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830 CMR 63.42.1: Section 42 Method of Apportionment

830 CMR DEPARTMENT OF REVENUE

830 CMR 63.00: TAXATION OF CORPORATIONS

830 CMR 63.00 is amended by adding the following section:

830 CMR 63.42.1: [Section 42 Method of Apportionment](#)

(1) **General.** If the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate the net income derived from business carried on within Massachusetts, a corporation or corporate trust may apply to the Commissioner to have its Massachusetts income determined by a method other than that provided in M.G.L. c. 63, s. 38. M.G.L. c. 63, § 42. A utility corporation as defined in M.G.L. c. 63, § 52A(1)(a) may apply to the Commissioner to have its Massachusetts income determined by a method other than that provided in M.G.L. c. 63, § 38, as adjusted by M.G.L. c. 63, § 52A(3). If the provisions of a regulation or regulations issued under M.G.L. c. 63, § 38(j) are not reasonably adapted to approximate the net income derived from business carried on within Massachusetts of a corporation to which such regulation applies, that corporation may apply to the Commissioner to have its Massachusetts income determined by a method other than that provided in the applicable regulation issued under M.G.L. c. 63, § 38(j).

(2) **Definitions.** For the purposes of this regulation, 830 CMR 63.42.1, the following terms have the following meanings:

Alternative apportionment, a method, other than that provided in M.G.L. c. 63, § 38, or § 38 as adjusted by § 52A(3), or s. 38 as adjusted by a regulation or regulations issued under M.G.L. c. 63, § 38(j), to determine a corporation's or corporate trust's Massachusetts income.

Applicant, a corporation or corporate trust as defined in this regulation, 830 CMR 63.42.1, applying for permission to use alternative apportionment under M.G.L. c. 63, § 42 and this regulation.

Application, application for alternative apportionment made under M.G.L. c. 63, § 42.

Commissioner, the Commissioner of Revenue or the Commissioner's representative duly authorized to perform the duties of the Commissioner relating to M.G.L. c. 63, § 42 alternative apportionment.

Corporate Trust, an entity defined in M.G.L. c. 62, § 1(j), entitled to apportion income as provided in M.G.L. c. 62, § 8.

Corporation, a domestic corporation as defined in M.G.L. c. 63, § 30(1), a foreign corporation as defined in M.G.L. c. 63, § 30(2) or a utility corporation as defined in M.G.L. c. 63, § 52A(a).

Duly-filed return, a return filed as required by M.G.L. c. 62C, §§ 6, 11, 12 and 19; returns or amended returns filed on or before the due date or returns filed within any extension granted by the Commissioner under M.G.L. c. 62C, § 19. Duly-filed does not include amended returns filed after the due date.

Massachusetts income, income derived from business carried on in Massachusetts.

M.G.L. c. 63, § 42 alternative apportionment, a method other than that provided in M.G.L. c. 63, § 38, or § 38 as adjusted by § 52A(3), or s. 38 as adjusted by a regulation or regulations issued under M.G.L. c. 63, § 38(j), to determine an applicant's Massachusetts income.

Statutory apportionment, the method of determining net income derived from business carried on within Massachusetts as provided in M.G.L. c. 63, § 38, or s. 38 as adjusted by § 52A(3), or § 38 as adjusted by a regulation or regulations issued under M.G.L. c. 63, § 38(j).

(3) **Application.** If an applicant believes that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate its net income derived from business carried on in Massachusetts, the applicant may apply to the Commissioner to have its Massachusetts income determined by an alternative apportionment method.

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(a) Application, Time of Application. An applicant makes application for M.G.L. c. 63, § 42 alternative apportionment by attaching an Application for Alternative Apportionment (Form AA-1) to its duly-filed tax return with tax payment and sending both the return and application to the address indicated on the return. Indicate an attached application by checking the appropriate box on the heading of the return. Place the application on top of the first page of the return. An application Form AA-1 is timely filed if it is attached to a duly-filed return. An application received by the Commissioner after the due date or the due date under a valid extension for receipt of the applicant's tax return will not be considered.

(b) Contents of Application.

1. Power of Attorney. The Commissioner or any duly authorized representative will discuss or disclose a applicant's confidential tax information with a representative of the applicant only if the representative properly completes and submits with the application for alternative apportionment a power of attorney on behalf of the applicant. The power of attorney must specifically authorize the representative to discuss an alternative apportionment method. If the power of attorney is not attached to the application, it must be submitted before any discussion or disclosure of tax information.

2. Statement of Reasons. An application must contain a statement of the reasons, supported by detailed facts, why the applicant believes that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate its Massachusetts income. The applicant must show by clear and cogent evidence that the income attributed to Massachusetts using statutory apportionment is in fact out of all appropriate proportion to the business transacted in Massachusetts or that use of statutory apportionment has led to a grossly distorted result.

