

LEGISLATIVE BILL 872

Approved by the Governor April 10, 2012

Introduced by Hadley, 37; Cornett, 45; Mello, 5; Price, 3; Smith, 14.

FOR AN ACT relating to revenue and taxation; to amend sections 77-2734.04 and 77-2734.14, Reissue Revised Statutes of Nebraska; to change provisions relating to apportionment of income between states; to define and redefine terms; to provide an operative date; and to repeal the original sections.

Be it enacted by the people of the State of Nebraska,

Section 1. Section 77-2734.04, Reissue Revised Statutes of Nebraska, is amended to read:

77-2734.04 As used in sections 77-2734.01 to 77-2734.15, unless the context otherwise requires:

(1) Annual average amortized loan balance means the total of the ending monthly values in the tax year divided by the number of months in the tax year;

(2) Application service means computer-based services provided to customers over a network for a fee without selling, renting, leasing, licensing, or otherwise transferring computer software. Application service includes, but is not limited to, software as a service, platform as a service, or infrastructure as a service;

(3) Billing address means the location indicated in the books and records of the taxpayer as the address of record where the bill relating to the customer's account is mailed;

(4) Borrower located in this state means:

(a) A borrower who is engaged in a trade or business in this state;

or

(b) A borrower whose billing address is in this state, but is not engaged in a trade or business in this state;

(5) Buyer includes a buyer, licensee, user, or person providing consideration for the use of an item or service;

~~(1)~~ (6) Commercial domicile shall mean means the principal place from which the trade or business of the taxpayer is directed or managed;

(7) Communications company means any entity that:

(a) Is:

(i) A telecommunications company as defined in section 86-119 that provides a telecommunications service as defined in section 86-121 or provides broadband, Internet, or video services as defined in section 86-593;

(ii) A communications company that provides the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points, and includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether such service is referred to as a voice over Internet protocol service or is classified by the Federal Communications Commission as enhanced or value added. The company may also provide video programming provided by, or generally considered comparable to programming provided by, a television broadcast station, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Video programming includes, but is not limited to, cable service as defined in 47 U.S.C. 522 and video programming services delivered by providers of commercial mobile radio service, as defined in 47 C.F.R. 20.3;

(iii) A broadcast company that provides an over-the-air broadcast radio station or over-the-air broadcast television station; and

(b) Owns, operates, manages, or controls any plant or equipment used to furnish telecommunications service, communication services, broadband services, Internet service, or broadcast services directly or indirectly to the general public at large and derives at least seventy percent of its gross sales for the current taxable year from the provision of these services. For purposes of the seventy-percent test, gross sales does not include interest, dividends, rents, royalties, capital gains, or ordinary gains from asset dispositions, other than in the normal course of business;

~~(2)~~ (8) Compensation shall mean means wages, salaries, commissions, and any other form of remuneration paid to employees for personal services;

~~(3)~~ (9) Corporate taxpayer shall mean means any corporation that is not a part of a unitary business or the part of a unitary business, whether it

is one or more corporations, that is doing business in this state. Corporate taxpayer ~~shall~~ does not include any corporation that has a valid election under subchapter S of the Internal Revenue Code or any financial institution as defined in section 77-3801;

~~(4)~~ (10) Corporation shall mean means all corporations and all other entities that are taxed as corporations under the Internal Revenue Code;

(11) Credit card means a credit card, debit card, purchase card, charge card, and travel or entertainment card;

~~(5)~~ (12) Doing business in this state shall mean means the exercise of the corporation's franchise in this state or the conduct of operations in this state that exceed the limitations provided in 15 U.S.C. 381 on a state imposing an income tax;

~~(6)~~ (13) Federal taxable income shall mean means the corporate taxpayer's federal taxable income as reported to the Internal Revenue Service or as subsequently changed or amended. Except as provided in subsection (5) or (6) of section 77-2716, no adjustment shall be allowed for a change from any election made or the method used in computing federal taxable income. An election to file a federal consolidated return shall not require the inclusion in any unitary group of a corporation that is not a part of the unitary business;

(14) Intangible property means all personal property which is not tangible personal property and includes, but is not limited to, patents, copyrights, trademarks, trade names, service names, franchises, licenses, royalties, processes, techniques, formulas, and technical know-how but excludes money;

