



Economic Development Tax Incentives -- Use of the Single Factor Apportionment Formula by an S Corporation. AN S CORPORATION MAY ELECT TO USE THE SINGLE FACTOR FORMULA AS PROVIDED IN SECTION 77-4105 OF THE EMPLOYMENT AND INVESTMENT GROWTH ACT.

Advice has been requested as to whether an S corporation can elect to determine taxable income by using the sales factor only formula as provided in the Employment and Investment Growth Act.

Section 77-4105, R.S.Supp., 1987, for purposes of the Employment and Investment Growth Act, provides in part that:

- (1) A taxpayer who has signed an agreement under section 77-4104 may elect to determine taxable income for purposes of the Nebraska corporate income tax imposed by section 77-2734.02 by multiplying federal taxable income, as adjusted, by the sales factor only.

Section 77-4103, R.S.Supp., 1987, for purposes of the Employment and Investment Growth Act, provides in part that:

- (12) Taxpayer shall mean any person subject to the sales and use taxes and either an income tax imposed by the Nebraska Revenue Act of 1967 or a franchise tax under Chapter 77, article 38, any corporation that is a member of the same unitary group which is subject to such taxes, and any partnership, subchapter S corporation, or joint venture when the partners, shareholders, or members are subject to such taxes; . . .

Section 77-2734.01 provides, in part, that:

- (2)(a) If the small business corporation is a member of a unitary group, the small business corporation shall be deemed to be doing business within this state if any part of its income is derived from transactions with other members of the unitary group doing business within this state, and such corporation shall apportion its income by using the apportionment factor determined for the entire unitary group, including the small business corporation, under sections 77-2734.05 to 77-2734.15,

- (b) If the small business corporation is not a member of a unitary group, it shall apportion its income under sections 77-2734.05 to 77-2734.15.

Since the other corporations that are members of the unitary group with the S corporation cannot be S corporations under federal law, and such other corporations are specifically included in the definition of taxpayer under the Act, those corporations may elect the sales only apportionment formula. Section 77-2734.01(2)(a) requires the S corporation that is a member of a unitary group to use the same apportionment factor as the rest of the group. As a result, the S corporation that is a member of the unitary group can use the sales only apportionment formula to determine the portion of its income that is derived from sources within this state.

In addition, the S corporation that is not a member of a unitary group is required under section 77-2734.01 to determine the portion of its income that is derived from sources within this state in a manner consistent with methods used by other corporate taxpayers, including an S corporation that is a member of a unitary group. Therefore, all S corporations may use the sales only apportionment formula for Nebraska income tax purposes.

APPROVED:



Donald S. Leuenberger
State Tax Commissioner

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