



ADMINISTRATIVE RULES OF MONTANA



42.26.248 NUMERATOR OF RECEIPTS FACTOR - SALE OF A SERVICE

- (1) The receipts from a sale of a service are in Montana if and to the extent that the service is delivered to a location in Montana. In general, the term "delivered to a location" refers to the location of the taxpayer's market for the service, which may not be the location of the taxpayer's employees or property. The methods to determine the location of the delivery of service in the context of several specific types of service transactions are set forth in this rule.
- (2) In-person services.
 - (a) Except as otherwise provided in this rule, in-person services are services that are physically provided in person by the taxpayer, where the customer or the customer's real or tangible property upon which the services are performed is in the same location as the service provider at the time the services are performed. This includes situations where the services are provided on behalf of the taxpayer by a third-party contractor. Examples of in-person services include, without limitation, warranty and repair services; cleaning services; plumbing services; carpentry; construction contractor services; pest control; landscape services; medical and dental services including medical testing, x-rays, and mental health care and treatment; child care; haircutting and salon services; live entertainment and athletic performances; and in-person training or lessons. In-person services include services within the description above that are performed at a location that is owned or operated by the service provider or a location of the customer, including the location of the customer's real or tangible personal property. Various professional services, including legal, accounting, financial, and consulting services, and other similar services, although they may involve some amount of in-person contact, are not treated as in-person services within the meaning of this rule.
 - (b) Method of determination. Except as otherwise provided, if the service provided by the taxpayer is an in-person service, the service is delivered to the location where the service is received. Therefore, the receipts from a sale are in Montana if and to the extent the customer receives the in-person service in Montana. In assigning its receipts from sales of in-person services, a taxpayer must first attempt to determine the location where a service is received as follows:
 - (i) If the service is performed with respect to the body of an individual customer in Montana (i.e., haircutting or x-ray services) or in the physical presence of the customer in Montana (i.e., live entertainment or athletic performances), the service is received in Montana.
 - (ii) If the service is performed with respect to the customer's real estate in Montana 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 Montana, the service is received in Montana.

- (iii) 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 Montana, the service is received in Montana if the property is shipped or delivered to the customer in Montana.
 - (c) Method of reasonable approximation. In an instance in which the state or states where a service is actually received cannot be determined, but the taxpayer has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, the taxpayer shall reasonably approximate such state or states. If the state to which the receipts are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor.
- (3) Services delivered to the customer or on behalf of the customer, or delivered electronically through the customer.
- (a) If the service provided by the taxpayer is not an in-person service within the meaning of (2) above, or a professional service within the meaning of (4) below, and the service is delivered to or on behalf of the customer, or delivered electronically through the customer, the receipts from a sale are in Montana if and to the extent that the service is delivered in Montana. For purposes of this rule, a service that is delivered "to" a customer is a service in which the customer and not a third party is the recipient of the service. A service that is delivered "on behalf of" a customer is one in which a customer contracts for a service but one or more third parties, rather than the customer, is the recipient of the service, such as fulfillment services, or the direct or indirect delivery of advertising to the customer's intended audience. A service can be delivered to or on behalf of a customer by physical means or through electronic transmission. A service that is delivered electronically "through" a customer is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to an end user or other third-party recipient.
 - (b) Assignment of receipts. The assignment of receipts to a state or states in the instance of a sale of a service that is delivered to the customer or on behalf of the customer, or delivered electronically through the customer, depends upon the method of delivery of the service and nature of the customer. Separate methods of assignment apply to services delivered by physical means and services delivered by electronic transmission (for purposes of this rule, a service delivered by an electronic transmission is not a delivery by a physical means). If a method of assignment set forth in this rule depends on whether the customer is an individual or a business customer, and the taxpayer acting in good faith cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. If the state to which the receipts from a sale are to be assigned can be determined or reasonably approximated, but the taxpayer is not taxable in that state, the receipts that would otherwise be assigned to that state are excluded from the denominator of the taxpayer's receipts factor.
 - (i) Delivery to or on behalf of a customer by physical means whether to an individual or business customer. Services delivered to a customer or on behalf of a customer

through a physical means include, for example, product delivery services where property is delivered to the customer or to a third party on behalf of the customer; the delivery of brochures, fliers, or other direct mail services; the delivery of advertising or advertising-related services to the customer's intended audience in the form of a physical medium; and the sale of custom software (i.e., where software is developed for a specific customer in a case where the transaction is properly treated as a service transaction for purposes of corporate taxation) where the taxpayer installs the custom software at the customer's site. This rule applies whether the taxpayer's customer is an individual customer or a business customer.

