2) Notwithstanding Section 59-7-303, 59-7-305, or 59-7-319, a sale of tangible
196 personal property is not considered to be in this state if:

197 (a) the tangible personal property is shipped from:

198 (i) a factory within this state;

199 (ii) an office within this state;

200 (iii) a store within this state;

201 (iv) a warehouse within this state; or

202 (v) another place of storage within this state; and

203 (b) the taxpayer is not taxable in the state of the purchaser as determined under Section
204 59-7-305.

205 (3) Notwithstanding Section 59-7-319, a sale other than a sale of tangible personal
206 property is not considered to be in this state if the taxpayer is not taxable in the state of the
207 purchaser as determined under Section 59-7-305.

208 Section 4. Section **59-10-118** is amended to read:

209 **59-10-118. Division of income for tax purposes.**

210 (1) As used in this section unless the context otherwise requires:

211 (a) "Business income" means income arising from transactions and activity in the
212 regular course of the taxpayer's trade or business and includes income from tangible and
213 intangible property if the acquisition, management, and disposition of the property constitutes

214 integral parts of the taxpayer's regular trade or business operations.

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

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

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

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

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

224 (2) Any taxpayer having business income which is taxable both within and without this
225 state, shall allocate and apportion his net income as provided in this section.

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

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

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

232 (i) if and to the extent that the property is utilized in this state; or

233 (ii) in their entirety if the taxpayer's commercial domicile is in this state and the
234 taxpayer is not organized under the laws of or taxable in the state in which the property is
235 utilized.

236 (c) The extent of utilization of tangible personal property in a state is determined by
237 multiplying the rents and royalties by a fraction, the numerator of which is the number of days
238 of physical location of the property in the state during the rental or royalty period in the taxable
239 year and the denominator of which is the number of days of physical location of the property
240 everywhere during all rental or royalty periods in the taxable year. If the physical location of
241 the property during the rental or royalty period is unknown or unascertainable by the taxpayer,
242 tangible personal property is utilized in the state in which the property was located at the time
243 the rental or royalty payer obtained possession.

244 (5) (a) Capital gains and losses from sales of real property located in this state are

245 allocable to this state.

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

248 (i) the property had a situs in this state at the time of the sale; or

249 (ii) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in
250 the state in which the property had a situs.

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

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

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

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

257 or

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

260 (b) A patent is utilized in a state to the extent that it is employed in production,
261 fabrication, manufacturing, or other processing in the state or to the extent that a patented
262 product is produced in the state. If the basis of receipts from patent royalties does not permit
263 allocation to states or if the accounting procedures do not reflect states of utilization, the patent
264 is utilized in the state in which the taxpayer's commercial domicile is located.

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

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

273 [~~(10) Property owned by the taxpayer is valued at its original cost. Property rented by~~
274 ~~the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the~~
275 ~~annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from~~

276 subrentals.]

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

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

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

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

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

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

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

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

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

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

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

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

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

305 ~~[(17) If the allocation and apportionment provisions of this chapter do not fairly~~
306 ~~represent the extent of the taxpayer's business activity in this state, the taxpayer may petition~~

307 for or the commission may require, in respect of all or any part of the taxpayer's business
308 activity, if reasonable:]

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

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

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

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

315 Section 5. **Retrospective operation.**

316 This bill has retrospective operation for taxable years beginning on or after January 1,
317 2008.

Legislative Review Note

as of 11-15-07 4:14 PM

Office of Legislative Research and General Counsel

Fiscal Note**S.B. 28 - Apportionment of Business Income, Attributing Sales to the State,
and Deduction of Net Losses by a Unitary Group**

2008 General Session

State of Utah

State Impact

Enactment of this bill will decrease Education Fund revenue by \$5,000,000 in FY 2009 and by \$22,000,000 in FY 2010. When the provisions of the bill are fully phased in the loss to the Education will be approximately \$61,000,000.

	<u>FY 2008</u> <u>Approp.</u>	<u>FY 2009</u> <u>Approp.</u>	<u>FY 2010</u> <u>Approp.</u>	<u>FY 2008</u> <u>Revenue</u>	<u>FY 2009</u> <u>Revenue</u>	<u>FY 2010</u> <u>Revenue</u>
Education Fund	\$0	\$0	\$0	\$0	(\$5,000,000)	(\$22,000,000)
Total	\$0	\$0	\$0	\$0	(\$5,000,000)	(\$22,000,000)

Individual, Business and/or Local Impact

Business will benefit by being allowed to determine the best method of valuation. Unitary groups could also benefit by being allowed to deduct losses from income tax liabilities in certain instances.
