

Request for Permission to Proceed with the Formal Regulatory Process
to Adopt Amendments to Regulations sections 25137-1 and 17951-4, Addressing the
Apportionment and Allocation of Income From Partnerships

Possible revisions to Regulation section 25137-1 were first discussed by staff of the Franchise Tax Board at an Interested Parties Meeting held on August 21, 2008. At that meeting, staff discussed fourteen issues that were under review and solicited input from the public. Unfortunately, the regulatory effort did not proceed to a conclusion following that meeting. Staff revived this regulatory effort in 2013 and held a second interested parties meeting on October 18, 2013. A third interested parties meeting, addressing proposed regulatory language drafted by staff, was held on July 8, 2014.

A. Background

When a taxpayer subject to the Corporation Tax Law is a partner in a partnership (as defined in Revenue and Taxation Code section 17008), the computation of its distributive share of partnership items is determined in accordance with Chapter 10 of Part 10 of Division 2 of the Revenue and Taxation Code. The portion of such distributive share (constituting business and nonbusiness income) that has its source in this state, or that is included in the taxpayer's business income, is determined in accordance with California Code of Regulations, title 18, section 25137-1, which was promulgated in 1972 and last amended in 1985. Similarly, when a nonresident individual receives income from a partnership, the source of that income is determined under the rules set forth in Regulation section 17951-4.

The partnership regulation has generally functioned well over the years but the passage of time has rendered some of its provisions out of date and new business models have arisen that the regulation does not address. For these reasons, FTB staff has studied the regulation and identified several issues for the second interested parties meeting that it believes should give rise to consideration of amending the regulation. The issues identified by staff did not limit the topics that could be discussed at the second interested parties meeting; rather, staff invited members of the public to raise for discussion any other issues respecting the partnership and related regulations that they may deem appropriate.

B. The second interested parties meeting

This interested parties meeting, held in October of 2013, addressed the earlier 2008 regulatory effort in a more streamlined manner, narrowing the number of issues to be addressed in the hope that addressing fewer issues would lead to a more productive meeting.

Of the issues that were identified by staff for discussion at the 2008 interested parties meeting, staff asked for public comment on the following eight issues:

- Clarify the treatment of distributive share items from non-unitary partnerships
- Address indirect ownership of business assets

- Address intercompany sales between partners and partnerships
- Address special allocation of partnership interests
- Address variations in taxable years between partners and partnerships
- Eliminate duplicate long-term contract provisions
- Integrate personal and corporate income tax rules
- Clarify the application of safe harbor rules in Regulation section 17951-4

The interested parties meeting was well attended and input was received that allowed staff to undertake the process of drafting proposed regulatory language addressing the topics that were seen as appropriate for revision by the interested parties and staff.

C. The third interested parties meeting

Staff held a third interested parties meeting on July 8, 2014. At that meeting staff presented draft language as well as an explanation of the draft language,¹ and received input from the public. Following the meeting, staff also received input in writing from one of the participants in this interested parties meeting. A report on the outcome of the third interested parties meeting was then produced.² Finally, staff released revised regulatory language reflecting the input received at the third interested parties meeting.³

Staff believes that the regulatory language that is added to Regulation section 25137-1(a), 25137-1(f) and Regulation section 17951-4(d) are reflective of existing law, but in the interest of fairness, staff made the regulation changes prospective. Staff further intends that no inference should be drawn from such prospectivity.

Staff now requests permission to commence the formal regulatory process under the Administrative Procedure Act.

¹ Attached as Exhibit A

² Attached as Exhibit B

³ Attached as Exhibit C

EXHIBIT A

Explanation of Discussion Draft for Proposed Amendments to Regulation 25137-1 and Regulation 17951-4.

An interested parties meeting was held on October 18, 2013 to discuss possible revisions of Regulations 25137-1 and 17951-4, relating to interests in partnerships and apportionment. Numerous topics were discussed at the IPM and staff has taken that input as well as its own research and has produced a discussion draft of revisions to the existing regulations that contain numerous suggested additions as well as deletions from the regulations. This Explanation is meant to accompany the discussion draft to allow members of the public to understand the reasons underlying the proposed changes to the existing regulations and provides a background for further discussions regarding the regulations at the next interested parties meeting.

Regulation 25137-1 changes

Subsection (a)

Subsection (a) of the regulation has been amended to change the obsolete term "income year" to the term "taxable year" to be consistent with newer regulations and laws. This change is made throughout the regulation.

The sentence *"The same principle applies when a taxpayer has an interest in a partnership that itself owns an interest, directly or indirectly, in one or more other partnerships"* has been added to the first paragraph to clarify that the rules contained in this regulation apply not only to partnership interests held directly by taxpayer corporations, but also to lower tier partnerships that are held indirectly by the taxpayer corporation as well. This is in response to concerns that the phrase "taxpayer" used throughout the regulation makes it unclear whether the rules of the regulation apply to lower tier partnerships not owned by a taxpaying entity directly but rather by another partnership entity.

