NEBRASKA INCOME TAX: CORPORATIONS

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I. INTRODUCTION

> (1) A tax is hereby imposed . . . on the taxable income derived from sources within this state of any corporation . . . whose business within this state during the taxable year consists exclusively of . . . interstate commerce . . . .
>
> (2) Except as provided in subsection (1) . . . for the privilege of exercising its franchise or doing business in this state . . . there is hereby imposed a franchise tax on each corporation . . . measured by its entire net income derived from all sources within this state . . . .[1]

With these legislative words, Nebraska has informed the nation's corporations that they must determine: (a) Whether they are subject to one of the Nebraska taxes; (b) if so, whether the tax is to be the income tax or the franchise tax; (c) what portion of their income is subject to the tax; and (d) how the Nebraska portion is to be ascertained and reported.

The purpose and design of this article is to provide the practitioner with an outline of the many state tax issues which may confront his corporate clients.

II. WHETHER SUBJECT TO EITHER TAX

Either the income tax or the franchise tax will be imposed on every corporation[2] deriving income from within Nebraska, unless such corporation: (a) is exempted from the Nebraska tax because it is exempt from federal income taxation;[3] (b) is granted immunity

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1. NEB. REV. STAT. § 77-2734(1), (2) (Supp. 1967).

2. As used herein the word "corporation" includes both technical corporations and "any other entity taxed as a corporation under the Internal Revenue Code." NEB. REV. STAT. § 77-2734(1) (Supp. 1967). Subchapter S corporations are not subject to the Nebraska tax unless there is a nonresident shareholder who fails to execute an agreement wherein he states an intention to file a Nebraska individual's tax return. *See* NEB. REV. STAT. § 77-2734(3) (Supp. 1967).

3. NEB. REV. STAT. § 77-2714 (Supp. 1967) exempts from Nebraska taxation "any organization to the extent that it is exempt from income taxes under the laws of the United States . . . ." It should be noted that before the foregoing grant of exemption from state taxation will be recognized, the taxpayer must submit a copy of the Internal Revenue Service ruling or determination letter which established the federal exemption.

from state taxation by reason of Public Law 86-272;[4] or (c) is beyond the state's taxing authority under the due process clause of the Fourteenth Amendment.[5]

The precise tax to be imposed will depend primarily upon the nature of the taxpayer's business activity within Nebraska. In many instances it will make little or no difference to the taxpayer whether he is subject to the income tax or the franchise tax. Nebraska utilizes the "combination franchise-income" tax package because each tax can reach certain areas not open to the other. The franchise tax, for example, may not be imposed on a taxpayer engaged exclusively in interstate commerce within the state,[6] while

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Where, however, the exemption arises under the Internal Revenue Service Regulations, the state exemption is automatic. NEB. INCOME TAX REG. TC 24-3 (1968).

4. 15 U.S.C. §§ 381-84 (1964). This statute prohibits a state from imposing an income tax on income derived from within a state through interstate commerce when the *only* business activities of the taxpayer within the taxing state consist of the solicitation of orders for sales of tangible personal property sent outside the state for approval or rejection and filled by delivery from a point outside the state. The prohibition, however, does not protect a taxpayer incorporated under the laws of the taxing state. It should be noted that §§ 381-84 do not afford immunity from taxation to airlines, trucklines, pipelines, or other similar businesses, since they are engaged in conduct other than the specified "solicitation of orders . . . for the sale of tangible personal property." *See* HELLERSTEIN, STATE AND LOCAL TAXATION 224-29 (2d ed. 1961); Hartman, *State Taxation of Corporate Income from a Multi-State Business*, 13 VAND. L. REV. 21 (1959).

5. The protection afforded by the due process clause extends only to corporations having either no or de minimis "nexus" with the taxing state. Out-of-state mail order businesses having no offices or warehouses in Nebraska are beyond the reach of Nebraska's taxing power. National Bella Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967). It has been said that "The simple but controlling question is whether the state has given anything for which it can ask return." Wisconsin v. J.C. Penney & Co., 311 U.S. 435, 444 (1940). The taxing state is giving something for which it can exact a return if the taxpayer merely consumates sales within the state. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). It is significant, in this connection, that since deciding the *Northwestern States* case, the Supreme Court has denied certiorari in a case involving presence of the corporate taxpayer in the taxing state only by way of itinerant solicitation, wherein the state court held that the tax imposed upon the corporation presented no undue burden on interstate commerce. Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So. 2d 70 (1958), *cert. denied*, 359 U.S. 28 (1959). Note, however, that in many instances itinerant solicitation by an out-of-state corporation would today be afforded immunity from state taxation by P.L. 86-272, 15 U.S.C. §§ 381-84 (1964). *See* note 4 *supra*.

6. Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). A franchise tax, even though measured by net income, is deemed to be a tax on the privilege of doing business within the state. The interstate commerce clause prohibits state taxation of the privilege of engaging in exclusively interstate commerce within a state, where such commerce is unaccompanied by separable intrastate commerce.

the income tax can be imposed on such a taxpayer.[7] Since it is to Nebraska's advantage to impose a tax upon every possible taxpayer, the income tax is utilized to reach this class of taxpayers.[8] However, with respect to taxpayers not engaged exclusively in interstate commerce, it would be to Nebraska's advantage to impose a franchise tax, since a franchise tax can indirectly tax interest income from federal obligations,[9] which is congressionally immunized from state income taxation.[10] The franchise tax is therefore the tax imposed on all taxable corporations except those engaged *exclusively* in interstate or foreign commerce within the state.

In determining whether a taxpayer's Nebraska business activity is exclusively interstate in nature, one must look to see whether the local activity can realistically be separated from the interstate commerce.[11]

III. APPORTIONMENT

A. Whether Entitled to Apportion

Irrespective of whether the income or franchise tax is to be imposed, a determination must be made as to what portion of the taxpayer's taxable income[12] is derived from sources within Ne-

7. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). The case contains dicta preserving the rule enunciated in Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951). *See* note 6 *supra*.

8. Neb. Rev. Stat. § 77-2734(1) (Supp. 1967); Neb. Income Tax Reg. TC 24-1 (1968).

9. Werner Machine Co. v. Director of Taxation, 350 U.S. 492 (1956).

10. *See* 31 U.S.C. § 742 (1964). The statute generally exempts interest-bearing federal obligations from state and local taxation. It has been said that the reason for the exemption is "to prevent taxes which diminish in the slightest degree the market value or the investment attractiveness of obligations issued by the United States in an effort to secure necessary credit." Smith v. Davis, 323 U.S. 111, 117 (1944).

11. Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954). *But see* Coverdale v. Arkansas-Louisiana Pipe Line Co., 303 U.S. 604 (1938). Distinguishing between business that is exclusively interstate and business involving intrastate activity may sometimes be exasperating. The leading case in the area is Cheney Bros. Co. v. Massachusetts, 246 U.S. 147 (1918), wherein the Court found that mere solicitation of orders by local salesmen working out of a local office constituted exclusively interstate business, but that the maintenance of a local repair shop or warehouse would constitute a separable intrastate business activity and destroy the exclusive nature of an otherwise interstate business. An interesting state decision of more recent vintage, which was affirmed by the Supreme Court without opinion, is Field Enterprises, Inc. v. Washington, 47 Wash. 2d 852, 289 P.2d 1010 (1955), *aff'd*, 352 U.S. 806 (1958). The Supreme Court cited as controlling Norton Co. v. Department of Revenue, 340 U.S. 534 (1951).

12. Under the Nebraska Act, the term "taxable income" refers to fed-

braska. Of course the total taxable income is derived from within Nebraska where the taxpayer carries on all of its business activity within Nebraska and all of its property is located in the state, even though most of its business is deemed to be in interstate commerce.[13] Where, however, the taxpayer carries on business activity[14] in another state which is sufficient in nature to give the other state *jurisdiction*[15] to impose a tax on or measured by net income, Nebraska permits apportionment and taxes only a portion of net income.

B. WHETHER TO APPORTION BY FORMULA OR OTHERWISE

Whenever the portion of taxable income derived from Nebraska is separate and distinct from income derived from other states, it must be separately determined and reported.[16] The Nebraska tax commissioner indicates that he will permit use of the apportionment formula only when the portion of business income derived from

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eral taxable income adjusted upward in the amount of any federal loss carryover which originated prior to January 1, 1968, and where appropriate adjusted downward by the amount of interest from federal obligations. *See* NEB. INCOME TAX REG. TC 24-7, -8, -13 (1968).

