

New York Draft Apportionment Regs Would Eliminate Exception for Unusual Events

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By Lauren Loricchio

New York would eliminate the apportionment rule regarding unusual events — or transactions outside the ordinary course of business — under recently updated draft rules.

The state Department of Taxation and Finance on July 18 issued [draft amendments](#) to the remaining sections of part 4 (except subpart 4-6.5) of the New York business corporation franchise tax regulations designed to clarify and interpret general rules used to determine the business apportionment fraction.

The definition of business receipts includes an exception for unusual events, which would be eliminated under the updated rules.

“I guess the idea would be that without the inclusion of unusual events within the framework of the regulations, taxpayers will have to use alternative apportionment authority to remove receipts from unusual events in the apportionment fraction,” Jennifer White of Reed Smith LLP told *Tax Notes* July 22.

White said she thinks it may become harder for taxpayers and the department to try to remove these receipts from the apportionment fraction because now they're up against the burden in the alternative apportionment statute, compared with there being a specific carveout within the definition of business receipts.

Timothy Noonan of Hodgson Russ LLP said July 22 that he thinks the proposed updates will bring the regulations more in line with a 2015 law.

“The prior version of the regulation excluded gains from unusual events from the apportionment factor, which was consistent with how the factor worked under pre-2015 law but may not have been consistent with how the post-2014 law read,” Noonan explained. “The inclusion of these outside-the-ordinary-course-of-business transactions is a significant change and will have a dramatic effect on the receipts factor for many taxpayers who have sold or who are selling a business.”

Noonan said the change could have the unintended consequence of making it more expensive for a New York-based taxpayer to buy a business because under the proposed formula a seller will have to include gains from the sale of tangible and intangible assets if, under the state's market-based sourcing rules, the benefit is received by the purchaser in New York.

“An out-of-state seller may find itself with significantly more New York tax if the purchaser is located in New York and receives the benefit of the deal in New York,” Noonan explained.

Noonan said the draft regs, much like [those issued](#) July 3, contain several new examples and illustrations to guide taxpayers. “Obviously, [the tax department has] taken a few years . . . to get this issued, but I think that they’ve done a very good job,” he said.

Noting that the initial draft regulations — issued in 2016 but never finalized — excluded gains from unusual transactions in the apportionment factor, Noonan said it remains unclear what happens to transactions that occurred in 2015, 2016, and 2017.

“Do they get apportioned based on the old rules and the old draft regulations, or the new draft regulations?” Noonan asked. He said he expects that the transactions will be apportioned under the new rules, but added that this could create confusion for some taxpayers who have already filed their tax returns.

The tax department also added to the definition of business receipts a subsection (4-1.1(d)) on how to source the sale of multiple assets in one transaction. “There’s no example of that, and I think that trying to reasonably divide may present some complications,” White said.

The tax department is seeking feedback on the draft rules — specifically on the definition of business receipts and the elimination of the apportionment rule regarding unusual events. Comments are due by October 18.