The second paragraph has been amended to clarify that the determination of business and nonbusiness partnership income is made at the partnership level regardless of whether the partnership and the corporate partner are engaged in a unitary business. This change is suggested to remove confusion regarding whether a corporate partner should make a determination as to the sourcing of partnership income based on its ownership of the intangible interest in the partnership rather than treating the partnership as a separate trade or business of the partner corporation. The amendment provides:

Even if the partnership's business and the taxpayer's business are not unitary, such that subsection (g) applies, the distributive share income allocated to the taxpayer is from a separate trade or business of the taxpayer, not nonbusiness income of the taxpayer. The determination of whether an item of income is apportionable business income or allocable nonbusiness income is made at the partnership level based on the trade or business of the partnership. Revenue and Taxation Code section 23040 is not applicable.

Subsection (f)

The first amendment to this subsection addresses the "taxable year" vs. "income year" issue described earlier and provides:

(f) Apportionment of Business Income-Single Trade or Business. (f) Apportionment of Business Income -Single Trade or Business. If the partnership's activities and the taxpayer's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of such single trade or business attributable to this state shall be determined by an apportionment formula, pursuant to either Section 25128, Section 25128.5 or Section 25128.7, Revenue and Taxation Code, whichever is applicable, of the taxpayer and its share of the partnership's factors for any partnership taxable year ending within or with the taxpayer's taxable year. ~~for any partnership year ending within or with the taxpayer's income year as follows:~~ The apportionment factors related to the taxpayer's interest in the partnership shall be determined as follows:

Subsection (f)(5) is maintained to provide additional clarification regarding issues related to different accounting periods.

Subsection (f)(3) is amended to provide greater clarification regarding sales between an partner and a unitary partnership. This issue was discussed at length at the first interested parties meeting and staff now proposes these amendments to further clarify that intercompany sales within a unitary business are not includable in the sales factor, even if the sales are made to another member of the unitary business who is not the direct partner owner of the partnership interest itself.

(3) Sales Factor. In general the numerator and denominator of the sales factor shall be determined as set forth in Regulations 25134 to 25136, inclusive, and 25137(c). However, the following special rules shall apply:

(A) The partnership's sales which give rise to business income, shall be included in the denominator of the taxpayer's sales factor to the extent of the taxpayer's interest in the partnership. The amount of such sales attributable to this state shall also be included in the numerator of the taxpayer's sales factor. Intercompany sales between the partnership, on the one hand, and the taxpayer or any member of the taxpayer's combined reporting group, on the other, shall be eliminated from the denominator of the taxpayer or the taxpayer's combined reporting group (if applicable), as well as ~~the~~ and numerator of the taxpayer's sales factor or the numerator of another member of the taxpayer's combined reporting group, whomever made the sale to the partnership, as follows:

(i) Sales by the taxpayer, or any member of the taxpayer's combined reporting group, to the partnership to the extent of the taxpayer's interest in the partnership.

(ii) Sales by the partnership to the taxpayer or any member of the taxpayer's combined reporting group, not to exceed the taxpayer's interest in all partnership sales.

(B) Notwithstanding any intercompany eliminations described in subparagraph (A) above, sales made to nonpartners, other than members of the partner taxpayer's combined reporting group, shall be included in the denominator of the taxpayer's sales factor in an amount equal to such taxpayer's interest in the partnership.

Subsection (f)(4) is revised to provide greater clarity for the term "interest in the partnership". This change is offered to address the uncertainty in the existing regulation's definition of "partnership interest". The change provides that a partner's interest percentage in the partnership shall be determined by its interest in profits, as opposed to capital. Staff believes this is easier to audit as well as more closely tied to the income subject to apportionment than a capital interest approach would provide. The revised section provides:

(4) Partnership Interest-Defined. A taxpayer's partnership interest for the purpose of computing the portion of the partnership's property, payroll and sales to be included in the taxpayer's property, payroll or sales factor shall be determined by the taxpayer's "interest in the partnership". The taxpayer's interest in the partnership shall be determined by reference to its interest in profits of the partnership. ~~determined under Chapter 10 of Part 10 of Division 2 of the Revenue and Taxation Code, and the regulations thereunder.~~

Subdivision (h) of the regulation is heavily amended to remove the provisions relating to long term contracts and instead simply provides a reference to the Regulation 25137-2 rules for long term contracts. The existing regulations provisions are repetitive and may cause confusion.

Regulation 17951-4 Changes

Regulation 17951-4 provides guidance for non-residents who are engaged in a trade or business. As part of the regulation, rules are provided for a non-resident who owns an interest in a partnership that conducts its trade or business both within and without of California. These rules cross reference to the apportionment rules set forth in Revenue and Taxation Code section 25120 through 25139 and the accompanying regulations thereunder. This includes Regulation 25137-1. Therefore, staff believes the rules in Regulation 17951-4 should be amended consistent with the rules set forth in Regulation 25137-1 where unique language is required to address the difference in treatment for non-resident individuals instead of corporations.