- (A) Method of determination. In assigning the receipts from a sale of a service delivered to a customer or on behalf of a customer through a physical means, a taxpayer must first attempt to determine the state or states where the service is delivered. If the taxpayer is able to determine the state or states where the service is delivered, it shall assign the receipts to that state or states.
 - (B) Method of reasonable approximation. If the taxpayer cannot determine the state or states where the service is actually delivered, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the service is delivered, it shall reasonably approximate the state or states.
- (ii) Delivery to a customer by electronic transmission. Services delivered by electronic transmission include, without limitation, services that are transmitted through the means of wire, lines, cable, fiber optics, electronic signals, satellite transmission, audio or radio waves, or other similar means, whether or not the service provider owns, leases, or otherwise controls the transmission equipment. In the case of the delivery of a service by electronic transmission to a customer, the following principles apply.
 - (A) Services delivered by electronic transmission to an individual customer.
 - (I) Method of determination. In the case of the delivery of a service to an individual customer by electronic transmission, the service is delivered in Montana if and to the extent that the taxpayer's customer receives the service in Montana. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to that state or states.
 - (II) Methods of reasonable approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states. If a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, it shall reasonably approximate the state or states using the customer's billing address.
 - (B) Services delivered by electronic transmission to a business customer.
 - (I) Method of determination. In the case of the delivery of a service to a business customer by electronic transmission, the service is delivered in

Montana if and to the extent that the taxpayer's customer receives the service in Montana. If the taxpayer can determine the state or states where the service is received, it shall assign the receipts from that sale to the state or states. For purposes of this rule, it is intended that the state or states where the service is received reflect the location at which the service is directly used by the employees or designees of the customer.

- (II) Method of reasonable approximation. If the taxpayer cannot determine the state or states where the customer actually receives the service, but has sufficient information regarding the place of receipt from which it can reasonably approximate the state or states where the service is received, it shall reasonably approximate the state or states.
- (III) Secondary method of reasonable approximation. In the case of the delivery of a service to a business customer by electronic transmission where a taxpayer does not have sufficient information from which it can determine or reasonably approximate the state or states in which the service is received, the taxpayer shall reasonably approximate the state or states as set forth in this rule. In these cases, unless the taxpayer can apply the safe harbor set forth in (IV) below, the taxpayer shall reasonably approximate the state or states in which the service is received as follows: first, by assigning the receipts from the sale to the state where the contract of sale is principally managed by the customer; second, if the state where the customer principally manages the contract is not reasonably determinable, by assigning the receipts from the sale to the customer's place of order; and third, if the customer's place of order is not reasonably determinable, by assigning the receipts from the sale using the customer's billing address; provided, however, if the taxpayer derives more than 5 percent of its receipts from sales of services from any single customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by that customer.
- (IV) Safe harbor. In the case of the delivery of a service to a business customer by electronic transmission a taxpayer may not be able to determine, or reasonably approximate under (II) or (III) above, the state or states in which the service is received. In these cases, the taxpayer may, in lieu of the method stated in (II) or (III) above, apply the safe harbor stated in this subsection. Under this safe harbor, a taxpayer may assign its receipts from sales to a particular customer based upon the customer's billing address in a taxpayer year in which the taxpayer engages in substantially similar service transactions with more than 250 customers, whether business or individual, and does not derive more than 5 percent of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of services delivered by electronic transmission to a business customer, and not otherwise.
- (V) Related party transaction. In the case of a sale of a service by electronic transmission to a business customer that is a related party, the taxpayer may not use the secondary method of reasonable approximation in (III) above, but may use the method of reasonable approximation in (II) above,

and the safe harbor in (IV) above, provided that the department may aggregate sales to related parties in determining whether the sales exceed 5 percent of receipts from sales of all services under that safe harbor provision if necessary or appropriate to prevent distortion.

