

Emergency Rule
LSA Document #19-688(E)

DIGEST

Temporarily adds provisions to explain and implement the sourcing of receipts from the provision of services and other intangibles as contained in SEA 563-2019. Statutory authority: [IC 6-3-2-2](#). Effective January 1, 2019 (retroactive).

SECTION 1. (a) The definitions in this SECTION apply throughout this document.

(b) "MGAAR" means the Multistate Tax Commission Multistate General Allocation and Apportionment Regulations adopted February 21, 1973, and as amended through February 24, 2017, including Section 18(c) adopted July 25, 2018.

(c) "Airline rule" means the Special Rules: Airlines adopted by the Multistate Tax Commission as of July 14, 1983.

(d) "Construction contractor rule" means the Special Regulation: Construction Contractors adopted by the Multistate Tax Commission as of July 10, 1980.

(e) "Publishing rule" means the Special Rules: Publishing adopted by the Multistate Tax Commission as of July 30, 1993.

(f) "Railroad rule" means the Special Rules: Railroads adopted by the Multistate Tax Commission as of July 16, 1981.

(g) "Trucking rule" means the Special Rules: Trucking Companies adopted by the Multistate Tax Commission as of July 11, 1986, and as amended July 27, 1989.

SECTION 2. Any terms referenced in this document shall have the same meaning as provided in MGAAR Reg. IV.17.(a).(3) unless the context specifically requires otherwise.

SECTION 3. If a provision of this document lists multiple possible tests, the tests shall be applied as a hierarchy unless clearly indicated by the particular SECTION in this document. Such hierarchy shall be applied in the order by which the test is listed in the particular SECTION in this document. For instance, (a) is the first test, and if (a) cannot result in a determination of a state, then (b) is applied. However, if (d) states that (a) must be applied in a particular situation, then the test in (b) is disregarded for that particular situation.

SECTION 4. The provisions of this document shall not apply to the following:

- (1) Receipts from insurance premiums.**
- (2) Receipts from motorsports racing, including advertising that would otherwise be sourced under this document.**
- (3) Receipts from repatriated foreign dividends under Section 965 of the Internal Revenue Code or global low taxed intangible income under Section 951A of the Internal Revenue Code.**
- (4) Receipts from broadcast services.**
- (5) Receipts from telecommunications services.**
- (6) Receipts attributable under [IC 6-3-2-2.2](#).**

SECTION 5. Any provision of MGAAR that requires the exclusion of a receipt from a service because the taxpayer is not taxable in a jurisdiction shall be disregarded. However, the disregard for any such MGAAR provision shall not prevent the exclusion of receipts if:

- (1) the exclusion is specifically provided in [IC 6-3](#); or**
- (2) the receipts cannot be sourced to any jurisdiction under this document.**

For purposes of this document, if receipts can be attributed to a jurisdiction under this document but the taxpayer is not subject to tax in that jurisdiction, those receipts shall be treated as sourced to that jurisdiction.

SECTION 6. A receipt may only be excluded from the receipts denominator if and to the extent:

- (1) exclusion of the receipts is explicitly provided under [IC 6-3-2-2](#) or [IC 6-3-2-2.2](#); or
- (2) if the jurisdiction to which the receipts can be attributed cannot be determined after application of the provisions set forth below.

SECTION 7. Any provision of MGAAR that requires a reasonable approximation in the absence of information but which provides a specific methodology for the reasonable approximation shall be treated as if the specific methodology reflects the benefit of the intangible. However, if a substantial portion of the sales can be ascertained and the taxpayer or the department reasonably believes that the remaining sales follow the same geographic distribution as the ascertainable sales, the taxpayer or the department may attribute those remaining receipts in the same proportion as the ascertainable sales.

SECTION 8. In the case of a related party transaction, the information that the customer has that is relevant to sourcing the receipts of the taxpayer is imputed to the taxpayer.

SECTION 9. In the case of a sale, rental, lease, or license of real property, the receipts from the sale are in this state if and to the extent that the real property is in this state.