Regulation 17951-4(d)(1) is amended consistent with Regulation 25137-1(a) to provide that the apportionment of income is determined at the partnership level and not at the partner level. The addition in this section specifically provides that Revenue and Taxation Code section 17952 should not be applied by the partnership in sourcing income allocated to the nonresident partner. This clarification is meant to address the issue in the non-precedential determination of the Board of Equalization in Appeal of Venture Communications Inc., which was decided on February 5, 2003. In that appeal, the Board applied the rules of RTC section 17952, rather than the apportionment rules of Revenue and Taxation Code section 25120 -25139, to determine the source of income from the sale of an intangible by an S

corporation. This is not consistent with the sourcing rules set forth in Regulation 25137-1 and this amendment is provided to remedy that inconsistency. The amendment provides:

(1) Except as provided, the total business income of the partnership shall be apportioned at the partnership level in accordance with the apportionment rules of the Uniform Division of Income for Tax Purposes Act, Sections 25120 to 25139, Revenue and Taxation Code, and the regulations thereunder. Revenue and Taxation Code section 17952 is not applicable in determining the source of income allocated to the nonresident taxpayer by the partnership.

Subsection (d)(2) is added to the existing regulation to provide additional clarity regarding the use of Regulation section 25137-1 in the determination of California source partnership income when the partnership is engaged in a unitary business with another business activity of the partner. The new section provides:

(2) If the partnership and the business activity of the partner are part of one unitary business, then the rules of Regulation section 25137-1(f) apply and the apportionment of the partnership business income is done at the partner level for the unitary partner or partners. Each partner's distributive share of the partnership business income apportioned to this state is income derived from sources within this state.

Associated changes are made throughout Regulation 17951-4 to account for the addition of this new section.

Finally, no changes are proposed at this time regarding the operative date for the changes to Regulations 25137-1 or 17951-4. Staff would like further input from the public regarding whether the changes should be prospective only or retrospective to some extent.

EXHIBIT B

Summary of Third Interested Parties Meeting Regulations 25137-1 and 17951-4 Partnerships and Apportionment

I. Administration: An interested parties meeting was held on July 8, 2014 to discuss possible revisions of Regulations 25137-1 and 17951-4. Parties attended in person and by telephone. Those physically present were asked to register at the entrance. Phone participants introduced themselves. The session was tape recorded for reference but there will be no attribution of comments and no transcript. The Hearing Officer was Carl Joseph. Available handouts were: notice of the meeting, proposed language setting forth revisions to the regulations at issue, and an explanation of the proposed language.

II. Discussion: The discussion was organized around the proposed draft language, with the hearing officer going through each proposed change in the regulations, explaining why the language is drafted in the manner that it is proposed, and inviting comment from the public on each change.

Regulation section 25137-1

Subdivision (a)

1. Subdivision (a) of the regulation is amended to change from the obsolete term "income year" to the term "taxable year" to be consistent with newer regulations and laws. This change is made throughout the regulation.

Comments:

No comments were received on this change.

2. The sentence "The same principle applies when a taxpayer has an interest in a partnership that itself owns an interest, directly or indirectly, in one or more other partnerships" has been added to the first paragraph to clarify that the rules contained in this regulation apply not only to partnership interests held directly by taxpayer corporations, but also to lower tier partnerships that are held indirectly by the taxpayer corporation as well. This is in response to concerns that the phrase "taxpayer" used throughout the regulation makes it unclear whether the rules of the regulation apply to lower tier partnerships not owned by a taxpaying entity directly but rather by another partnership entity.

The second paragraph was also amended in the proposed language to clarify that the determination of business and nonbusiness partnership income is made at the partnership level regardless of whether the partnership and the corporate partner are engaged in a unitary business. This change was suggested to remove confusion regarding whether a corporate partner should make a determination as to the sourcing of partnership income based on its ownership of the intangible interest in the partnership rather than treating the partnership as a separate trade or business of the partner corporation.

September 30, 2014

Comments:

Commentators suggested that this language was still confusing and did not provide the clarity that staff sought to provide. The commentators suggested changing the language to provide additional clarity.

Subdivision (f)

1. The rules in subdivision (f)(3) were amended to provide additional clarity regarding the sales factor treatment of transactions that occur between a partnership and a partner with whom the partnership is engaged in a unitary business. The amendments provide that such sales, whether made directly with the unitary partner, or with another member of the unitary partner's combined reporting group, should not be included in the sales factor. Staff also explained at the interested parties meeting that these amendments will be prospective.

Comments:

No comments were received. Staff has now inserted subdivision (j) into the proposed amendments to provide for prospective application of all of the amendments made as part of this regulatory effort.

2. The rule in subdivision (f)(4), which defines the term "partnership interest," is amended as part of this regulatory effort to specify that a taxpayer's "interest in the partnership" means its interest in profits of the partnership.

Comments:

Comments were received that the language did not address situations where the individual's profits in the partnership can change from year to year, such as when there is a gain to the partners under IRC section 704, nor did the language address the use of special allocations that are sometimes used by partnerships, such as assigning a certain amount of partnership profits to one partner and then profits to the other partners only if profits exceed that amount. The hearing officer responded that the level of complexity in this area is high, and that staff was attempting to provide a guiding general rule rather than specific guidance for all possible scenarios that could arise. The hearing officer agreed to consider additional language to address the concerns of the commentators.

Subdivision (h)

Subdivision (h) of the regulation is heavily amended to remove the provisions relating to long term contracts and instead simply provides a reference to the Regulation 25137-2 rules for long term contracts. The existing regulations provisions are repetitive and may cause confusion.

Comments:

No comments were received on this change.

