

ADMINISTRATIVE RULE REVIEW

Rule No. 150-314-0435	
Page Page 1 of 5	Last Revised Date September 1, 2016
NOTICE OF INTENDED ACTION	
Bulletin Dated	Hearing Scheduled

PURPOSE: This is the version of OAR 150-315-0435 that applies to tax years beginning prior to January 1, 2018.

1 **OAR 150-314-0435**

2 **Sales Factor; Sales Other Than Sales of Tangible Personal Property in This State**

3 (1) This rule is effective August 31, 2008 and applies to tax years beginning on or after January 1, 2008.
4 For tax years beginning prior to January 1, 2008 an "income producing activity" did not include
5 transactions performed on behalf of a taxpayer, such as those conducted on the taxpayer's behalf by an
6 independent contractor.

7 (2) In General. ORS 314.665(4) provides for the inclusion of gross receipts from transactions other than
8 sales of tangible personal property (including transactions with the United States Government) in the
9 numerator of the sales factor); under this section gross receipts are attributed to this state if the income
10 producing activity that gave rise to the receipts is performed wholly within this state. Also, gross receipts
11 are attributed to this state if, with respect to a particular item of income, the income producing activity is
12 performed within and without this state but the greater proportion of the income producing activity is
13 performed in this state, based on costs of performance. Income Producing Activity; Defined. The term
14 "income producing activity" applies to each separate item of income and means the transactions and
15 activity directly engaged in by the taxpayer in the regular course of its trade or business for the ultimate
16 purpose of obtaining gains or profit. Income producing activity includes transactions and activities
17 performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor.
18 Accordingly, income producing activity includes but is not limited to the following:

19 (a) The rendering of personal services by employees or by an agent or independent contractor acting on
20 behalf of the taxpayer or the utilization of tangible and intangible property by the taxpayer or by an agent
21 or independent contractor acting on behalf of the taxpayer in performing a service.

22 (b) The sale, rental, leasing, franchising, licensing or other use of real property.

23 (c) The rental, leasing, franchising, licensing or other use of tangible personal property.

24 (d) The sale, franchising, licensing or other use of intangible personal property. The mere holding of
25 intangible personal property is not, of itself, an income producing activity.

26 (3)(a) Where the income producing activity in respect to business income from intangible personal
27 property can be readily identified, the income is included in the denominator of the sales factor and, if the



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- 1 income producing activity occurs in this state, in the numerator of the sales factor as well. For example,
2 usually the income producing activity can be readily identified in respect to interest income received on
3 deferred payments on sales of tangible property (OAR 150-314-0425) and income from the sale,
4 licensing or other use of intangible personal property.
- 5 (b) Where business income from intangible property cannot readily be attributed to any particular income
6 producing activity of the taxpayer, the income cannot be assigned to the numerator of the sales factor for
7 any state and must be excluded from the denominator of the sales factor. For example, where business
8 income in the form of dividends received on stock, royalties received on patents or copyrights, or interest
9 received on bonds, debentures or government securities results from the mere holding of the intangible
10 personal property by the taxpayer, the dividends and interest must be excluded from the denominator of
11 the sales factor.
- 12 (4) Costs of Performance; Defined. The term "costs of performance" means direct costs determined in a
13 manner consistent with generally accepted accounting principles and in accordance with accepted
14 conditions or practices in the trade or business of the taxpayer to perform the income producing activity
15 that gives rise to the particular item of income. Included in the taxpayer's cost of performance are
16 taxpayer's payments to an agent or independent contractor for the performance of personal services and
17 utilization of tangible and intangible property which give rise to the particular item of income. For
18 purposes of this rule, direct costs do not include costs that are not part of the income producing activity
19 itself, such as accounting or billing expenses.
- 20 (5) Application.
- 21 (a) In General. Receipts (other than from sales of tangible personal property) in respect to a particular
22 income producing activity performed by the taxpayer are in this state if:
- 23 (A) The income producing activity is performed wholly within this state; or
24 (B) The income producing activity is performed both in and outside this state and a greater proportion of
25 the income producing activity is performed in this state than in any other state, based on costs of
26 performance.