SECTION 10. In the case of a rental, lease, or license of tangible personal property, the following conditions apply:

- (1) The receipts from the sale are in this state if and to the extent that the property is in this state.
- (2) If property is mobile property that is located both within and without this state during the period of the lease or other contract, the receipts attributable to this state are the receipts from the contract period multiplied by the ratio of the time the property is used in this state to the time the property is used everywhere.
- (3) For purposes of this document, property in transit between locations of the customer shall be considered to be at the destination of the property.
- (4) The receipts from the rental, lease, or license of an automobile assigned to a traveling employee shall be included in the numerator of the factor of the state:
 - (A) to the extent to which the employee's compensation would be assigned under [IC 6-3-2-2\(c\)](#); or
 - (B) in the state in which the automobile is licensed if clause (A) cannot be ascertained.

SECTION 11. (a) For purposes of this document, "in-person services" means the services described in MGAAR Reg. IV.17.(d).(2)(A). However, the term shall not include legal, accounting, financial, consulting, architectural, engineering, or similar services described in MGAAR Reg. IV.17.(d).(4).

(b) If the service is performed with respect to the body of an individual customer in this state (e.g., hair cutting or x-ray services) or in the physical presence of the customer in this state (e.g., live entertainment or athletic performances), the benefit of the service is received in the state in which the service is performed. However, in the case where the service is provided remotely, the following apply:

- (1) If a service would be considered an in-person service but is offered remotely as opposed to in-person, the service is in this state if the person receiving the service is in this state. For purposes of determining whether a person is in this state, the taxpayer shall first make a reasonable effort to determine the state or states in which the service is received. If the taxpayer is unable to determine that state, then the receipts shall be sourced to the state from which the service was provided.
- (2) If a live entertainment event or athletic performance occurs in one (1) jurisdiction but a ticket or other admissions price is paid to simulcast the event or performance at a location in this state, the ticket or admissions price is in this state. This shall not apply to charges that would be considered broadcast services such as pay-per-view charges.

(c) If the service is performed with respect to the customer's real estate in this state or if the service is performed with respect to the customer's tangible personal property at the customer's residence or in the customer's possession in this state, the service is received in this state.

(d) If the service is performed with respect to the customer's tangible personal property and the tangible personal property is to be shipped or delivered to the customer, whether the service is performed within or outside this state, the service is received in this state if the property is shipped or delivered to the customer in this state.

SECTION 12. Services delivered to a customer by physical means shall be attributed to the extent the customer receives the benefit in Indiana, subject to the following conditions:

(1) In the case of mail, parcel, or similar delivery services of an item, the benefit shall be determined by the state to which the underlying item is delivered.

(2) In the case of services where an underlying product is to be delivered in one (1) or more states, the receipts from such services are attributable to this state in the proportion that the underlying product is apportioned to this state. This shall include, but is not limited to, the following:

(A) Products delivered to or on behalf of the customer.

(B) Delivery of brochures, fliers, or other direct mail services.

(3) In the case of advertising delivered by physical means, the benefit of the service shall be as follows:

(A) In the case of billboard or fixed place advertising, where the billboard or fixed place is located.

(B) In the case of advertising services by television, radio, Internet, or broadcast means, the receipts shall be sourced based on the intended audience. In the absence of actual information, the ratio can be determined based on the targeted population in this state to the targeted population in all states.

(C) In the case of advertising by mail, parcel, or similar delivery means, the advertising shall be sourced based on the delivery address to which the advertising is mailed.

SECTION 13. Services delivered to an individual customer by electronic transmission shall be sourced to Indiana if the customer receives the service in this state. In the absence of actual knowledge of the place of receipt, the taxpayer may source the receipts based on the customer's billing address.

SECTION 14. Services delivered to a business customer by electronic transmission shall be sourced to Indiana if and to the extent the employees or designees of the customer directly use the service in Indiana. If the taxpayer cannot determine the state or states in which the service is used, the taxpayer shall use the following to determine sourcing:

(1) If the taxpayer knows where the contract is principally managed by the customer, the receipts shall be sourced to that state.

(2) If the taxpayer cannot determine the state in subdivision (1), then the taxpayer shall source the receipts to the state where the customer's order was placed.

(3) If the taxpayer cannot determine the state in subdivision (1) or (2), then the taxpayer shall source the receipts to the state of the customer's billing address.

(4) Notwithstanding subdivisions (2) and (3), in the case that a taxpayer derives more than five percent (5%) of its receipts from the sale of services from any single customer and cannot reasonably determine where the service is used, the taxpayer must source any receipts according to subdivision (1).

