

Representative Wayne A. Harper proposes the following substitute bill:

1 **APPORTIONMENT OF BUSINESS INCOME, ATTRIBUTING**
2 **SALES TO THE STATE, AND DEDUCTION OF**
3 **NET LOSSES BY AN ACQUIRED CORPORATION**

4 2008 GENERAL SESSION

5 STATE OF UTAH

6 **Chief Sponsor: Howard A. Stephenson**

7 House Sponsor: Wayne A. Harper

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, the determination of
13 when certain sales are considered to be made in this state, and the calculation of a net
14 loss deduction by an acquired corporation.

15 **Highlighted Provisions:**

16 This bill:

- 17 ▶ allows a taxpayer to elect to apportion business income to the state on the basis of a
18 formula that weights the sales factor more heavily than the property or payroll
19 factors;
- 20 ▶ addresses a taxpayer's ability to make or revoke an election to use a particular
21 method for apportioning business income to the state;
- 22 ▶ addresses the calculation of a net loss deduction by an acquired corporation;
- 23 ▶ addresses the circumstances under which certain sales are considered to be made in
24 this state; and
- 25 ▶ makes technical changes.



26 **Monies Appropriated in this Bill:**

27 None

28 **Other Special Clauses:**

29 This bill has retrospective operation for taxable years beginning on or after January 1,
30 2008.

31 **Utah Code Sections Affected:**

32 AMENDS:

33 **59-7-110**, as last amended by Laws of Utah 1994, Chapter 83

34 **59-7-311**, as last amended by Laws of Utah 2005, Chapter 225

35 **59-7-318**, as last amended by Laws of Utah 1994, Chapter 83

36 **59-10-118**, as last amended by Laws of Utah 1995, Chapter 311



37
38 *Be it enacted by the Legislature of the state of Utah:*

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

40 **59-7-110. Utah net losses -- Carryforwards and carrybacks.**

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

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

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

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

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

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

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

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

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

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

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

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

77 (a) subject to Subsection (6)(e), calculating the sum of:

78 (i) subject to Subsection (6)(f), an amount determined by dividing the average value of
79 the acquired corporation's real and tangible personal property owned or rented and used in this
80 state during the taxable year by the average value of all of the unitary group's real and tangible
81 personal property owned or rented and used during the taxable year;

82 (ii) subject to Subsection (6)(f), an amount determined by dividing the total amount
83 paid in this state during the taxable year by the acquired corporation for compensation by the
84 total compensation paid everywhere by the unitary group during the taxable year; and

85 (iii) an amount determined by:

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

88 (B) if the unitary group elects to apportion business income to this state using a method
89 described in Subsections 59-7-311(3)(b)(i) through (iii), multiplying the amount calculated
90 under Subsection (6)(a)(iii)(A) by the same number by which the unitary group multiplies the
91 sales factor for the taxable year under Subsection 59-7-311(3)(b):

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

95 (i) for that taxable year; and

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

97 (c) multiplying the amount calculated under Subsection (6)(b) by the business income
98 of the unitary group for the taxable year that is subject to apportionment under Section
99 59-7-311; and

100 (d) calculating the sum of:

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

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

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

104 (B) nonbusiness loss allocable to this state.

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

109 (f) If a unitary group elects to apportion business income to this state using the method
110 described in Subsection 59-7-311(3)(b)(iv), the amounts determined under Subsections
111 (6)(a)(i) and (ii) shall be zero.

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

113 **59-7-311. Method of apportionment of business income.**

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

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

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

118 (2) Subject to the other provisions of this section, a taxpayer shall elect to calculate the

119 fraction for apportioning business income under this section for a taxable year using:

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

121 (b) the method described in Subsection (3)(b) in effect for the taxable year.