- (iii) Services delivered electronically through or on behalf of an individual or business customer. A service delivered electronically "on behalf of" the customer is one in which a customer contracts for a service to be delivered electronically but one or more third parties, rather than the customer, is the recipient of the service, such as the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience. A service delivered electronically "through" a customer to third-party recipients is a service that is delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other third-party recipients.
 - (A) Method of determination. In the case of the delivery of a service by electronic transmission, where the service is delivered electronically to end users or other third-party recipients through or on behalf of the customer, the service is delivered in Montana if and to the extent that the end users or other third-party recipients are in Montana. For example, in the case of the direct or indirect delivery of advertising on behalf of a customer to the customer's intended audience by electronic means, the service is delivered in Montana to the extent that the audience for the advertising is in Montana. In the case of the delivery of a service to a customer that acts as an intermediary in reselling the service in substantially identical form to third-party recipients, the service is delivered in Montana to the extent that the end users or other third-party recipients receive the services in Montana. The methods in this subsection apply whether the taxpayer's customer is an individual or a business customer and whether the end users or other third-party recipients to which the services are delivered through or on behalf of the customer are individuals or businesses.
 - (B) Method of reasonable approximation. If the taxpayer cannot determine the state or states where the services are actually delivered to the end users or other third-party recipients either through or on behalf of the customer, but has sufficient information regarding the place of delivery from which it can reasonably approximate the state or states where the services are delivered, it shall reasonably approximate the state or states.
 - (C) Select secondary methods of reasonable approximation.
 - (I) If a taxpayer's service is the direct or indirect electronic delivery of advertising on behalf of its customer to the customer's intended audience, and if the taxpayer lacks sufficient information regarding the location of the audience from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the audience in a state for the advertising using the following secondary methods of reasonable approximation. If a taxpayer is delivering advertising directly or indirectly to a known list of subscribers, the taxpayer shall reasonably approximate the audience for advertising in a state using a percentage that reflects the ratio of the state's subscribers in the specific geographic area in which the advertising is delivered relative to the total subscribers in that area. For a

taxpayer with less information about its audience, the taxpayer shall reasonably approximate the audience in a state using the percentage that reflects the ratio of the state's population in the specific geographic area in which the advertising is delivered relative to the total population in that area.

- (II) If a taxpayer's service is the delivery of a service to a customer that then acts as the taxpayer's intermediary in reselling that service to end users or other third-party recipients, if the taxpayer lacks sufficient information regarding the location of the end users or other third party recipients from which it can determine or reasonably approximate that location, the taxpayer shall reasonably approximate the extent to which the service is received in a state by using the percentage that reflects the ratio of the state's population in the specific geographic area in which the taxpayer's intermediary resells the services, relative to the total population in that area.
- (III) When using the secondary reasonable approximation methods provided above, the relevant specific geographic area of delivery include only the area where the service was substantially and materially delivered or resold. Unless the taxpayer demonstrates the contrary, it will be presumed that the area where the service was substantially and materially delivered or resold does not include areas outside the United States.

(4) Professional services.

- (a) Except as otherwise provided in this rule, professional services are services that require specialized knowledge and in some cases require a professional certification, license, or degree. These services include the performance of technical services that require the application of specialized knowledge. Professional services include, without limitation, management services, bank and financial services, financial custodial services, investment and brokerage services, fiduciary services, tax preparation, payroll and accounting services, lending services, credit card services (including credit card processing services), data processing services, legal services, consulting services, video production services, graphic and other design services, engineering services, and architectural services.
- (b) Overlap with other categories of services.
 - (i) Certain services that fall within the definition of "professional services" set forth in this rule are nevertheless treated as "in-person services" within the meaning of (2) above, and are assigned under the methods of that section. Specifically, professional services that are physically provided in person by the taxpayer such as carpentry, certain medical and dental services, or child care services, where the customer or the customer's real or tangible property upon which the services are provided is in the same location as the service provider at the time the services are performed, are "in-person services" and are assigned as such, notwithstanding that they may also be considered to be "professional services." However, professional services where the service is of an intellectual or intangible nature, such as legal, accounting, financial, and consulting services, are assigned as professional services under this rule, notwithstanding the fact that these services may involve some amount of in-person contact.