(5) Notwithstanding subdivisions (1) through (3), if a taxpayer engages in substantially similar service transactions with more than two hundred fifty (250) customers and a particular customer does not meet the criteria described in subdivision (4), the taxpayer may source the receipts according to the billing address of the customer. However, the taxpayer may only use this rule for receipts under this subdivision if:

(A) the taxpayer cannot determine the state in which the service is used by the customer; and

(B) the taxpayer sources all such receipts according to this subdivision, other than those described in subdivision (4) or that the taxpayer can determine the state in which the service is used by the customer.

(6) If a sale under this SECTION is made to a related party, the taxpayer shall source the receipts as provided in this SECTION; however, if the taxpayer cannot determine the state or states in which the service is used, the taxpayer must attribute the receipts based on the related party's ratio of sales to Indiana to sales to all jurisdictions.

SECTION 15. For purposes of SECTIONS 13 and 14 of this document, if the taxpayer is unable to determine if a taxpayer is an individual customer or a business customer, the taxpayer shall treat the receipts as being attributable to a business customer.

SECTION 16. In the case of services delivered electronically through or on behalf of an individual or business customer, the receipts are sourced to this state to the extent that the end users or other intended recipients of the service are in this state, subject to the following conditions:

(1) For purposes of this document, a service is delivered "on behalf of" a customer if:

(A) a customer contracts for electronic delivery of a service; and

(B) the recipient of the service is a third party.

(2) A service is delivered "through" a customer to third party recipients only if the service is delivered to the customer for purposes of resale in substantially identical form to end users or third party

recipients.

(3) If a taxpayer selling advertising lacks specific information regarding the intended recipients in a particular state but has (or can reasonably obtain) a known list of subscribers for the advertising service, the taxpayer may use the total number of subscribers in a specific geographic area where the advertising is to be provided. In the absence of information regarding intended audience or known subscribers, the ratio of the intended population in Indiana to the total population in the intended geographic area shall be used to determine the portion of receipts attributable to Indiana.

SECTION 17. In the case of professional services provided to an individual customer, the receipts from such services shall be sourced to the customer's state of primary residence, subject to the following conditions:

- (1) If the taxpayer cannot reasonably identify the customer's state of primary residence, then the taxpayer shall source the receipts to the customer's billing address.
- (2) Notwithstanding subdivision (1), if a taxpayer receives more than five percent (5%) of its service receipts from an individual customer, the taxpayer shall identify the customer's state of primary residence and source the receipts to that location.

SECTION 18. In the case of professional services provided to a business customer, the receipts from such service shall be sourced as follows:

- (1) With regard to professional services provided with regard to real or tangible personal property, including, but not limited to, architectural and engineering services, the location of the real or tangible personal property.
- (2) For other professional services, to the state from which the contract is principally managed.
- (3) If the state in subdivision (2) cannot be determined, then the state of the customer's place of order.
- (4) If the state in subdivision (2) or (3) cannot be determined, then the state of the customer's billing address.
- (5) Notwithstanding subdivision (3) or (4), if a taxpayer receives five percent (5%) or more of its receipts from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.
- (6) Notwithstanding any other provision of this document, in the event of professional services provided to a related party, the portion of the taxpayer's services in Indiana shall be in proportion to the related party's receipts from Indiana to the related party's receipts from all jurisdictions.

SECTION 19. In the case of the license or lease of intangible property, the receipts are attributable to this state to the extent the intangible is used in this state, subject to the following conditions:

- (1) A license of intangible property that conveys all substantial rights in the intangible property shall be treated and sourced as a sale of intangible property as provided in SECTION 20 of this document.
- (2) Intangible property licensed as part of the sale or lease of tangible personal property shall be treated as the sale or lease of tangible personal property and attributed in the same manner as the associated tangible personal property.
- (3) In the case of a marketing intangible, the receipts from the marketing intangible are to be attributed as follows:
 - (A) If and to the extent that the taxpayer has actual evidence of the portion of the receipts attributable to this state, the receipts shall be attributed in that proportion.
 - (B) If the taxpayer does not have the information necessary to determine the proportion under clause (A), then the proportion shall be determined based on the proportion of the population in the geographic area in this state as compared to the population of the entire geographic area of the intended market.
 - (C) In the case of the use of a marketing intangible regarding wholesale sales or transfers, the portion of the receipts attributable to this state shall be determined based on the geographic area where the product is ultimately marketed. The proportion shall be the population in the geographic area in this state as compared to the population of the entire geographic area.
 - (D) For purposes of this provision, a marketing intangible shall include, without limitation, the license of the following:
 - (i) A service mark.
 - (ii) A trademark.
 - (iii) A trade name.
 - (iv) A copyright.
 - (v) A license of a film, television, or multimedia production or event for commercial distribution, provided that such receipts are not considered to be from telecommunications services or

broadcast services.