13. Suppose, for example, that an Omaha based corporation, which maintains no office or other property outside of Nebraska, is engaged in the business of selling steaks to buyers in all parts of the country. The corporation purchases and packs all of its products in the state, and ships the meat by common carrier from Omaha. All orders are received and solicited through the mails. All of this corporation's income would be taxed by Nebraska, even though it makes sales to customers in every state. It should be noted, however, that if the corporation were organized under the laws of another state, its income may have to be apportioned. *See* note 15 *infra*.

14. "Business activity" refers to activity in the normal course of business. "Net income" refers to net business income.

15. *See* NEB. REV. STAT. §§ 77-2736, -2737 (Supp. 1967). In determining whether another state has jurisdiction to impose a tax on the business activity of a corporation carried on within its territory, both P.L. 86-272, 15 U.S.C. §§ 381-85 (1964), and the due process concept must be considered. *See* notes 4 & 5 *supra*. Under the facts stated in note 13 *supra*, both P.L. 86-272 and the due process concept would prevent states other than Nebraska from taxing the corporation. However, neither P.L. 86-272 nor the due process concept prevents the state of incorporation from taxing a corporation. Consequently, if the corporation described in note 13 were not domestic to Nebraska, its income would be apportioned, since the state of incorporation has jurisdiction to impose an income tax. For a discussion of the general issue of whether the out-of-state business activity of a taxpayer entitles him to apportionment, see Irvine Co. v. McColgan, 26 Cal. 2d 160, 157 P.2d 847 (1945). *See also* ANNOT., 167 A.L.R. 943 (1947).

16. NEB. REV. STAT. § 77-2743(1) (Supp. 1967). If the Nebraska portion is truly separate and distinct, one should be able to construct a profit and loss statement covering the Nebraska segment of the business only.

Nebraska sources cannot reasonably be separated from that derived without the state.[17]

Generally, it may be said that the Nebraska portion is not reasonably separable if the taxpayer's multistate business is a "unitary" one,[18] in the sense that the ultimate business profit is derived from all facets of the business, rather than merely from the final or single facet occurring in Nebraska. For example, if the taxpayer buys hides in one state, manufactures shoes in another, and has retail shoe outlets in Nebraska, the income from Nebraska is not separate and distinct.[19] Whenever the portion of taxable income derived from sources within Nebraska is not separate and distinct, the apportionment formula should be utilized, because its function "is to determine what portion of the multistate taxpayer's total tax base should be taxed by a particular state, so as to relate the taxpayer's presence within the state to his presence everywhere."[20]

C. The Apportionment Formula

The apportionment formula[21] is applied only to the taxpayer's

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17. Neb. Income Tax Reg. TC 24-13 (1968). From the forceful language of the Regulation, it would appear that the commissioner will insist upon separate accounting whenever it would work to the state's advantage. The burden is then put upon the taxpayer to show that the Nebraska portion is not reasonably separable, if he desires to avoid separate accounting.

18. When the business or operation within the taxing state is an integral part of a multistate enterprise having centralized out-of-state purchasing, advertising, financing, management, etc., then the enterprise should be classified as "unitary." There are, however, certain multistate operations which lend themselves to separate accounting such as banking, ranching, innkeeping, and the like.

19. It should be noted that substantially different results may arise under the formula and separable portion methods. For example, under the formula approach, each state will show a loss if the entire operation in all states results in a loss, but under the separable portion approach the Nebraska segment may show a profit while the operation in all states shows a loss. In this example no Nebraska tax liability would arise under the formula, while a tax would be levied upon the separable Nebraska profit under the separable portion method. *See, e.g.*, Superior Oil Co. v. Franchise Tax Bd., 60 Cal. 2d 406, 386 P.2d 33, 34 Cal. Rptr. 545 (1963), wherein the California Supreme Court upheld the assertion of the taxpayer that his profitable operation of oil wells in California contributed to his out-of-state drilling operations, which showed a loss for the taxable year, and that therefore the business was "unitary." Consequently, the taxpayer was entitled to use the formula approach, thus reducing the impact of the California tax.

