



ADMINISTRATIVE RULES OF MONTANA

42.26.249 NUMERATOR OF RECEIPTS FACTOR - LICENSE OR LEASE OF INTANGIBLE PROPERTY

- (1) General provisions.
 - (a) The receipts from the license of intangible property are in Montana if and to the extent the intangible property is used in Montana. In general, the term "use" is construed to refer to the location of the taxpayer's market for the use of the intangible property that is being licensed and is not to be construed to refer to the location of the property or payroll of the taxpayer. The provisions that apply to determine the location of the use of intangible property in the context of several specific types of licensing transactions are set forth in (2) through (5) below. For purposes of the provisions set forth in this rule, a lease of intangible property is to be treated the same as a license of intangible property.
 - (b) In general, a license of intangible property that conveys all substantial rights in that property is treated as a sale of intangible property for purposes of ARM 42.26.250. Note, however, that a sale or exchange of intangible property is treated as a license of that property where the receipts from the sale or exchange derive from payments that are contingent on the productivity, use, or disposition of the property.
 - (c) Intangible property licensed as part of the sale or lease of tangible property is treated as the sale or lease of tangible property.
 - (d) In any instance in which the taxpayer is not taxable in the state to which the receipts from the license of intangible property are assigned, the receipts are excluded from the denominator of the taxpayer's receipts factor.
 - (e) Nothing in this rule shall be construed to allow or require inclusion of receipts in the receipts factor that are not included in the definition of "gross receipts" pursuant to ARM 42.26.202, or related regulations, or that are excluded from the numerator and the denominator of the receipts factor pursuant to ARM 42.26.250(1)(d). To the extent that the transfer of either a security or business "goodwill" or similar intangible value, including, without limitation, "going concern value" or "workforce in place," may be characterized as a license or lease of intangible property, receipts from such transaction shall be excluded from the numerator and denominator of the taxpayer's receipts factor.
- (2) License of a marketing intangible. Where a license is granted for the right to use intangible property in connection with the sale, lease, license, or other marketing of goods, services, or other items such as a marketing intangible to a consumer, the royalties or other licensing fees paid by the licensee for that marketing intangible are assigned to Montana to the extent that those fees are attributable to the sale or other provision of goods, services, or other items purchased or otherwise acquired by consumers or other ultimate customers in Montana. Examples of a license of a marketing intangible include, without limitation, the license of a service mark, trademark, or

trade name; certain copyrights; the license of a film, television, or multimedia production or event for commercial distribution; and a franchise agreement. In each of these instances the license of the marketing intangible is intended to promote consumer sales. In the case of the license of a marketing intangible, where a taxpayer has actual evidence of the amount or proportion of its receipts that is attributable to Montana, it shall assign that amount or proportion to Montana. In the absence of actual evidence of the amount or proportion of the licensee's receipts that are derived from Montana consumers, the portion of the licensing fee to be assigned to Montana must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Montana population in the specific geographic area in which the licensee makes material use of the intangible property to regularly market its goods, services, or other items relative to the total population in that area. If the license of a marketing intangible is for the right to use the intangible property in connection with sales or other transfers at wholesale rather than directly to retail customers, the portion of the licensing fee to be assigned to Montana must be reasonably approximated by multiplying the total fee by a percentage that reflects the ratio of the Montana population in the specific geographic area in which the licensee's goods, services, or other items are ultimately and materially marketed using the intangible property relative to the total population of that area. Unless the taxpayer demonstrates that the marketing intangible is materially used in the marketing of items outside the United States, the fees from licensing that marketing intangible will be presumed to be derived from within the United States.

- (3) License of a production intangible. If a license is granted for the right to use intangible property 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 (a "production intangible"), the licensing fees paid by the licensee for that right are assigned to Montana to the extent that the use for which the fees are paid takes place in Montana. Examples of a license of a production intangible include, without limitation, the license of a patent, a copyright, or trade secrets to be used in the manufacturing process, where the value of the intangible lies predominately in its use in that process. In the case of a license of a production intangible to a party other than a related party where the location of actual use is unknown, it is presumed that the use of the intangible property takes place in the state of the licensee's commercial domicile, where the licensee is a business, or the licensee's state of primary residence, where the licensee is an individual. If the department can reasonably establish that the actual use of intangible property pursuant to a license of a production intangible takes place in part in Montana, it is presumed that the entire use is in this state except to the extent that the taxpayer can demonstrate that the actual location of a portion of the use takes place outside Montana. In the case of a license of a production intangible to a related party, the taxpayer must assign the receipts to where the intangible property is actually used.
- (4) License of a mixed intangible. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible (a "mixed intangible") and the fees to be paid in each instance are separately and reasonably stated in the licensing contract, the department will accept the separate statement for purposes of this rule. If a license of intangible property includes both a license of a marketing intangible and a license of a production intangible and the fees are to be paid in each instance are not separately and reasonably stated in the contract, it is presumed that the licensing fees are paid entirely for the license of the marketing intangible except to the extent that the taxpayer or the department can reasonably establish otherwise.
- (5) License of intangible property where substance of transaction resembles a sale of goods or services.

- (a) In some cases, the license of intangible property will resemble the sale of an electronically delivered good or service rather than the license of a marketing intangible or a production intangible. In these cases, the receipts from the licensing transaction are assigned by applying the provisions set forth in ARM 42.26.248(3) as if the transaction were a service delivered to an individual or business customer or delivered electronically through an individual or business customer, as applicable. Examples of transactions to be assigned under this section include, without limitation, the license of database access, the license of access to information, the license of digital goods, and the license of certain software, where the transaction of pre-written software that is treated as the sale of tangible personal property.
- (b) Sublicenses. Pursuant to (a) above, the provisions of ARM 42.26.248(3)(b)(iii) may apply where a taxpayer licenses intangible property to a customer that in turn sublicenses the intangible property to end users as if the transaction were a service delivered electronically through a customer to end users. In particular, the provisions set forth at ARM 42.26.248(3)(b)(iii) that apply to services delivered electronically to a customer for purposes of resale and subsequent electronic delivery in substantially identical form to end users or other recipients may also apply with respect to licenses of intangible property for purposes of sublicense to end users. For this purpose, the intangible property sublicensed to an end user shall not fail to be substantially identical to the property that was licensed to the sublicensor merely because the sublicense transfers a reduced bundle of rights with respect to that property (i.e., because the sublicensee's rights are limited to its own use of the property and do not include the ability to grant a further sublicense), or because that property is bundled with additional services or items of property.

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

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