Regulation section 17951-4

Regulation 17951-4 provides guidance for nonresidents who are engaged in a trade or business. As part of the regulation, rules are provided for a nonresident who owns an interest in a partnership that conducts its trade or business both within and without of California. These rules cross reference to the apportionment rules set forth in Revenue and Taxation Code section 25120 through 25139 and the accompanying regulations thereunder. This includes Regulation 25137-1. Therefore, staff believes the rules in Regulation 17951-4 should be amended consistent with the rules set forth in Regulation 25137-1 where unique language is required to address the difference in treatment for nonresident individuals instead of corporations.

Regulation 17951-4(d)(1) is amended consistent with Regulation 25137-1(a) to provide that the apportionment of income is determined at the partnership level and not at the partner level. The addition in this section specifically provides that Revenue and Taxation Code section 17952 should not be applied by the partnership in sourcing income allocated to the nonresident partner. Subsection (d)(2) is also added to the existing regulation to provide additional clarity regarding the use of Regulation section 25137-1 in the determination of California source partnership income when the partnership is engaged in a unitary business with another business activity of the partner.

Comments:

Comments were received that the language that staff has added to this section does not provide adequate clarity, and staff received a written request after the interested parties meeting that provided additional input on this issue and suggested language to clarify that the amendment that staff is seeking applies to apportionable business income as determined at the partnership level and not to allocable nonbusiness income earned by the partnership. Staff will consider the language provided and propose to amend the regulation to address these concerns.

The changes to 17951-4 will also be applied prospectively and language will be added to the regulation to make this clear.

EXHIBIT C

Section 25137-1 is amended to read:

§ 25137-1. Apportionment and Allocation of Partnership Income.

(a) In General. When a taxpayer has an interest in a partnership as defined in Section 17008, Revenue and Taxation Code, the division of its distributive share of partnership items shall be determined in accordance with Chapter 10 of Part 10 of Division 2 of the Revenue and Taxation Code. The determination of the portion of such distributive share (constituting business and nonbusiness income) which has its source in this state or which is includible in the taxpayer's business income subject to apportionment, shall be made in accordance with these regulations provided that the taxpayer, or the partnership, or both, have income from sources within and without this state. The taxpayer in computing net income for its ~~income~~taxable year shall include its distributive share of partnership items referred to above for any partnership year ending within or with the taxpayer's ~~income year~~ taxable year. The same principle applies when a taxpayer has an interest in a partnership that itself owns an interest, directly or indirectly, in one or more other partnerships.

The first step is to determine which portion of the taxpayer's income and its distributive share of the partnership items constitute "business income" and "nonbusiness income" under Section 25120, Revenue and Taxation Code, and the regulations thereunder. The various items of nonbusiness income are then directly allocated to specific states pursuant to the provision of Section 25124 to 25127, Revenue and Taxation Code. The taxpayer's distributive share of partnership business income is apportioned by the formula set forth in subsections (f) or (g), whichever is applicable. Even if the partnership's business and the taxpayer's business are not unitary, such that subsection (g) applies, the distributive share income allocated to the taxpayer is from a separate trade or business of the taxpayer, not nonbusiness income of the taxpayer. Therefore, the determination of whether an item of income is apportionable business income or allocable nonbusiness income is to be made at the partnership level based on the application of Revenue and Taxation Code section 25120(a) to the item of income and its relationship to the trade or business of the partnership. Revenue and Taxation Code section 23040 is not applicable. The sum of (1) the items of nonbusiness income directly allocated to this state, plus (2) the amount of business income attributed to this state is the portion of the taxpayer's entire net income which is subject to tax.

Income arising from transactions and activity in the regular course of the partnership's trade or business constitutes business income. Thus, a corporate-partner's distributive share of partnership business income constitutes business income to the corporate-partner, but the determination of whether the partnership's activities and the activities of the corporate-partner constitutes a single trade or business or more than one trade or business turns on the facts in each case. If the partnership's activities and the taxpayer's activities constitute a unitary business under established standards, disregarding ownership requirements, the taxpayer's share of the partnership's trade or business shall be combined with the taxpayer's trade or business as constituting a single trade or business.

EXAMPLE 1:

Corporation A's distributive share of income in partnership P is 20%. Corporation A

September 30, 2014

manufactures toys which are sold in the seven western states by partnership P. Corporation

A's business income for the year was \$1,000,000 and partnership P's business income for the same year was \$800,000. The business income of Corporation A is \$1,160,000 (\$1,000,000 plus 20% of \$800,000).

EXAMPLE 2:

Corporation A's distributive share of income in partnership P is 90%. Partnership P manufactures toys of which approximately 30% are sold by Corporation A in the seven western states. The remainder is sold to outsiders by partnership P. In addition, Corporation A also sells other lines of toys not manufactured by partnership P. Corporation A handles all financing, management, accounting, advertising, and purchasing functions for partnership P as well as for itself. Corporation A incurred a loss of \$500,000 for the year but partnership P's income was \$1,000,000. The business income of Corporation A is \$400,000 (90% of \$1,000,000 = \$900,000 less the loss of \$500,000).