20. House Judiciary Comm., State Taxation of Intrastate Commerce, H.R. Rep. No. 1480, 88th Cong., 2d Sess. 168 (1964).

21. For a comprehensive treatment of apportionment and allocation problems, see Altman & Keesling, Allocation of Income in State Taxation (2d ed. 1950).

federal taxable *business* income as adjusted.[22] The portion of such income attributable to Nebraska is obtained by multiplying the entire taxable business income by a fraction, the numerator of which is the sum of the property factor, the payroll factor, and the sales factor, and the denominator of which is three:

Define:

NBI = Nebraska business income
TBI = taxable business income from all states
Pr = property factor
Py = payroll factor
S = sales factor

Write:

$$NBI = TBI \times \frac{Pr + Py + S}{3}$$

Each of the above-mentioned factors is itself a fraction, the numerator of which is specified activity or contact within Nebraska, and the denominator of which is the taxpayer's total specified activity occurring everywhere. When controversy arises under the formula, it will be concerned with whether an item should be included in the numerator or denominator of one of these factors, and if so in what amount it is includable.

1. Property factor

The numerator of the property factor is the average value[23] of the "taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible property owned or rented and used during the tax period."[24]

22. See note 12 *supra* for mention of adjustments to federal taxable income. Nonbusiness income is directly allocated and is not considered in the application of the formula. NEB. REV. STAT. § 77-2735(1) (Supp. 1967) purports to define business income. Nonbusiness income is all other income, not arising from activities in the taxpayer's trade or business or from property constituting an integral part thereof. *See* NEB. REV. STAT. § 77-2735(4) (Supp. 1967) and NEB. INCOME TAX REG. TC 24-12(e) (1968). These definitions are inadequate and give little guidance in what may become a problem area.

23. While the tax commissioner may require the averaging of monthly values in some instances, normally "average value" will be determined by averaging the values at the beginning and end of the tax period. NEB. REV. STAT. § 77-2746 (Supp. 1967).

24. NEB. REV. STAT. § 77-2744 (Supp. 1967). Note that the statute refers only to that property which is owned or rented and *used*. Note further that the statute does not include intangible personal property. While the Regulations, at the time of this writing, are silent on the matter, it would appear that nonbusiness property, *i.e.* property *not used* in business, is not to be included in the factor. It seems appropriate to exclude such property, since nonbusiness property has nothing to do with

Define:

Pr = property factor
NPr = Nebraska property
TPr = total property in all states

Write:

$$Pr = \frac{NPr}{TPr}$$

Property is valued at original cost. Depreciation, obsolescence, market value, and book value are not considered. Property which is rented or leased is valued at eight times the net annual rental rate.[25] "Migratory tangible personal property" or goods in transit are evidently not to be included in the denominator unless they acquire a tax situs in Nebraska and are included in the numerator.[26]

2. Payroll factor

The numerator of the payroll factor is the total amount of compensation[27] paid in Nebraska by the taxpayer during the taxable period. The denominator is the total amount paid everywhere during the taxable year:

Define:

Py = payroll factor

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dividing business income. Moreover, the inclusion of nonbusiness property could lead to undesirable results. For instance, if a Nebraska based personal service business owned an out-of-state plot of land or apartment building, the inclusion of such property in the denominator would distort the factor to Nebraska's disadvantage. On the other hand, a predominately out-of-state business holding Nebraska land for future plant development would be penalized if the land were included in the numerator.

25. "In determining the net annual rental rate, the annual rental rate paid by the taxpayer shall be reduced by the amount of any annual rental rate received by the taxpayer from subrentals." NEB. INCOME TAX REG. TC 24-13 (1968).

26. *See* NEB. INCOME TAX REG. TC 24-13 (1968). The tax commissioner's "heads I win, tails you lose" approach to migratory property is not premised upon legislative direction. A workable rule might be to attribute in transit or migratory goods to the state of destination, as California has done. Appeal of Montgomery Ward & Co. (Cal. State Bd. of Equalization, March 20, 1963) (cited in HOLDEN, CALIFORNIA BUSINESS TAXES 153 (1963)). Or the goods might be attributed to the taxpayer's commercial domicile until title has passed, since the domiciliary state would have taxing jurisdiction. Trucks, buses, airplanes, and the like might be apportioned according to miles traveled or arrivals and departures within the taxing state.