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

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

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

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

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

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

129 (ii) the denominator of the fraction is three; ~~and~~ or

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

131 (b) subject to Subsection (4)(a)(ii):

132 (i) for a taxable year beginning on or after January 1, 2006, but beginning on or before

133 December 31, 2008, a taxpayer may elect to calculate the fraction for apportioning business
134 income as follows:

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

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

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

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

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

140 ~~[(B)]~~ (Bb) two; and

141 ~~[(ii)]~~ (B) the denominator of the fraction is four~~[-];~~

142 ~~[(3) (a) For purposes of Subsection (2) and subject to Subsection (3)(b), for taxable~~
143 ~~years beginning on or after January 1, 2006, a taxpayer may elect to calculate the fraction for~~
144 ~~apportioning business income under this section in accordance with Subsection (2)(b).]~~

145 ~~[(b) If a taxpayer makes the election described in Subsection (3)(a), the taxpayer may~~
146 ~~not revoke the election for a period of five taxable years.]~~

147 (ii) for the taxable year beginning on or after January 1, 2009, but beginning on or
148 before December 31, 2009, a taxpayer may elect to calculate the fraction for apportioning
149 business income as follows:

150 (A) the numerator of the fraction is the sum of:
151 (I) the property factor as calculated under Section 59-7-312;
152 (II) the payroll factor as calculated under Section 59-7-315; and
153 (III) the product of:
154 (Aa) the sales factor as calculated under Section 59-7-317; and
155 (Bb) four; and
156 (B) the denominator of the fraction is six;
157 (iii) for the taxable year beginning on or after January 1, 2010, but beginning on or
158 before December 31, 2010, a taxpayer may elect to calculate the fraction for apportioning
159 business income as follows:
160 (A) the numerator of the fraction is the sum of:
161 (I) the property factor as calculated under Section 59-7-312;
162 (II) the payroll factor as calculated under Section 59-7-315; and
163 (III) the product of:
164 (Aa) the sales factor as calculated under Section 59-7-317; and
165 (Bb) ten; and
166 (B) the denominator of the fraction is 12; and
167 (iv) for taxable years beginning on or after January 1, 2011, a taxpayer may elect to
168 calculate the fraction for apportioning business income as follows:
169 (A) the numerator of the fraction is the sales factor as calculated under Section
170 59-7-317; and
171 (B) the denominator of the fraction is one.
172 (4) (a) For a taxpayer that elects to calculate the fraction for apportioning business
173 income to this state using a method described in Subsection (3)(b):
174 (i) the election shall be made on or before the due date for filing the return for the
175 taxable year, including extensions; and
176 (ii) (A) if the taxpayer makes an election to apportion business income to this state
177 using the method described in Subsection (3)(b)(i) beginning with a taxable year that begins on
178 or after January 1, 2006, but begins on or before December 31, 2007, the taxpayer may revoke
179 the election as provided in Subsection (4)(b); or
180 (B) if the taxpayer elects to apportion business income to this state using a method

181 described in Subsection (3)(b) beginning with a taxable year that begins on or after January 1,
182 2008:

183 (I) the taxpayer shall apportion business income to this state using the fraction
184 described in Subsection (3)(b) in effect for that taxable year; and

185 (II) subject to Subsection (4)(c), may not revoke that election.

186 (b) (i) A taxpayer that revokes an election under Subsection (4)(a)(ii)(A) shall make the
187 revocation:

188 (A) for the taxable year beginning on or after January 1, 2008, but beginning on or
189 before December 31, 2008; and

190 (B) on or before the due date for filing the return for the taxable year, including
191 extensions.

192 (ii) A taxpayer that revokes an election under Subsection (4)(a)(ii)(A):

193 (A) for the taxable year beginning on or after January 1, 2008, but beginning before
194 December 31, 2008, shall apportion business income to this state using the fraction described
195 in Subsection (3)(a); and

196 (B) for a taxable year beginning on or after January 1, 2009:

197 (I) may apportion business income to this state using the fraction described in
198 Subsection (3)(a); or

199 (II) subject to Subsection (4)(b)(iii), may elect to apportion business income to this
200 state using a method described in Subsection (3)(b).