(vi) A franchise agreement.

(4) In the case of receipts from the licensing of rights to use intangible goods other than in connection with the sale, lease, license, or other marketing of goods, services, or other items, and the license is to be used in a production capacity (hereinafter referred to as a "production intangible"), the licensing fees shall generally be sourced as follows:

(A) If the licensee is not a related party, to the state in which the licensee uses the intangible, if this is known or reasonably should be known to the taxpayer. However, if that state is not known or if that state cannot be determined then:

(i) to the state of the licensee's commercial domicile, if the licensee is a business; or

(ii) to the state of the licensee's primary residence, if the licensee is an individual.

(B) If the licensee is a related party, to the state in which the manufacturing or production process takes place.

(5) If a license of intangible property includes both a marketing intangible and a production intangible, the receipts shall be sourced as follows:

(A) If the amounts are separately and reasonably stated in the licensing contract, the amounts so stated shall be sourced separately.

(B) If the amounts are not separately stated or the separate statement is unreasonable, the receipts shall be treated and sourced as the licensing of a marketing intangible unless, and only to the extent, either the department or the taxpayer can reasonably establish that an amount represents a production intangible.

(6) If the license of intangible property resembles the sale of an electronically delivered good or service, the receipts from the intangible shall be sourced in the same manner as the electronically delivered good or service. This shall include licenses for which the customer intends to resell the good or service in a substantially identical form to end users or other recipients.

SECTION 20. For a sale or exchange of intangible property, the following conditions apply:

(1) In the case of a sale or exchange of property where the property is a contract right, government license, or similar intangible property that authorizes the holder to conduct a business activity in a specific geographic area, the receipts are assigned if and to the extent the property is used in this state.

(2) In the case of a sale where the receipts depend on the productivity, use, or disposition of the intangible property, the sale shall be sourced in the manner prescribed in SECTION 19 of this document.

(3) In the case of receipts from the sale of intangible property that resembles the sale of goods and services, the receipt shall be sourced in the same manner as the sale of the underlying good or service.

(4) Any other receipts from the sale or disposition of intangible property shall be excluded from both the numerator and denominator for apportionment purposes.

SECTION 21. For receipts from the provision of airline transportation, the receipts shall be attributed to Indiana in the ratio of departures from Indiana, measured by value and cost of the aircraft, to the departures from all jurisdictions measured by value of cost of the aircraft. For purposes of this document, the following conditions apply:

(1) The value and cost of the aircraft will be determined for each departure. Thus, a plane making six (6) Indiana departures and thirty (30) total departures in which receipts would otherwise be counted will have the value and cost of the plane included in the numerator six (6) times and the denominator thirty (30) times. However, if the plane was operated by a foreign operating company, with seven (7) of those flights occurring outside the United States, those seven (7) flights would not be included in the receipts denominator.

(2) If a taxpayer operates multiple aircraft of a particular type that are ready for flight, the taxpayer may use the average cost or value of such aircraft.

(3) For purposes of this document, if an aircraft is both owned and operated by a taxpayer, the value and cost of the aircraft shall be the original basis of the property for federal income tax purposes at the time of acquisition, adjusted by any subsequent capital additions or improvements to the property and by any partial disposition of the property. If the property is not acquired by purchase, the property shall be valued otherwise in accordance with MGAAR IV.11.(a).

(4) For an aircraft leased or rented by an operator, the value and cost of the aircraft shall be eight (8) times the net annual rental rate, as determined under MGAAR IV.11.(b), including exceptions for subrentals, negative net rental rates, and nominal rental rates.

(5) Any other matter not specifically addressed shall be determined in the manner provided by the

airline rule.