(15) Loan means any extension of credit resulting from direct negotiations between the taxpayer and its customer or the purchase, in whole or in part, of an extension of credit from another person. Loan includes participations, syndications, and leases treated as loans for federal income tax purposes. Loan does not include properties treated as loans under section 595 of the Internal Revenue Code prior to its repeal by Public Law 104-188, futures or forward contracts, options, notional principal contracts such as swaps, credit card receivables, including purchased credit card relationships, noninterest bearing balances due from depository institutions, cash items in the process of collection, federal funds sold, securities purchased under agreements to resell, assets held in a trading account, securities, interests in a real estate mortgage investment conduit or other mortgage-backed or asset-backed security, and other similar items;

(16) Loan secured by real property means a loan or other obligation which, at the time the original loan or obligation was incurred or during the current taxable year, was secured by real property. A loan secured by real property includes an installment sales contract for real property;

(17) Loan secured by tangible personal property means a loan or other obligation which, at the time the original loan or obligation was incurred or during the current taxable year, was secured by tangible personal property. A loan secured by tangible personal property includes an installment sales contract for tangible personal property;

(18) Loan servicing fee includes (a) fees or charges for originating and processing loan applications, including, but not limited to, prepaid interest and loan discounts, (b) fees or charges for collecting, tracking, and accounting for loan payments received, and (c) gross receipts from the sale of loan servicing rights;

(19) Participation means an extension of credit in which an undivided ownership interest is held on a pro rata basis in a single loan or pool of loans and related collateral;

~~(7)~~ (20) Sales shall mean means all gross receipts of the taxpayer, except:+

(a) Income from discharge of indebtedness;

(b) Amounts received from hedging transactions involving intangible assets; or

(c) Net gains from marketable securities held for investment;

~~(8)~~ (21) Single economic unit shall mean means a business in which there is a sharing or exchange of value between the parts of the unit. A sharing or exchange of value occurs when the parts of the business are linked by (a) common management or (b) common operational resources that produce material (i) economies of scale, (ii) transfers of value, or (iii) flow of goods, capital, or services between the parts of the unit.

(A) For the purposes of this subdivision, common management shall include, includes, but is not be limited to, (I) a centralized executive force or (II) review or approval authority over long-term operations with or without the exercise of control over the day-to-day operations.

(B) For the purposes of this subdivision, common operational

resources ~~shall include~~, includes, but is not be limited to, centralization of any of the following: Accounting, advertising, engineering, financing, insurance, legal, personnel, pension or benefit plans, purchasing, research and development, selling, or union relations;

~~(9)~~ (22) State shall mean means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof;

~~(10)~~ (23) Subject to the Internal Revenue Code shall mean means a corporation that meets the requirements of section 243 of the Internal Revenue Code in order for its distributions to qualify for the dividends-received deduction;

~~(11)~~ (24) Taxable income shall mean means federal taxable income as adjusted and, if appropriate, as apportioned;

~~(12)~~ (25) Taxable year shall mean means the period the corporate taxpayer used on its federal income tax return;

(26) Treasury function is the pooling, management, and investment of intangible assets to satisfy the cash-flow needs of the trade or business, including, but not limited to, providing liquidity for a taxpayer's business cycle, providing a reserve for business contingencies, or business acquisitions. A taxpayer principally engaged in the trade or business of purchasing and selling intangible assets of the type typically held in a taxpayer's treasury function, such as a registered broker-dealer, is not performing a treasury function with respect to income so produced;

~~(13)~~ (27) Unitary business shall mean means a business that is conducted as a single economic unit by one or more corporations with common ownership and shall include all activities in different lines of business that contribute to the single economic unit.

For the purposes of this subdivision, common ownership shall mean means one or more corporations owning fifty percent or more of another corporation; and

~~(14)~~ (28) Unitary group shall mean means the group of corporations that are conducting a unitary business.

Sec. 2. Section 77-2734.14, Reissue Revised Statutes of Nebraska, is amended to read:

77-2734.14 (1) 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 everywhere during the tax period.

(2) Sales of tangible personal property in this state include:

(a) Property delivered or shipped to a purchaser, other than the United States Government, within this state regardless of the f.o.b. point or other conditions of the sale;

(b) Property shipped from an office, store, warehouse, factory, or other place of storage in this state if (i) the purchaser is the United States Government or (ii) for all taxable years beginning or deemed to begin before January 1, 1995, under the Internal Revenue Code of 1986, as amended, the taxpayer is not taxable in the state of the purchaser;

(c) For all taxable years beginning or deemed to begin on or after January 1, 1995, and before January 1, 1996, under the Internal Revenue Code of 1986, as amended, two-thirds of the property shipped from an office, store, warehouse, factory, or other place of storage in this state if the taxpayer is not taxable in the state of the purchaser; or

(d) For all taxable years beginning or deemed to begin on or after January 1, 1996, but before January 1, 1997, under the Internal Revenue Code of 1986, as amended, one-third of the property shipped from an office, store, warehouse, factory, or other place of storage in this state if the taxpayer is not taxable in the state of the purchaser.

