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Representative Wayne A. Harper proposes the following substitute bill:

APPORTIONMENT OF BUSINESS INCOME AND ATTRIBUTING SALES TO THE STATE

2008 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Howard A. Stephenson

House Sponsor: Wayne A. Harper

LONG TITLE

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 and the determination of when certain sales are considered to be made in this state.

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 the circumstances under which certain sales are considered to be made in this state; and
- makes technical changes.

Monies Appropriated in this Bill:

None

Other Special Clauses:

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

This bill coordinates with S.B. 136, Apportionment of Business Income and Deduction of Net Losses by an Acquired Corporation, by modifying substantive language.

Utah Code Sections Affected:

AMENDS:

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

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

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

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

Section 1. Section **59-7-311** is amended to read:

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

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

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

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

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

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

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

(3) For purposes of Subsection (2):

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[~~(II)~~] (Bb) two; and

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

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

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

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

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

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

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

(III) the product of:

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

(Bb) three; and

(B) the denominator of the fraction is five;

(iii) for the taxable year beginning on or after January 1, 2010, but beginning on or before December 31, 2010, a taxpayer may elect to calculate the fraction for apportioning business income as follows:

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

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

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

(III) the product of:

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

(Bb) 4-2/3; and

(B) the denominator of the fraction is 6-2/3; and

(iv) for the taxable year beginning on or after January 1, 2011, but beginning on or before December 31, 2011, a taxpayer may elect to calculate the fraction for apportioning business income as follows:

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

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

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

(III) the product of:

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

(Bb) eight; and

(B) the denominator of the fraction is ten;

(v) for the taxable year beginning on or after January 1, 2012, but beginning on or before December 31, 2012, a taxpayer may elect to calculate the fraction for apportioning business income as follows:

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

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

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

(III) the product of:

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

(Bb) 18; and

(B) the denominator of the fraction is 20; and

(vi) for taxable years beginning on or after January 1, 2013, a taxpayer may elect to calculate the fraction for apportioning business income as follows:

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

(B) the denominator of the fraction is one.

(4) (a) For a taxpayer that elects to calculate the fraction for apportioning business income to this state using a method described in Subsection (3)(b):

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

(ii) (A) if the taxpayer makes an election to apportion business income to this state using the method described in Subsection (3)(b)(i) beginning with a taxable year that begins on or after January 1, 2006, but begins on or before December 31, 2007, the taxpayer may revoke the election as provided in Subsection (4)(b); or

(B) if the taxpayer elects to apportion business income to this state using a method described in Subsection (3)(b) beginning with a taxable year that begins on or after January 1, 2008:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[~~(c)~~] (5) In accordance with Title 63, Chapter 46a, Utah Administrative Rulemaking Act, the commission may make rules:

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

(b) to administer this section.

Section 2. Section **59-7-318** is amended to read:

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

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

[~~(1)~~] (i) the tangible personal property is delivered or shipped to a purchaser[~~, other than the United States Government,~~]; and

(ii) the purchaser described in Subsection (1)(a)(i) is 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.~~]

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

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

(a) the tangible personal property is shipped from:

(i) a factory within this state;

(ii) an office within this state;

(iii) a store within this state;

(iv) a warehouse within this state; or

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

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

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

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

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

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

(a) "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 constitutes integral parts of the taxpayer's regular trade or business operations.

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

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

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

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

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

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

(3) 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, shall be allocated as provided in Subsections (4) through (7).

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

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

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

(ii) 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.

(c) 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.

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

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

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

(ii) 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.

(c) 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.

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

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

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

(ii) 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.

(b) 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.

(8) All business income shall 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~~] using the same methods, procedures, and requirements of Sections 59-7-311 through 59-7-320.

[~~(9) 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.~~]

[~~(10) 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.~~]

[~~(11) The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the commission 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.~~]

[~~(12) 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.~~]

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

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

[~~(b) 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~~]

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

[~~(i) 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~~]

[~~(ii) 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.~~]

[~~(14) 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.~~]

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

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

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

[~~(b) 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.~~]

[~~(17) 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 commission may require, in respect of all or any part of the taxpayer's business activity, if reasonable:~~]

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

[~~(b) the exclusion of any one or more 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 and apportionment of the taxpayer's income.~~]

Section 4. **Retrospective operation.**

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

Section 5. **Coordinating S.B. 28 with S.B. 136 -- Modifying substantive language.**

If this S.B. 28 and S.B. 136, Apportionment of Business Income and Deduction of Net Losses by an Acquired Corporation, both pass, it is the intent of the Legislature that the Office of Legislative Research and General Counsel, in preparing the Utah Code database for publication:

(1) modify Subsection 59-7-110(6)(a) in S.B. 136 to read:

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

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

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

(iii) an amount determined by:

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

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

(2) insert the following language as a new Subsection 59-7-110(6)(f) in S.B. 136:

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