3. Proposed Alternative Method. An application must also contain a detailed description of its proposed alternative apportionment method. The applicant must provide a written summary justifying the proposed alternative method, attaching sufficient documentation to justify the figures used, their origin, nature and relation to the overall result reached.

4. Additional Information. The Commissioner may request from an applicant information in addition to that submitted by the applicant with its application. Upon receipt of such request the applicant must file with the Commissioner within the time specified by the Commissioner a statement under oath of its treasurer of the additional information required. If additional information is requested, submission of such information to the Commissioner's satisfaction is a prerequisite to the Commissioner's consideration of the application.

(c) Return, Payment. An application must be attached to a duly-filed tax return showing computation of tax using both statutory apportionment and the applicant's proposed alternative apportionment method. Tax is due as computed using statutory apportionment.

(4) Alternative Apportionment Method. The applicant's proposed alternative method may include, in respect to all or any part of the applicant's business activity, if reasonable:

- (a) the exclusion of one or more factors;
- (b) the inclusion of one or more additional factors which will fairly represent the applicant's Massachusetts business activity; or
- (c) the employment of any other method to achieve a reasonable allocation and apportionment of the applicant's income.

(5) Compliance with Regulation. An applicant seeking permission to use alternative apportionment must strictly comply with the rules set out in this regulation, 830 CMR 63.42.1. If an applicant fails to comply, such failure may result in denial of its application.

(6) Advance rulings ordinarily not available. Except in extraordinary circumstances the Commissioner will not issue a letter ruling (See 830 CMR 62C.3.2) on a proposed alternative apportionment method.

(7) Application Considered. The Commissioner will consider each proper and timely filed application for alternative apportionment. If in the Commissioner's judgment the allocation and apportionment provisions of M.G.L. c. 63 are reasonably adapted to approximate the applicant's net income derived from business carried on in Massachusetts, the application will be denied; and the applicant's Massachusetts income will be determined using statutory apportionment. If in the Commissioner's judgment it appears that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate the applicant's net income from business carried on in Massachusetts, an alternative apportionment method will be used to determine the applicant's Massachusetts income. As soon as possible after the Commissioner receives a properly completed and properly filed application for alternative apportionment and any additional information requested, the Commissioner will send the applicant a "Notice of Alternative Apportionment Denied", or a

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"Notice of Alternative Apportionment," or a "Notice of Intention to Impose Alternative Method."

(a) Application Withdrawal. An application for alternative apportionment may be withdrawn any time before a Notice of Alternative Apportionment is sent to the applicant. Withdrawal is accomplished by sending a letter requesting withdrawal attached to a copy of the application submitted (Form AA-1) to the M.G.L. c. 63, § 42 Process Person, Determination Bureau, Room 303, Department of Revenue, 100 Cambridge St., Boston, MA 02204. If withdrawal is proper and timely, statutory apportionment will be used to determine the applicant's Massachusetts income.

(b) Application Denied, Notice of Alternative Apportionment Denied. The Commissioner will notify the applicant in writing at the address provided on its application (Form AA-1) of the Commissioner's decision to deny its application.

(c) The Applicant's Proposed Alternative Apportionment Method Accepted, Notice of Alternative Apportionment. If the Commissioner determines that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate the applicant's net income from business carried on in Massachusetts and that the applicant's proposed alternative apportionment method appears to be reasonably adapted to approximate its net income derived from business carried on in Massachusetts, the Commissioner may grant the applicant permission to use such method to determine its Massachusetts income. The Commissioner will notify the applicant in writing at the address provided on the application (Form AA-1) of permission to use the applicant's proposed alternative apportionment method (Notice of Alternative Apportionment). If the applicant receives permission to use its proposed method, and the applicant submitted a duly-filed tax return showing computation of the tax using both statutory apportionment and the applicant's proposed alternative apportionment method, as required in 830 CMR 63.42.1(3)(c), a refund of overpayment, with interest if due, will be made pursuant to M.G.L. c. 62C, § 36.

(d) The Applicant's Proposed Alternative Apportionment Method Rejected, Notice of Intention to Impose Alternative Method.

1. Notice. If the Commissioner determines that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate the applicant's net income from business carried on in Massachusetts and that the applicant's proposed alternative apportionment method is not reasonably adapted to approximate its net income derived from business carried on in Massachusetts, the Commissioner will by reasonable methods determine the amount of the applicant's net income derived from business activity carried on in Massachusetts. The Commissioner will notify the applicant in writing at the address provided on its application (Form AA-1) of the Commissioner's decision to allow alternative apportionment and a description of the alternative method to be used (Notice of Intention to Impose Alternative Method).

2. Objections. The applicant has thirty-five days from the date on the Notice of Intention to Impose Alternative Method to advise the Commissioner of any objections to the Commissioner's proposed method. The applicant must make its objections in writing and send them to the Commissioner as instructed in the Notice of Intention to Impose Alternative Method.