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- 1 (b) Under the authority provided in ORS 314.667, paragraphs (A)–(C) of this subsection describe when
 2 receipts from certain income producing activities are in this state.
- 3 (A) Gross receipts from the sale, lease, rental, franchising, or licensing of real property are in this state if
 4 the real property is located in this state.
- 5 (B) Gross receipts from the rental, lease, franchising, or licensing of tangible or intangible personal
 6 property are in this state if the property is located in this state.
- 7 (i) The rental, lease, franchising, licensing or other use of tangible or intangible personal property in this
 8 state is a separate income producing activity from the rental, lease, licensing or other use of the same
 9 property while located in another state; consequently, if the property is within and without this state
 10 during the rental, lease, franchising or licensing period, gross receipts attributable to this state must be
 11 measured by the ratio that the time the property was physically present or was used in this state bears to
 12 the total time or use of the property everywhere during the period.
- 13 Example 1: Taxpayer is the owner of 10 railroad cars. During the year, the total of the days each railroad
 14 car was present in this state was 50 days. The receipts attributable to the use of the 10 railroad cars in this
 15 state are a separate item of income and are determined as follows: 10 cars x 50 days = 500 car days 10
 16 cars x 365 days = 3,650 car days x Total Receipts = Receipts Attributable to this State
- 17 (ii) Intangible personal property is located in this state if the property is used in business activity in this
 18 state, whether the use is by the taxpayer, a third-party licensee, or another entity with the right to use the
 19 property. Intangible personal property may be used in more than one state at the same time. The use of
 20 intangible personal property in this state is a separate income producing activity from use of the same
 21 property in another state. Use is determined in each tax year.
- 22 (C) Gross receipts for the performance of personal services are attributable to this state to the extent the
 23 services are performed in this state. If services relating to a single item of income are performed partly
 24 within and partly without this state, the gross receipts from the performance of the services are
 25 attributable to this state only if a greater proportion of the services were performed in this state, based on
 26 costs of performance. Usually, where services are performed partly within and partly without this state,
 27 the services performed in each state will constitute a separate income producing activity; in these cases

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- 1 the gross receipts for the performance of services attributable to this state must be measured by the ratio
 2 which the time spent in performing the services in this state bears to the total time spent in performing
 3 the services everywhere. Time spent in performing services includes the amount of time expended in the
 4 performance of a contract or other obligation that gives rise to the gross receipts. Personal service not
 5 directly connected with the performance of the contract or other obligation, as for example, time
 6 expended in negotiating the contract, is excluded from the computations.
- 7 Example 2: Taxpayer, a road show, gave theatrical performances at various locations in State X and in
 8 this state during the tax period. All gross receipts from performances given in this state are attributed to
 9 this state.
- 10 Example 3: The taxpayer, a public opinion survey corporation, conducted a poll by its employees in State
 11 X and in this state for the sum of \$9,000. The project required 600 hours to obtain the basic data and
 12 prepare the survey report. Two hundred of the 600 hours were expended in this state. The receipts
 13 attributable to this state are \$3,000. $200 \text{ hours} / 600 \text{ hours} \times \$9,000$
- 14 (c) Services on behalf of taxpayer. An income producing activity performed on behalf of a taxpayer by
 15 an agent or independent contractor is attributed to this state if the income producing activity is in this
 16 state.
- 17 (A) In order to determine if income producing activity is in this state, consider the following list in
 18 sequential order:
- 19 (i) When the taxpayer can reasonably determine at the time of filing that the income producing activity is
 20 actually performed in this state by the agent or independent contractor, but the activity occurs in more
 21 than one state, the location where the income producing activity is actually performed shall be deemed to
 22 be not reasonably determinable at the time of filing under this subsection;
- 23 (ii) If the taxpayer cannot reasonably determine at the time of filing where the income producing activity
 24 is actually performed, when the contract between the taxpayer and the agent or independent contractor
 25 indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or
 26 contractor associated with the performance is determinable under the contract;



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- 1 (iii) If it cannot be determined where the income producing activity is actually performed and the agent
- 2 or independent contractor's contract with the taxpayer does not indicate where it is to be performed, when
- 3 the contract between the taxpayer and the taxpayer's customer indicates it is to be performed in this state
- 4 and the portion of the taxpayer's payment to the agent or contractor associated with the performance is
- 5 determinable under the contract; or
- 6 (iv) If it cannot be determined where the income producing activity is actually performed and neither
- 7 contract indicates where it is to be performed or the portion of the payment associated with the
- 8 performance, when the domicile of the taxpayer's customer is in this state. If the taxpayer's customer is
- 9 not an individual, "domicile" means commercial domicile as defined in ORS 314.610.
- 10 (B) If the location of the income producing activity by an agent or independent contractor, or the portion
- 11 of the payment associated with the performance, cannot be determined under sections (5)(c)(A)(i)
- 12 through (5)(c)(A)(iii), or the taxpayer's customer's domicile cannot be determined under section
- 13 (5)(c)(A)(iv) of this rule, or, although determinable, the income producing activity is in a state where the
- 14 taxpayer is not taxable, the income producing activity will be disregarded.
- 15 Stat. Auth.: ORS 305.100
- 16 Stats. Implemented: ORS 314.665 & 314.667