201 (iii) For purposes of Subsection (4)(b)(ii)(B)(II), if a taxpayer elects to apportion
202 business income to this state using a method described in Subsection (3)(b):

203 (I) the taxpayer shall apportion business income to this state using the fraction
204 described in Subsection (3)(b) in effect for that taxable year; and

205 (II) subject to Subsection (4)(c), may not revoke that election.

206 (c) (i) If a taxpayer shows good cause, the commission may allow the taxpayer to
207 revoke an election made in accordance with Subsection (3)(b).

208 (ii) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act,
209 the commission may make rules prescribing the circumstances under which a taxpayer may
210 revoke an election made in accordance with Subsection (3)(b).

211 [(e)] (5) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking

212 Act, the commission may make rules:

213 (a) providing procedures for a taxpayer to make [the] an election described in

214 Subsection (3)[(a).] (b); or

215 (b) to administer this section.

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

217 **59-7-318. Sales considered to be in this state.**

218 [Sales] (1) (a) Subject to Subsection (1)(b) and except as provided in Subsection (2), a
219 sale of tangible personal property [are] is considered to be in this state if:

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

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

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

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

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

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

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

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

234 (i) a factory within this state;

235 (ii) an office within this state;

236 (iii) a store within this state;

237 (iv) a warehouse within this state; or

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

239 (b) the taxpayer is not taxable in the state of the purchaser as determined under Section
240 59-7-305.

241 (3) Notwithstanding Section 59-7-319, a sale other than a sale of tangible personal
242 property is not considered to be in this state if the taxpayer is not taxable in the state of the

243 purchaser as determined under Section 59-7-305.

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

245 **59-10-118. Division of income for tax purposes.**

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

247 (a) "Business income" means income arising from transactions and activity in the
248 regular course of the taxpayer's trade or business and includes income from tangible and
249 intangible property if the acquisition, management, and disposition of the property constitutes
250 integral parts of the taxpayer's regular trade or business operations.

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

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

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

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

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

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

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

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

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

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

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

272 (c) The extent of utilization of tangible personal property in a state is determined by
273 multiplying the rents and royalties by a fraction, the numerator of which is the number of days

274 of physical location of the property in the state during the rental or royalty period in the taxable
275 year and the denominator of which is the number of days of physical location of the property
276 everywhere during all rental or royalty periods in the taxable year. If the physical location of
277 the property during the rental or royalty period is unknown or unascertainable by the taxpayer,
278 tangible personal property is utilized in the state in which the property was located at the time
279 the rental or royalty payer obtained possession.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

336 ~~[(16) Sales, other than sales of tangible personal property, are in this state if:]~~
337 ~~[(a) the income-producing activity is performed in this state; or]~~
338 ~~[(b) the income-producing activity is performed both in and outside this state and a~~
339 ~~greater proportion of the income-producing activity is performed in this state than in any other~~
340 ~~state, based on costs of performance.]~~
341 ~~[(17) If the allocation and apportionment provisions of this chapter do not fairly~~
342 ~~represent the extent of the taxpayer's business activity in this state, the taxpayer may petition~~
343 ~~for or the commission may require, in respect of all or any part of the taxpayer's business~~
344 ~~activity, if reasonable:]~~
345 ~~[(a) separate accounting;]~~
346 ~~[(b) the exclusion of any one or more of the factors;]~~
347 ~~[(c) the inclusion of one or more additional factors which will fairly represent the~~
348 ~~taxpayer's business activity in this state; or]~~
349 ~~[(d) the employment of any other method to effectuate an equitable allocation and~~
350 ~~apportionment of the taxpayer's income.]~~

351 Section 5. **Retrospective operation.**

352 This bill has retrospective operation for taxable years beginning on or after January 1,
353 2008.