3. Imposition. The Commissioner's representative may further discuss with the applicant the Commissioner's method; and as a result the Commissioner may in his discretion revise his proposed method. If the method is revised, a new Notice of Intention to Impose Alternative Method will be sent to the applicant. If no objections are made, or those made do not warrant consideration in the Commissioner's opinion, the Commissioner will impose his method of alternative apportionment and send the applicant a Notice of Alternative Apportionment. The applicant is then required to submit its tax return showing computation of the tax using the Commissioner's alternative apportionment method. A refund of overpayment, with interest if due, will be made pursuant to M.G.L. c. 62C, §36.

(e) Deemed Denial. If the Commissioner does not act upon an application for alternative apportionment before the expiration of nine months from the date the application was properly filed, the application is deemed denied. The Commissioner and the applicant may consent in writing to extend the time for the decision on the application.

(8) Permission Granted.

(a) Alternative Apportionment Method Used. If permission to use an alternative method of apportionment is granted and such method is used, the amount determined using the alternative apportionment method is the applicant's net income taxable under M.G.L. c. 63. The amount is in lieu of the determination otherwise required under M.G.L. c. 63, § 38, or § 38 as adjusted by M.G.L. c. 63, § 52A(3), or s. 38 as adjusted by a regulation or regulations issued under M.G.L. c. 63, § 38(j).

(b) Permission Effective in Year of Application. Permission to use Section 42 alternative apportionment is effective only for the year for which permission is granted. If an applicant is granted permission and uses alternative apportionment in

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the year of application the Commissioner may require similar information from the applicant for the two subsequent tax years if it appears that statutory apportionment is not reasonably adapted to approximate for the applicable year the applicant's Massachusetts income, and the Commissioner may by reasonable methods determine the applicant's Massachusetts income in the same manner as if the applicant had applied for alternative apportionment. The Commissioner may, in his discretion, determine the applicant's Massachusetts income in either of the two years following the year of application by using the alternative method used by the applicant in the year of application or by using any reasonable method of apportionment. An applicant may apply for permission to use alternative apportionment in any year following its initial application. However, a new application does not alter the Commissioner's authority under M.G.L. c. 63, § 42 and 830 CMR 63.42.1 as to the two years succeeding any use of alternative apportionment.

(c) Prior Permission Revoked. Any grant of permission to use M.G.L. c. 63, § 42 alternative apportionment other than a grant of permission made through the application process described in 830 CMR 63.42.1, if not otherwise revoked or ineffective, is revoked as of the effective date of 830 CMR 63.42.1. Permission to use M.G.L. c. 63, § 42 alternative apportionment is now granted exclusively through the application process described in 830 CMR 63.42.1, effective only for the tax year for which application is made.

(d) Transition Rule. An applicant that has been given permission to use alternative apportionment issued before the promulgation date of 830 CMR 63.42.1 or has properly filed an application for such treatment under M.G.L. c. 63, § 42, is not required to submit a new application as required by 830 CMR 63.42.1 for any year as to which it has already filed its return. If it seeks to use alternative apportionment for any tax year for which the return is filed on or after the promulgation date of 830 CMR 63.42.1, it must apply in the manner outlined.

(e) Penalties. If an applicant files and pays tax computing such tax using any method of apportionment other than statutory apportionment without first complying with the provisions of 830 CMR 63.42.1, or if the method for which permission was granted has not been properly followed, the return filed will be considered incorrect or insufficient within the meaning of M.G.L. c. 62C, § 28. If a person who has been notified by the Commissioner that he has filed an incorrect or insufficient return refuses or neglects within thirty days after the date of the notification to file a proper return or if a person files a false or fraudulent return, the Commissioner may determine the tax due and assess the tax at not more than double the amount so determined, in addition to any other penalties established by law.

(9) Abatement. If permission to use Section 42 alternative apportionment is denied, the applicant's tax is determined using statutory apportionment. If the applicant's proposed alternative apportionment method is rejected and the application is not withdrawn, the applicant's tax is determined using the Commissioner's alternative apportionment method. An applicant aggrieved by the denial of its application or aggrieved by the Commissioner's modification of its proposed alternative apportionment method may apply for abatement of tax paid as provided in M.G.L. c. 62C, s. 37 and 830 CMR 62C.37.1. No tax will be abated on the ground that Section 42 alternative apportionment should have been used unless the corporation or corporate trust has properly applied for permission to use alternative apportionment under M.G.L. c. 63, s. 42 and this regulation, 830 CMR 63.42.1. Permission to use alternative apportionment is not effective retroactively and therefore will not be considered the basis for granting an abatement for any year earlier than the year for which the application was submitted.

(10) Corporations Filing a Combined Massachusetts Return. A corporation which is part of a group filing a Massachusetts combined return which believes that the allocation and apportionment provisions of M.G.L. c. 63 are not reasonably adapted to approximate its net income derived from business carried on within Massachusetts may submit an application for alternative apportionment. Each corporation seeking to use an alternative apportionment method must submit a separate application.

REGULATORY HISTORY

Date of Promulgation: 1/8/88

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