

LEGISLATURE OF NEBRASKA

ONE HUNDRED SECOND LEGISLATURE

SECOND SESSION

LEGISLATIVE BILL 872

Introduced by Hadley, 37; Cornett, 45; Mello, 5.

Read first time January 06, 2012

Committee: Revenue

A BILL

1 FOR AN ACT relating to revenue and taxation; to amend sections
2 77-2734.04 and 77-2734.14, Reissue Revised Statutes of
3 Nebraska; to change provisions relating to apportionment
4 of income between states; to define terms; to provide an
5 operative date; and to repeal the original sections.
6 Be it enacted by the people of the State of Nebraska,

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

3 77-2734.04 As used in sections 77-2734.01 to 77-2734.15,
4 unless the context otherwise requires:

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

8 (2) Application service means computer-based services
9 provided to customers over a network for a fee without selling,
10 renting, leasing, licensing, or otherwise transferring computer
11 software, including, but not limited to, software as a service,
12 platform as a service, or infrastructure as a service;

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

16 (4) Borrower located in this state means:

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

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

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

23 ~~(1)~~ (6) Commercial domicile shall mean means the
24 principal place from which the trade or business of the taxpayer is
25 directed or managed;

1 ~~(2)~~(7) Compensation ~~shall mean~~ means wages, salaries,
2 commissions, and any other form of remuneration paid to employees for
3 personal services;

4 ~~(3)~~(8) Corporate taxpayer ~~shall mean~~ means any
5 corporation that is not a part of a unitary business or the part of a
6 unitary business, whether it is one or more corporations, that is
7 doing business in this state. Corporate taxpayer ~~shall~~ does not
8 include any corporation that has a valid election under subchapter S
9 of the Internal Revenue Code or any financial institution as defined
10 in section 77-3801;

11 ~~(4)~~(9) Corporation ~~shall mean~~ means all corporations and
12 all other entities that are taxed as corporations under the Internal
13 Revenue Code;

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

16 (11) Credit card issuer's reimbursement fee means the fee
17 that a taxpayer receives in exchange for funding and incurring the
18 risk associated with a credit or debit card transaction;

19 ~~(5)~~(12) Doing business in this state ~~shall mean~~ means
20 the exercise of the corporation's franchise in this state or the
21 conduct of operations in this state that exceed the limitations
22 provided in 15 U.S.C. 381 on a state imposing an income tax;

23 ~~(6)~~(13) Federal taxable income ~~shall mean~~ means the
24 corporate taxpayer's federal taxable income as reported to the
25 Internal Revenue Service or as subsequently changed or amended.

1 Except as provided in subsection (5) or (6) of section 77-2716, no
2 adjustment shall be allowed for a change from any election made or
3 the method used in computing federal taxable income. An election to
4 file a federal consolidated return shall not require the inclusion in
5 any unitary group of a corporation that is not a part of the unitary
6 business;

7 (14) Intangible property includes, but is not limited to,
8 patents, copyrights, trademarks, trade names, service names,
9 franchises, licenses, royalties, processes, techniques, formulas, and
10 technical know-how;

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

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

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

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

17 (19) Merchant discount means the fee or negotiated
18 discount that is charged to a merchant for accepting a credit card as
19 payment for merchandise or services that are sold to the credit card
20 holder;

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

24 ~~(7)-(21) Sales shall mean means~~ all gross receipts of the
25 taxpayer, except: †

1 (a) Income from discharge of indebtedness; or
2 (b) Amounts received from hedging transactions involving
3 intangible assets;

4 ~~(8)-(22)~~ Single economic unit ~~shall mean~~ means a business
5 in which there is a sharing or exchange of value between the parts of
6 the unit. A sharing or exchange of value occurs when the parts of the
7 business are linked by (a) common management or (b) common
8 operational resources that produce material (i) economies of scale,
9 (ii) transfers of value, or (iii) flow of goods, capital, or services
10 between the parts of the unit.

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

16 (B) For the purposes of this subdivision, common
17 operational resources ~~shall include,~~ includes, but is not ~~be~~-limited
18 to, centralization of any of the following: Accounting, advertising,
19 engineering, financing, insurance, legal, personnel, pension or
20 benefit plans, purchasing, research and development, selling, or
21 union relations;

22 ~~(9)-(23)~~ State ~~shall mean~~ means any state of the United
23 States, the District of Columbia, the Commonwealth of Puerto Rico,
24 any territory or possession of the United States, and any foreign
25 country or political subdivision thereof;

1 ~~(10)~~(24) Subject to the Internal Revenue Code ~~shall mean~~
2 means a corporation that meets the requirements of section 243 of the
3 Internal Revenue Code in order for its distributions to qualify for
4 the dividends-received deduction;

5 ~~(11)~~(25) Taxable income ~~shall mean~~ means federal taxable
6 income as adjusted and, if appropriate, as apportioned;

7 ~~(12)~~(26) Taxable year ~~shall mean~~ means the period the
8 corporate taxpayer used on its federal income tax return;

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

18 ~~(13)~~(28) Unitary business ~~shall mean~~ means a business
19 that is conducted as a single economic unit by one or more
20 corporations with common ownership and shall include all activities
21 in different lines of business that contribute to the single economic
22 unit.