27. "The term 'amount of compensation' shall mean compensation for services which is included in the gross income of the recipient pursuant to Section 61(a)(1) of the Internal Revenue Code of 1954 . . . ." and Treas. Reg. 1.61-2. NEB. INCOME TAX REG. TC 24-13 (1968). *See also* NEB. REV. STAT. § 77-2735(3) (Supp. 1967), which limits the term "compensation" to that which is paid to *employees*. Compensation paid to independent contractors is excluded. No doubt the traditional common law tests are to be used in distinguishing between employees and independent contractors.

NPy = Nebraska payroll
TPy = total payroll in all states

Write:

$$Py = \frac{NPy}{TPy}$$

Compensation is considered to have been paid in Nebraska: (a) if the recipient performed his service or labor entirely within Nebraska; or (b) if, while the service was performed both within and without Nebraska, the out-of-state performance was incidental to the recipient's in-state performance; or (c) if the base of operations is Nebraska, or the service is directed or controlled from Nebraska, and some of the service or labor is performed in Nebraska; or (d) if the recipient's residence is Nebraska and some of the work is therein performed, while none of his work is performed in the state other than Nebraska from which it is directed or controlled.[28]

3. Sales or receipts factor

The numerator of the sales or receipts factor is total "business"[29] sales of the taxpayer in Nebraska during the tax period. The denominator is the taxpayer's total business sales everywhere during the period:

Define:

S = sales or receipts factor
NS = Nebraska business sales
TS = total business sales in all states

Write:

$$S = \frac{NS}{TS}$$

Sales of tangible personal property are made in Nebraska if (a) the property is delivered or shipped to a purchaser within Nebraska,[30] except when the purchaser is the United States Government; or (b)

28. *See* NEB. INCOME TAX REG. TC 24-13 (1968). The comprehensive format of the Regulation is apparently designed to attribute to Nebraska, along with other compensation, all compensation having some contact with Nebraska and not otherwise taxable by another state by reason of insufficient nexus therewith.

29. It seems clear that the legislature intended the word "sales" to refer only to sales in the ordinary course of business. *See* NEB. REV. STAT. § 77-2735(5) (Supp. 1967), which specifically excludes allocable nonbusiness sales.

30. Under NEB. REV. STAT. § 77-2750(1) (Supp. 1967), shipments arriving in Nebraska from a Chicago mail order house would be attributed to the numerator. Of course this treatment presupposes a sufficient jurisdictional nexus to tax, *e.g.*, by reason of the taxpayer maintaining a Nebraska office. In this connection it should be noted that even if the office is a repair shop and has no direct sales connection, Nebraska will tax the corporation maintaining the office.

the property is shipped from a location in Nebraska and the purchaser is the United States Government, or "the taxpayer is not taxable in the state of the purchaser."[31]

With respect to businesses having sales of something other than tangible personal property, the sales are made in Nebraska if (a) the income-producing activity is performed in Nebraska; or (b) a greater proportion of such activity, as determined from performance costs, is performed in Nebraska than in any other single state. Unexpected results are possible under this concept of income-producing activity. In one case[32] of particular interest, all of the taxpayer's film rental receipts from around the world were allocated to California, because all of taxpayer's out-of-state sales activity was carried on by an independent contractor; and therefore all of the taxpayer's income-producing activity was deemed to have occurred within the State of California.[33]

Needless to say, this sales factor can create a serious record-keeping problem for multistate taxpayers.

4. Utilizing the factors

The property factor, the payroll factor, and the sales factor are *each* converted into percentages. The three percentages are then added, and the sum is divided by three (3), yielding a percentage which acts as the multiplier, and might be characterized as the percent of business income attributable to Nebraska sources. The taxpayer's net business income is then multiplied by the multiplier, yielding the portion of his business income taxable by Nebraska. To this business portion is added the nonbusiness por-

31. *See* NEB. REV. STAT. § 77-2750(2) (Supp. 1967). Presumably, a taxpayer will be considered "not taxable in" such other state unless such state *actually imposes* a tax upon or measured by the taxpayer's net income. *See* NEB. INCOME TAX REG. TC 24-13 (1968). A strenuous argument could be framed in opposition to such an interpretation through the use of NEB. REV. STAT. § 77-2737 (Supp. 1967), which purports to define when a "taxpayer is taxable in another state" and includes mere jurisdiction to tax thereunder.