When the activities of the partnership and the taxpayer do not constitute a unitary business under established standards, disregarding ownership requirements, the taxpayer's share of the partnership's trade or business shall be treated as a separate trade or business of the taxpayer. In such a case the taxpayer is engaged in two trades or businesses.

EXAMPLE:

Corporation A's distributive share of income in partnership P is 20%. Corporation A manufactures and sells toys in the seven western states. Partnership P operates farms within and without this state. Corporation A's income for the year is \$1,000,000 and partnership P's income is \$800,000 for the same year. Corporation A is engaged in two trades or businesses, and will be required to apportion its income of \$1,000,000 from its own operations to this state on the basis of a three factor apportionment formula. Partnership P would attribute part of its business income of \$800,000 to this state on the basis of its own three factor apportionment formula. Accordingly, Corporation A would report 20% of the partnership income apportioned to this state plus a portion of its income from its toy manufacturing business.

(b) **Distributive Items of Nonbusiness Income.** Partnership income from interest, dividends, rents, royalties or capital gains is nonbusiness income when such income does not constitute business income. The taxpayer's distributive share of such nonbusiness income shall be reported in the same manner as other nonbusiness income derived from other activities of the taxpayer (see Sections 25123 to 25127, inclusive).

(c) **Business and Nonbusiness Income; Application of Definitions.** The classification of income by the labels customarily given such as interest, dividends, rents, royalties, capital gains, etc., is of no aid in determining whether partnership income is business or nonbusiness income. The gain or loss recognized on the sale of property, for example, may be business income or nonbusiness income depending upon the relation to the partnership's trade or business. Rules and examples for determining whether these types of income constitute business or nonbusiness income are set forth in Regulation 25120(c) and are applicable to partnerships under this regulation.

(d) Proration of Deductions. In most cases an allowable deduction of a partnership will be applicable only to the business income arising from a particular trade or business or to a particular item of nonbusiness income. In some cases an allowable deduction may be applicable to the business incomes of more than one trade or business and/or to several items of nonbusiness income. In such cases the deduction shall be prorated among such trades or businesses and such items of nonbusiness income in a manner which fairly distributes the deduction among the classes of income to which it is applicable.

(e) Distributive Items of Expense. Any items of expense ~~distributed~~ allocated to the taxpayer in accordance with Chapter 10 of Part 10 of Division 2 of the Revenue and Taxation Code, shall be taken into account in computing the taxpayer's business and nonbusiness income, to the extent allowable under the law and in accordance with these regulations as to determining their applicability to the taxpayer's business or nonbusiness income.

(f) Apportionment of Business Income-Single Trade or Business. If the partnership's activities and the taxpayer's activities constitute a unitary business under established standards, disregarding ownership requirements, the business income of such single trade or business attributable to this state shall be determined by an apportionment formula, pursuant to either Section 25128, Section 25128.5 or Section 25128.7, Revenue and Taxation Code, whichever is applicable, of the taxpayer and its share of the partnership's factors for any partnership taxable year ending within or with the taxpayer's taxable year.~~for any partnership year ending within or with the taxpayer's income year as follows:~~ The apportionment factors related to the taxpayer's interest in the partnership shall be determined as follows:

(1) Property Factor. In general the numerator and denominator of the property factor shall be determined as set forth in Regulations 25129 to 25131, inclusive, and 25137(b). However, the following special rules shall apply:

(A) A portion of the partnership's real and tangible personal property, both owned or rented and used during the income year in the regular course of such trade or business, to the extent of the taxpayer's interest in the partnership, shall be included in the denominator of the taxpayer's property factor. The value of such property located in this state shall also be included in the numerator of the property factor.

(B) The value of property which is rented or leased by the taxpayer to the partnership or vice versa shall, with respect to the taxpayer, be excluded from the property factor of the partnership or eliminated to the extent of the taxpayer's interest in the partnership, whatever the case may be, in order to avoid duplication.

EXAMPLE 1:

Corporation A's interest in partnership P is 20%. Corporation A's distributive share of partnership P's income is included in business income of Corporation A to be apportioned by formula. Corporation A owns a building (original cost of \$100,000) which is rented to partnership P for \$12,000 per year. Corporation A

must include the original cost of \$100,000 for the building in its property factor. Therefore, no portion of the value of the rented property will be reflected in the property factor of Corporation A.

EXAMPLE 2:

Same facts as in Example 1 except partnership P owns the building and rents it to Corporation A. Corporation A will include \$20,000 (20% of \$100,000) in its property factor because of its interest in partnership P. In addition, Corporation A will take into account \$9,600 (\$12,000 less 20% thereof) of rental expense into its property factor in order to give weight in the property factor to the rented building used in Corporation A's operation. Thus, the value of the building to be used in the property factor of Corporation A is \$96,800 (\$20,000 plus 8 x \$9,600).

(2) Payroll Factor. In general the numerator and denominator of the payroll factor shall be determined as set forth in Regulations 25132 and 25133. However, the following special rules shall apply:

The partnership's payroll used to produce business income, shall be included in the denominator of the taxpayer's payroll factor to the extent of the taxpayer's interest in the partnership. The amount of any such payroll applicable to this state shall also be included in the numerator of the taxpayer's payroll factor.