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

1 ~~(14)~~(29) Unitary group ~~shall mean~~means the group of
2 corporations that are conducting a unitary business.

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

5 77-2734.14 (1) The sales factor is a fraction, the
6 numerator of which is the total sales of the taxpayer in this state
7 during the tax period, and the denominator of which is the total
8 sales everywhere during the tax period.

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

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

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

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

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

7 (3) For sales other than tangible personal property:

8 (a) Sales of services are in this state if the sales are
9 derived from buyers within this state. Sales of services are derived
10 from buyers within this state if:

11 (i) The service relates to real property located in this
12 state;

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

15 (iii) The service relates to tangible personal property
16 delivered directly or indirectly to customers in this state;

17 (iv) The service is provided to an individual physically
18 present in this state at the time the service is received;

19 (v) The service is provided to a buyer engaged in a trade
20 or business in this state and relates to that trade or business; or

21 (vi) The service is provided to a location within this
22 state;

23 (b) Sales of an application service are in this state if
24 the buyers use the application service in this state. The application
25 service is used in this state if, the buyers, from a location in this

1 state:

2 (i) Use it in the regular course of business in this
3 state; or

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

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

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

23 (d) Interest, dividends, investment income, net gains
24 from the sale or redemption of marketable securities, and other
25 amounts received from transactions in intangible assets held in

1 connection with a treasury function are in this state to the extent
2 that it is included in taxable income and the investment, management,
3 and record-keeping activities associated with corporate investments
4 occur in this state;

5 (e) Gross interest, fees, points, charges, and penalties
6 from loans, net gains from the sale of loans, and loan servicing fees
7 derived from loans owned by the taxpayer or another person, including
8 servicing participations, secured by real property or tangible
9 personal property are in this state if the property securing the loan
10 is located in this state. If the real or tangible personal property
11 securing the loan is located within and without this state, the gross
12 interest, fees, points, charges, and penalties from loans, net gains
13 from the sale of loans, and loan servicing fees derived from loans
14 owned by the taxpayer or another person, including servicing
15 participations, are based upon the ratio of the annual average
16 amortized loan balance of a loan secured by the real property or
17 tangible personal property located in this state to the annual
18 average amortized loan balance of a loan secured by the real property
19 or tangible personal property located without this state;

20 (f) Gross interest, fees, points, charges, and penalties
21 from loans, net gains from the sale of loans, and loan servicing fees
22 derived from loans owned by the taxpayer or another person, including
23 servicing participations, that are not secured by real or tangible
24 personal property are in this state if the borrower is located in
25 this state;

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

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

8 (i) The taxpayer's credit card issuer's reimbursement
9 fees are in this state if the billing address of the credit card
10 holder is in this state;

11 (j) Gross receipts from merchant discount are in this
12 state if the merchant's trade or business is located in this state.
13 If the merchant's trade or business is located within and without
14 this state, only receipts from merchant discounts on sales made
15 within this state are included in this state. If the location of a
16 sale cannot be determined, the merchant discount on the sale is in
17 this state if the merchant's billing address is in this state. The
18 gross receipts are computed net of any credit card holder charge
19 backs, but may not be reduced by any interchange transaction fees or
20 by any issuer's reimbursement fees paid to another for charges made
21 by its credit card holders; and

22 (k) Sales other than sales of tangible personal property
23 not specifically addressed in this subsection must be sourced so as
24 to fairly represent the extent of the taxpayer's business activity in
25 this state. If the buyer is an individual, the sale or use is deemed

1 to have occurred in this state if the buyer's billing address is in
2 this state. If the buyer is a business entity, the sale or use is
3 deemed to have occurred in the state from which the order was placed
4 in the regular course of the customer's business. If that place
5 cannot be determined, the sale is considered received at the
6 customer's billing address.

7 ~~(3) Sales, other than sales of tangible personal~~
8 ~~property, are in this state if:~~

9 ~~(a) The income producing activity is performed in this~~
10 ~~state; or~~

11 ~~(b) The income producing activity is performed both in~~
12 ~~and outside this state and a greater proportion of the income-~~
13 ~~producing activity is performed in this state than in any other~~
14 ~~state, based on costs of performance.~~

15 Sec. 3. This act becomes operative for all taxable years
16 beginning or deemed to begin on or after January 1, 2013, under the
17 Internal Revenue Code of 1986, as amended.

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