32. *In re* Screen Plays II Corp., P-H STATE & LOCAL TAX SERV. (Cal.) ¶ 13,164 (Cal. State Bd. of Equalization 1957).

33. Ideally, it would be the independent contractor rather than the taxpayer who would be taxable in states other than California. However, by reason of the taxpayer's ownership of the film and because of a divergency of views as to when distributors, factors, and commission merchants are independent contractors, it is conceivable that taxing authorities of other states would seek to impose a tax upon the taxpayer utilizing such independent distributors. The Nebraska Regulations do not touch on this problem area. For a discussion of other ramifications of using an independent contractor, see Irvine Co. v. McColgan, 26 Cal. 2d 160, 157 P.2d 847 (1945). It is worthy of note that under P.L. 86-272, 15 U.S.C. §§ 381-84 (1964), the activities of independent contractors and brokers are not attributed to the principal.

tion directly allocated to Nebraska according to the table set out below, and the tax rate is applied to the resulting sum:

Define:

Pr = property factor
Py = payroll factor
S = sales factor
M = multiplier
TBI = total business income from all states
NBI = Nebraska business income
NNBI = Nebraska nonbusiness income
NTI = Nebraska taxable income
r = Nebraska tax rate
NT = Nebraska tax liability

Write:

$$(1) \quad \frac{Pr + Py + S}{3} = M$$

$$(2) \quad TBI \times M = NBI$$

$$(3) \quad NBI + NNBI = NTI$$

$$(4) \quad NTI \times r = NT$$

D. DIRECT ALLOCATION OF CERTAIN CLASSES OF INCOME

Rents and royalties from real or tangible personal property, capital gains, interest, dividends, and patent or copyright royalties, to the extent that they constitute nonbusiness income, are nonapportionable. These items of income, when nonbusiness in nature, are deemed to be so closely connected with a particular state as to be taxable in that state only, and are therefore allocated directly to the appropriate state. The table below indicates how such items are allocated when, because of the nature of the taxpayer's business, they are nonbusiness items.

MANNER OF ALLOCATING SPECIFIED ITEMS OF INCOME[34]

Class or Type of Income Which May be Nonbusiness	How Allocated
A. Rents and royalties from tangible personal property	entirely to Nebraska if taxpayer's commercial domicile is Nebraska and if not organized under or taxable in state of utilization; otherwise allocated to Nebraska to extent of utilization[35]

34. This table summarizes NEB. REV. STAT. §§ 77-2738 to -2742 (Supp. 1967) and NEB. INCOME TAX REG. TC 24-12 (1968).

35. The extent of utilization is determined by multiplying rents by a fraction, the numerator of which is the number of days in-state and the denominator of which is the number of days of physical location every-

B.	Gains and losses from sale of real property; and net rents and royalties from real property	to Nebraska only if property is located in Nebraska
C.	Gains and losses from sales of intangible personal property	to Nebraska only if taxpayer's commercial domicile is Nebraska
D.	Interest and dividend income	to Nebraska only if commercial domicile is Nebraska[36]
E.	Patent and copyright royalties	to extent utilized by payor in this state; or if taxpayer's commercial domicile is Nebraska, then to extent utilized in all states wherein payor is not taxable
F.	Gains and losses from sales of nonbusiness tangible personal property	to Nebraska if property has Nebraska situs at time of sale; or if taxpayer's commercial domicile is Nebraska and he is not taxable in state where property has situs

With respect to direct allocation, differences of opinion are certain to arise in the application and the meaning of the concepts "nonbusiness income"[37] and "commercial domicile."[38] Moreover, there

where during all rental periods during the taxable period. *See* NEB. REV. STAT. § 77-2739(3) (Supp. 1967).