(3) For sales other than sales of tangible personal property, except for sales as described in subsection (4) of this section:

(a) Sales of a service are in this state if the sales are derived from a buyer within this state. Sales of a service are derived from a buyer within this state if:

(i) The service, when rendered, relates to real property located in this state;

(ii) The service, when rendered, relates to tangible personal property located in this state at the time the service is received;

(iii) The service, when rendered, is provided to an individual physically present in this state at the time the service is received; or

(iv) The service, when rendered, is provided to a buyer engaged in a trade or business in this state and relates to that part of the trade or business then operated in this state. For services described in this

subdivision, if the buyer uses the service within and without this state, calculated using any reasonable method, the sales are apportioned between the use in this state in proportion to the use of the service in this state and the other states;

(b) Sales of an application service are in this state if the buyer uses the application service in this state. The application service is used in this state if, the buyer, from a location in this state:

(i) Uses it in the regular course of business in this state; or

(ii) If the buyer is an individual, his or her billing address is in this state.

If the buyer is not an individual and uses the application service within and without this state, calculated using any reasonable method, the sales are apportioned between the use in this state in proportion to the use of the application service in this state and the other states. If the location of a sale cannot be determined, the sale of an application service is in the state from which the order was placed in the regular course of the customer's business. If that office cannot be determined, the sales are considered received at the customer's billing address;

(c) Sales of intangible property are in this state if the buyer uses the intangible property at a location in this state. If the buyer uses the intangible property within and without this state, the sales are apportioned between this state in proportion to the use of the intangible property in this state and the other states. If the location of a sale cannot be determined, the sale of intangible property is in this state if the buyer's billing address is in this state;

(d) Interest, dividends, investment income, and other net gains from transactions in intangible assets held in connection with a treasury function, other than net gains from the sale or redemption of marketable securities, are in this state to the extent that it is included in taxable income and to the extent the investment, management, and record-keeping activities associated with corporate investments occur in this state;

(e) Gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, secured by real property or tangible personal property are in this state if the property securing the loan is located in this state. If the real or tangible personal property securing the loan is located within and without this state, the gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, are based upon the ratio of the annual average amortized loan balance of a loan secured by the real property or tangible personal property located in this state to the annual average amortized loan balance of a loan secured by the real property or tangible personal property located within and without this state;

(f) Gross interest, fees, points, charges, and penalties from loans, net gains from the sale of loans, and loan servicing fees derived from loans owned by the taxpayer or another person, including servicing participations, that are not secured by real or tangible personal property are in this state if the borrower is located in this state, which location shall be presumed to be the borrower's billing address;

(g) Gross interest, fees, points, charges, and penalties from credit card receivables and gross receipts from annual fees and other fees charged to credit card holders are in this state if the billing address of the credit card holder is in this state;

(h) Net gains, but not less than zero, from the sale of credit card receivables are in this state if the billing address of the credit card holder is in this state;

(i) Gross receipts from the lease, rental, or licensing of tangible personal property are in this state to the extent the property is located in this state;

(j) Gross receipts from the sale, lease, rental, or licensing of real property are in this state if the real property is located in this state; and

(k) Sales other than sales of tangible personal property not specifically addressed in this subsection must be sourced so as to fairly represent the extent of the taxpayer's business activity in this state. This requirement will be considered met in the following situations: (i) If the buyer is an individual, a sale is deemed to have occurred at the buyer's billing address; and (ii) if the buyer is not an individual and the sale is from an order placed in the regular course of the customer's business, the sale is deemed to have occurred in the state from which the order was placed

and, if that place cannot be readily determined, the sale is deemed to have occurred at the customer's billing address.

(4) To continue the tax policy of this state which enhances the deployment of broadband in rural and underserved areas of this state, sales, other than sales of tangible personal property, of a communications company 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.

~~(3) 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.~~

Sec. 3. This act becomes operative for all taxable years beginning or deemed to begin on or after January 1, 2014, under the Internal Revenue Code of 1986, as amended.

Sec. 4. Original sections 77-2734.04 and 77-2734.14, Reissue Revised Statutes of Nebraska, are repealed.