- (ii) Professional services may in some cases include the transmission of one or more documents or other communications by mail or by electronic means. In some cases, all or most communications between the service provider and the service recipient may be by mail or by electronic means. However, in these cases, despite this transmission, the assignment methods that apply are those set forth in this section and not those set forth in (3) above, pertaining to services delivered to a customer or through or on behalf of a customer.
- (c) Assignment of receipts. In the case of a professional service, it is generally possible to characterize the location of delivery in multiple ways by emphasizing different elements of the service provided, no one of which will consistently represent the market for the services. Therefore, the location of delivery in the case of professional services is not susceptible to a general method of determination, and must be reasonably approximated. The assignment of receipts from a sale of a professional service depends in many cases upon whether the customer is an individual or business customer. In any instance in which the taxpayer, acting in good faith, cannot reasonably determine whether the customer is an individual or business customer, the taxpayer shall treat the customer as a business customer. For purposes of assigning the receipts from a sale of a professional service, a taxpayer's customer is the person that contracts for the service irrespective of whether another person pays for or also benefits from the taxpayer's services. In any instance in which the taxpayer is not taxable in the state to which receipts from a sale is assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.
 - (i) Receipts from sales of professional services other than those services described in (c)(ii) below (architectural and engineering services), (c)(iii) below (services provided by a financial institution), and (c)(iv) below (transactions with related parties), are assigned in accordance with this section.
 - (A) Professional services delivered to individual customers. Except as otherwise provided in this section, in any instance in which the service provided is a professional service and the taxpayer's customer is an individual customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this section. In particular, the taxpayer shall assign the receipts from a sale to the customer's state of primary residence, or, if the taxpayer cannot reasonably identify the customer's state of primary residence, to the state of the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5 percent of its receipts from sales of all services from an individual customer, the taxpayer shall identify the customer's state of primary residence and assign the receipts from the service or services provided to that customer to that state.
 - (B) Professional services delivered to business customers. Except as otherwise provided in this section, in any instance in which the service provided is a professional service and the taxpayer's customer is a business customer, the state or states in which the service is delivered must be reasonably approximated as set forth in this section. In particular, unless the taxpayer may use the safe harbor set forth in (C) below, the taxpayer shall assign the receipts from the sale as follows: first, by assigning the receipts to the state where the contract of sale is principally managed by the customer; second, if the place of customer management is not reasonably determinable, to the customer's place

of order; and third, if the customer place of order is not reasonably determinable, to the customer's billing address; provided, however, in any instance in which the taxpayer derives more than 5 percent of its receipts from sales of all services from a customer, the taxpayer is required to identify the state in which the contract of sale is principally managed by the customer.

- (C) Safe harbor; large volume of transactions. Notwithstanding the provisions set forth in (A) and (B) above, a taxpayer may assign its receipts from sales to a particular customer based on the customer's billing address in any taxable year in which the taxpayer engages in substantially similar service transactions with more than 250 customers, whether individual or business, and does not derive more than 5 percent of its receipts from sales of all services from that customer. This safe harbor applies only for purposes of this rule and not otherwise.
- (ii) Architectural and engineering services with respect to real or tangible personal property. Architectural and engineering services with respect to real or tangible personal property are professional services within the meaning of this rule. However, unlike in the case of the general method that applies to professional services, the receipts from a sale of an architectural service are assigned to a state or states if and to the extent that the services are with respect to real estate improvements located, or expected to be located, in the state or states; and the receipts from a sale of an engineering service are assigned to a state or states if and to the extent that the services are with respect to tangible or real property located in the state or states, including real estate improvements located in, or expected to be located in, the state or states. These provisions apply whether or not the customer is an individual or business customer. In any instance in which architectural or engineering services are not described here, the receipts from a sale of these services must be assigned under the general method for professional services.
- (iii) Services provided by a financial institution. The apportionment rules that apply to financial institutions are set forth at ARM Title 42, chapter 26, subchapter 13. ARM Title 42, chapter 26, subchapter 13 includes specific rules to determine a financial institution's receipts factor. However, the rules in ARM Title 42, chapter 26, subchapter 13 also provide that receipts from sales, other than sales of tangible personal property, including services transactions that are not otherwise apportioned under that subchapter, are to be assigned pursuant to this rule. In any instance in which a financial institution performs services that are to be assigned pursuant to this rule including, for example, financial custodial services, those services are considered professional services within the meaning of this rule, and are assigned according to the general method for professional services transactions set forth in this rule.
- (iv) Related party transactions. In any instance in which the professional service is sold to a related party, rather than applying the method for professional services delivered to business customers, the state or states to which the service is assigned is the place of receipt by the related party as reasonably approximated using the following hierarchy: 1.) If the service primarily relates to specific operations or activities of a related party conducted in one or more locations, then to the state or states in which those operations or activities are conducted in proportion to the related party's payroll at the locations to which the service relates in the state or states; or 2.) If the service does not relate primarily to operations or activities of a related party conducted in

particular locations, but instead relates to the operations of the related party generally, then to the state or states in which the related party has employees, in proportion to the related party's payroll in those states. The taxpayer may use the safe harbor provided by this rule provided that the department may aggregate the receipts from sales to related parties in applying the 5 percent method if necessary or appropriate to avoid distortion.

Authorizing statute(s): 15-1-201, 15-31-313, MCA

Implementing statute(s): 15-1-601, 15-31-310, 15-31-311, 15-31-312, MCA

History: NEW, 2017 MAR p. 2328, Eff. 1/1/18.