36. NEB. INCOME TAX REG. TC 24-12(c) (1968) indicates that interest from federal bonds is never to be included in or allocated to Nebraska income. The Regulation is believed to be erroneous. The purpose underlying the combination tax package is the desire to include federal bond interest in the measure of the franchise tax. *See* notes 9 & 10 *supra.* Consequently, when the franchise tax is imposed, federal bond interest can and will be allocated to Nebraska when the taxpayer's commercial domicile is Nebraska. NEB. REV. STAT. § 77-2734(2) (Supp. 1967), when read in relation with §§ 77-2741 and 77-2716, clearly requires such allocation.

37. *See* Montgomery Ward & Co. v. Commissioner of Taxation, 276 Minn. 479, 151 N.W.2d 294 (1967), wherein the court held interest and dividend income from investment funds was not directly allocable, but instead was to be apportioned as business income in accord with MINN. STAT. § 290.17(4) (1965), which authorized apportionment of "income from intangible property employed in such business." Under the Nebraska Act, interest and dividend income would be apportionable business income "if the acquisition, management, and disposition" of the intangibles constitute an integral part of the business operations. NEB. REV. STAT. § 77-2735(1) (Supp. 1967). The reasoning contained in the *Montgomery Ward* decision could lead to a claim that management of a corporation's funds, in the form of cash or other intangibles, is an integral part of the business and that therefore the resulting interest is business income, especially if it is used in the business.

38. Commercial domicile is generally said to be the real center of business activity, *i.e.*, where operations are headquartered and management functions. *See* Wheeling Steel Corp. v. Fox, 298 U.S. 193 (1936): Commer-

will be record-keeping and reporting problems.[39]

IV. GENERAL PROVISIONS

There is a provision in the Act which affords the tax commissioner great flexibility in attempting to reach an equitable result in any given case. Whenever the previously discussed apportionment or allocation provisions do not fairly represent the taxpayer's income attributable to Nebraska, either the taxpayer may petition for, or the commissioner may require, employment of some alternative method of computation or separate accounting.[40]

Mention should be made of other provisions in the Nebraska Revenue Act, including the comprehensive withholding provisions[41] and the provisions for estimating taxes.[42] Mention might also be made of the fact that national banks are taxed under the Act "according to or measured by their net income."[43]

The Nebraska Revenue Act provisions on corporate taxation appear to be both comprehensive and flexible.[44] Moreover, the Act

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cial domicile is to a corporation what residence is to an individual, with the ultimate resolution of the question turning on the facts of a given case.

39. Direct allocation of the specified items of nonbusiness income is required irrespective of whether the taxpayer's business income is subject to a Nebraska tax and irrespective of whether such business income is apportioned. Schedule K of forms 1120N and 1120N-FR does not make this apparent, nor do the Regulations clarify it as yet.

40. NEB. REV. STAT. § 77-2752 (Supp. 1967). In a proper case, the tax commissioner may permit or require apportionment through the relationship of in-state to out-of-state days, miles, arrivals, pipelines, or similar units which might bear a reasonable relationship to activity within and without the state. The method of apportionment utilized in a given case, whether formula or otherwise, must not unfairly burden interstate commerce either by discriminating against it or by subjecting it to unfair multiple taxation. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959).

41. NEB. REV. STAT. §§ 77-2753 to -2758 (Supp. 1967).

42. NEB. REV. STAT. § 77-2769 (Supp. 1967). Corporations should file declarations of estimated tax if their Nebraska tax liability after apportionment for the year "can reasonably be expected" to exceed $5,000. NEB. INCOME TAX REG. TC 22-1 (1968). Only the amount *in excess* of $5,000 is subject to payment and declaration. NEB. INCOME TAX REG. TC 22-1 (1968).

43. Federal law permits a state to tax national banks under one of four methods. *See* First Agricultural Nat. Bank v. State Tax Comm'n, 392 U.S. 339 (1968). Nebraska has chosen the method prescribed by subsection (4) of 12 U.S.C. § 548 (1964). The rate may be no higher "than the rate assessed upon other financial corporations." 12 U.S.C. § 548 (1964).

44. The principles expressed herein and the methods of apportioning income may be applicable to multistate businesses being conducted by nonresident individuals and partnerships having a nonresident partner. *See* NEB. INCOME TAX REG. TC 23-3 (b) (1968).

is susceptible of a broad construction. While the exact scope of its ultimate application is yet to be seen, it may be assumed that the breadth of the Act will be limited only by the congressional, constitutional, and statutory restrictions noted herein.