SECTION 22. For receipts from the provision of railroad transportation, the following conditions apply:

- (1) The attribution of receipts from the transportation of passengers and the transportation of freight and other tangible personal property shall be determined separately. However, if tangible personal property is handled in passenger service, the receipts from the transportation of such tangible personal property shall be considered to be from the transportation of passengers.
- (2) Receipts from intrastate transportation, whether in this state or any other state, shall be determined separately from receipts from interstate transportation.
- (3) Receipts from the transportation of passengers or property shall be determined as follows:
 - (A) All the receipts from transportation that originates and terminates at a point in Indiana shall be considered as being from this state.
 - (B) In the case of receipts from interstate transportation of passengers or property, the receipts shall be in this state determined by the ratio of miles traveled in this state to the total miles traveled everywhere.
- (4) Any other matter not specifically addressed shall be determined in the manner provided by the railroad rule.

SECTION 23. For receipts from the provision of trucking or transportation services of tangible personal property, the following conditions apply:

- (1) All the receipts from transportation that originates and terminates at a point in Indiana shall be considered as being from this state.
- (2) In the case of receipts from interstate transportation, the receipts shall be in this state determined by the ratio of miles traveled in this state to the total miles traveled everywhere.
- (3) Any other matter not specifically addressed shall be determined in the manner provided by the trucking rule.

SECTION 24. For receipts from construction contracts, the receipts from such contracts are in this state if the construction project is in this state, subject to the following conditions:

- (1) If the project is located partly within this state and partly outside this state, the portion in this state shall be equal to the proportion of construction costs incurred in this state during the period for which the receipts are to be otherwise included.
- (2) In general, receipts shall be considered to be received if, and to the extent, the receipts are included in income for federal income tax purposes.
- (3) If a taxpayer uses a completed contract method of accounting and the taxpayer ceases doing business in this state prior to completion of the contract, the receipts and income from the contract up to the date of the taxpayer's cessation of business shall be included in the taxpayer's receipts and income during the last year in which the taxpayer is doing business in Indiana.
- (4) Any other matter not specifically addressed shall be determined in the manner provided by the construction contractor rule.

SECTION 25. For newspaper and magazine publishers, the following conditions apply:

- (1) For receipts from the sales of magazines and newspapers by digital means, the receipts attributable to such sales are in this state if the purchaser is in this state.
- (2) Receipts from advertising are in this state based on the ratio of subscribers in this state to subscribers in all states. If advertising is intended to reach only a specified geographic area, then the receipts should be attributed based on the ratio of subscribers in this state in the specified geographic area to all subscribers in that specified geographic area.
- (3) Receipts from the sale of customer lists or similar subscriber data are in this state based on the ratio of subscribers in the list or data in Indiana compared to all subscribers in the list or data.

SECTION 26. For receipts from lottery or gambling, the following conditions apply:

- (1) For a person receiving gambling winnings, such as a lottery ticket purchaser or a player at a casino, the receipts from gambling winnings shall be sourced to this state if the gambling winnings are the result of the following:
 - (A) A lottery ticket or equivalent purchased from a location in Indiana, regardless of whether the contest is conducted solely in Indiana or in conjunction with another jurisdiction.
 - (B) Wagers at a casino, horse track, sports betting facility, or similar operation conducted at a physical location in this state and from which the wager is placed in person at the location of the operator in this state.

(C) Gambling conducted through Internet, telephone, or other remote means, if the person placing the wager is in this state.

(2) For an operator of a casino, horse racing track, sports betting facility, or similar operation, the following applies:

(A) Gambling receipts from the conduct of in-person gambling, horse racing, sports betting, or similar operations at a physical location in this state are considered to be receipts attributable to this state.

(B) In the case of gambling conducted through Internet, telephone, or other remote means, receipts are in this state if the person placing the wager is in this state.

(C) For purposes of clauses (A) and (B), receipts from gambling activities shall equal the portion of wagers, gross receipts, or adjusted gross receipts that would be subject to tax if the activity had been conducted in Indiana.

SECTION 27. Receipts from the sale, exchange, or assignment of tax credits, or from the refundable portion of a tax credit includible as income for federal tax purposes are in this state if:

(1) the tax credit is for a tax imposed by this state or by or on behalf of a political subdivision of this state; or

(2) the tax credit is a federal tax credit and the credit is earned by doing business in Indiana.

SECTION 28. Receipts described in [IC 6-5.5-4-3](#) through [IC 6-5.5-4-13](#) are attributable to this state in the same manner as provided in those sections except as specifically provided in this document, [IC 6-3-2-2](#), or [IC 6-3-2-2.2](#).

SECTION 29. This document expires _____ 2020.

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