EXAMPLE 1:

Corporation A's interest in partnership P is 20% and its distributive share of partnership P's income is included in business income of Corporation A to be apportioned by formula. Corporation A's own payroll is \$1,000,000 and the payroll of partnership P is \$800,000. Corporation A's total payroll for purposes of the payroll factor is \$1,160,000 (\$1,000,000 plus 20% of \$800,000).

(3) Sales Factor. In general the numerator and denominator of the sales factor shall be determined as set forth in Regulations 25134 to 25136, inclusive, and 25137(c). However, the following special rules shall apply:

(A) The partnership's sales which give rise to business income, shall be included in the denominator of the taxpayer's sales factor to the extent of the taxpayer's interest in the partnership. The amount of such sales attributable to this state shall also be included in the numerator of the taxpayer's sales factor. Intercompany sales between the partnership, on the one hand, and the taxpayer or any member of the taxpayer's combined reporting group, on the other, shall be eliminated from the denominator of the taxpayer or the taxpayer's combined reporting group (if applicable), as well as the ~~and~~ numerator of the taxpayer's sales factor or the numerator of another member of the taxpayer's combined reporting group, whomever made the sale to the partnership, as follows:

(i) Sales by the taxpayer, or any member of the taxpayer's combined reporting group, to the partnership to the extent of the taxpayer's interest in the partnership.

(ii) Sales by the partnership to the taxpayer, or any member of the taxpayer's combined reporting group, not to exceed the taxpayer's interest in all partnership sales.

(B) Notwithstanding any intercompany eliminations described in subparagraph (A) above, sales made to nonpartners, other than members of the partner taxpayer's combined reporting group, shall be included in the denominator of the taxpayer's sales factor in an amount equal to such taxpayer's interest in the partnership.

(C) Application of the above rules are illustrated by the following examples:

EXAMPLE 1:

Corporation A's interest in partnership P is 20%, and its distributive share of partnership P's income is included in business income of Corporation A to be apportioned by formula. Corporation A's sales were \$20,000,000 for the year, \$5,000,000 of which were made to partnership P. Partnership P made sales of \$10,000,000 during the same year, none of which were to Corporation A or other partners.

The denominator of Corporation A's sales factor is \$21,000,000 determined as follows:

Sales by Corporation A.....		\$20,000,000
Add: Corporation A's interest (20%) in Partnership P's sales	\$2,000,000	
Less: Corporation A's interest (20%) in Corporation A's sales to Partnership P.....	1,000,000	1,000,000
Denominator of Sales Factor.....		\$21,000,00

EXAMPLE 2.

The following facts are applicable to Examples 2(a) to (c), inclusive. Corporation A's interest in partnership P is 20% and Corporation B's interest is 80%. The distributive share of partnership income is included in business income of Corporation A and Corporation B, respectively.

The sales made by Corporation A, Corporation B, and Partnership P are as follows:

Corporation A.....		\$20,000,000
Corporation B.....		60,000,000
Partnership P:		
To Corporation A.	\$2,000,000	
Corporation B.....	8,000,000	\$10,000,000

The denominator of Corporation A's sales factor is \$20,000,000 determined as follows:

Sales by Corporation A.....		\$20,000,000
Add: Corporation A's interest (20%) in Partnership P's sales.....	\$2,000,000	
Less: Partnership P's Sales Sales by Corporation A.....	2,000,000	-0-
Denominator of Corporation A's sales factor.....		\$20,000,000

The denominator of Corporation B's sales factor is \$60,000,000 determined as follows:

Sales by Corporation B.....		\$60,000,000
Add: Corporation B's interest (80%) in Partnership P's sales.....	\$8,000,000	
Less: Partnership P's sales to Corporation B.....	8,000,000	-0- 60,000,000

The sales made by Corporation A, Corporation B, and Partnership P are as follows:

Corporation A.....	\$20,000,000	
Corporation B.....	60,000,000	
Partnership P:		
To Corporation A.	\$1,000,000	
To Corporation B.	9,000,000	\$10,000,000

The denominator of Corporation A's sales factor is \$21,000,000 determined as follows:

Sales by Corporation A.....		\$20,000,000
Add: Corporation A's interest (20%) in Partnership P's sales.....	\$2,000,000	
Less: Partnership P's sales to Corporation A.....	1,000,000	1,000,000
Denominator of Corporation A's sales factor.....		\$21,000,000

The denominator of Corporation B's sales factor is \$60,000,000 determined as follows:

Sales by Corporation B.....		\$60,000,000
Add: Corporation B's interest (80%) in Partnership P's sales.....	\$8,000,000	
Less: Intercompany sales be- tween Partnership P and Corporation B	8,000,000	-0-
Denominator of Corporation B's sales factor.....		\$60,000,000

The sales made by Corporation A, Corporation B, and Partnership P are as follows:

Corporation A.....	\$20,000,000
Corporation B.....	80,000,000
Partnership P:	
To Corporation A.	\$3,000,000
To Corporation B.	6,000,000
To Corporation X.	1,000,000
	\$10,000,000

The denominator of Corporation A's sales factor is \$20,200,000 determined as follows:

Sales by Corporation A.....		\$20,000,000
Add: Corporation A's interest in Partnership P's sales to Nonpartner X Corporation (20% x \$1,000,000).....		200,000
Corporation A's interest in Partnership P's sales to Partners (20% x \$9,000,000).....	\$1,800,000	
Less: Intercompany sales from Partnership P to Corporation A	1,800,000	-0-
Denominator of Corporation A's sales factor.....		\$20,200,000

The denominator of Corporation B's sales factor is \$81,800,000 determined as follows:

Sales by Corporation B.....		\$80,000,000
Add: Corporation B's interest in Partnership P's sales to Nonpartners x Corporation (80% x \$1,000,000).....		800,000
Corporation B's interest		

in Partnership P's sales to Partners (80% x \$9,000,000).....	\$7,200,000	
Less: Intercompany sales from Partnership P to Corporation B.....	6,000,000	1,200,000
Denominator of Corporation B's sales factor.....		\$82,000,000

Not to exceed taxpayer's interest in Partnership P's sales

- (4) Partnership Interest-Defined. A taxpayer's partnership interest for the purpose of computing the portion of the partnership's property, payroll and sales to be included in the taxpayer's property, payroll or sales factor shall be determined by the taxpayer's "interest in the partnership". The taxpayer's interest in the partnership shall be determined by the portion of total interest in profits of the partnership assigned to the partner for the taxable year, determined under Chapter 10 of Part 10 of Division 2 of the Revenue and Taxation Code, and the regulations thereunder.
- (5) Common Accounting Period. If a partnership and a corporation are engaged in a unitary business and their accounting periods are different, if necessary, in order to avoid distortion, the income and factors of the partnership will be determined on the basis of the corporate partner's accounting period.
- (g) Apportionment of Business Income-Two or More Trades or Businesses. When the activities of the partnership and the taxpayer do not constitute a unitary business under established standards, disregarding ownership requirements, the taxpayer's share of the partnership's trade or business shall be treated as another trade or business of the taxpayer. The determination of the amount of the partnership's business income and the taxpayer's distributive share of that income attributable to sources within this state shall be as follows:
- (1) If the partnership derives business income from sources within and without this state, the amount of business income derived from sources within this state shall be determined on the basis of a three factor formula of property, payroll and sales. The factors shall be determined in accordance with the provisions of Sections 25129 to 25137, inclusive, Revenue and Taxation Code, and the regulations thereunder. After determining the amount of business income attributable to this state by the three factor formula, the taxpayer's distributive share of such business income shall be reported as business income from a separate business by the taxpayer. That income when added to the taxpayer's other business income apportioned to this state and nonbusiness income allocable to this state is the taxpayer's measure of tax for its income year.

EXAMPLE:

Corporation A's distributive share of income in partnership P is 20%. Partnership P derives income from sources within and without this state but its business is unrelated to the business of Corporation A. Partnership P has business income of \$500,000 for the year of which 40% is apportioned to this state by its three factor formula of property,

payroll and sales. Corporation A shall include in its measure of tax its income received from partnership P \$40,000 ($\$500,000 \times 40\% \times 20\%$).

(2) If the partnership derives business income from sources entirely within this state, or entirely without this state, such income shall not be subject to formula apportionment. The taxpayer's distributive share of such business income attributable to this state (if any) shall be added to the taxpayer's other business income apportioned to this state plus nonbusiness income, if any, allocable to this state, the total of which is the taxpayer's measure of tax for its income year.

EXAMPLE 1:

Corporation A's distributive share of income in Partnership P is 20%. The distributive share of P's business income is not an integral part of A's trade or business so as to be considered one business. Corporation A derives business income from sources within and without this state. Partnership P is engaged in business wholly within this state. Corporation A's business income for the year is \$5,000,000 of which 50% is apportioned to this state. Partnership P has a loss on its operation for the same year of \$500,000. Corporation A's measure of tax is \$2,400,000 ($\$5,000,000 \times 50\% = \$2,500,000 - \$100,000 (\$500,000 \times 20\%)$).

EXAMPLE 2:

Same facts as in Example 1 except Partnership P operates its business wholly outside this state. Corporation A's measure of tax is \$2,500,000 ($\$5,000,000 \times 50\%$) as no portion of Partnership P's loss is attributable to this state.

(h) Apportionment of Business Income-Long-Term Construction Contracts. If the partnership's activities and the taxpayer's activities constitute a unitary business under established standards, disregarding ownership requirements, so as to constitute a single trade or business and the partnership is engaged in long-term construction contracts and has elected either the percentage of completion method of accounting, or the completed contract method of accounting, the distributive share of partnership business income to be reported each year by the taxpayer shall be determined by Regulation section 25137-2, as well as reference to the preceding sections of this regulation where applicable, ~~and to the following subparagraphs~~ regardless of whether the partnership's operations are carried on entirely within this state, entirely without this state, or partly within and partly without this state.

~~(1) Percentage of Completion Method. Under this method of accounting for long term contracts, the amount to be included each year as business income from each contract is the amount by which the gross contract price which corresponds to the percentage of the entire contract which has been completed during the income year exceeds all expenditures made during the income year in connection with the contract. In so doing account must be taken of the material and supplies on hand at the beginning and end of the income year for use in such contract. Each corporate partner is required to report its distributive share of income as set forth in these regulations.~~

EXAMPLE:

A construction partnership using the percentage of completion method of accounting for long-term contracts, entered into a long-term contract to build a structure for \$9,000,000. The contract allowed three years for completion, and as of the end of the second

partnership year the partnership's books of account, kept on the accrual method, disclosed the following:

	Receipts	Expenditures
End of 1st partnership year.	\$2,500,000	\$2,400,000
End of 2nd partnership year.	4,500,000	4,100,000
Totals.....	\$7,000,000	\$6,500,000

In computing the above expenditures, consideration was given to material and supplies on hand at the beginning and end of each year.

It was estimated that the contract was 30% completed at the end of the first year and 80% completed at the end of the second year. The amount of business income for the first partnership year is \$300,000 (30% of \$9,000,000 or \$2,700,000 less expenditures of \$2,400,000). The amount of business income for the second partnership year is \$400,000 (50% of \$9,000,000 or \$4,500,000 less expenditures of \$4,100,000). Each year the corporate partners would report their respective distributive shares of business income from the contract.

(2) Completed Contract Method. Under this method of accounting for long-term contracts, a special computation is required to apportion the distributive share of partnership income from each completed contract (see paragraph (6) of this regulation). Accordingly, all receipts and expenditures applicable to such contracts whether complete or incomplete as of the end of the income year are excluded from other types of business income, such as interest, rents, royalties, etc., which are apportioned by the regular three factor formula of property, payroll and sales (see subsection (f) of this regulation).

(3) Property Factor. The numerator and denominator of the property factor shall be determined as set forth in subsection (f)(1) of this regulation subject to the following special rules:

(A) The taxpayer's interest in the average value of the partnership's cost (including materials and labor) of construction in progress, to the extent such costs exceed progress billings (accrued or received, depending on whether the partnership reports on the accrual or cash basis for keeping its accounts) shall be included in the denominator of the taxpayer's property factor. The value of any such property located in this state shall be included in the numerator of the taxpayer's property factor.

EXAMPLE 1:

A partnership started a long term construction project in this state on the first day of the partnership's year. By the end of the second partnership year its equity in the costs of production for such year is computed as follows:

1st Year		2nd Year	
Beginning	Ending	Beginning	Ending
September 30, 2014			

Construction Costs	\$1,000,000	
Progress Billings	600,000	
Balance	\$400,000	\$400,000
Construction Costs		
Total from Beginning of Project		\$5,000,000
Progress Billings		
Total from Beginning of Project		4,000,000
Balance End of Year		\$1,000,000
Balance Beginning of Year		400,000
Total		\$1,400,000
Average (1/2)		\$700,000

Each corporate partner would include its respective share of \$700,000 in its property factor based on its interest in the partnership.

Note: It may be necessary to use monthly averages if yearly averages do not properly reflect the average value of the partnership's equity (see Section 25131 and the regulations thereunder).

EXAMPLE 2:

Same facts as in Example 1, except that progress billings exceeded construction costs. No value for the corporate partner's interest in the construction project is shown in its property factor.

(B) Rent paid for the use of equipment directly attributable to a particular construction project is included in the corporate partner's property factor at eight times the net annual rental rate to the extent of its partnership interest even though such rental expense may be included in the cost of construction.

(C) The taxpayer's interest in partnership property for property factor purposes is computed in the same manner regardless of the long term contract method of accounting elected and is computed for each partnership year even though business income is computed separately under the completed contract method of accounting.

(4) Payroll Factor. The numerator and denominator of the payroll factor shall be determined as set forth in subsection (f)(2) of this regulation subject to the following special rules:

(A) Compensation paid employees which is attributable to a particular construction project is included in the payroll factor of the taxpayer to the extent of its partnership interest even though such compensation is included in the cost of construction.

(B) Compensation paid employees who in the aggregate perform most of their services in a state to which their employer does not report such employees for unemployment tax purposes, shall nevertheless be attributed to the state where the services are performed

and shall be included in the numerator of the taxpayer's payroll factor to the extent of the taxpayer's interest in the partnership.

EXAMPLE:

A partnership engaged in a long-term contract in state X assigns several key employees to that state to supervise the project. The partnership, for unemployment tax purposes continues to report these employees to state Y where the partnership's main office is located and where the employees reside. For payroll factor purposes the compensation is included in the numerator for state X to the extent of the taxpayer's interest in the partnership.

(C) The taxpayer's interest in the partnership payroll is computed in the same manner for all long-term contract methods of accounting and is computed for each partnership year even though under the completed contract method of accounting, business income is computed separately.

(5) Sales Factor. The numerator and denominator of the sales factor shall be determined as set forth in subsection (f)(3) of this regulation subject to the following special rules:

(A) Gross receipts to the extent of the taxpayer's interest in the partnership derived from a construction contract are attributable to this state if the construction project is located in this state. If the construction project is located partly within and partly without this state, gross receipts attributable to this state are based upon the ratio which construction costs for the project in this state for the year bears to the total of such construction costs for the entire project for the year.

EXAMPLE:

A partnership contracts to build a dam on a river at a point which lies half within this state and half within state X. During the first partnership year construction costs in this state are \$2,000,000. Total construction costs for the project are \$3,000,000 for the year. Gross receipts (progress billings) for the year are \$2,400,000. Accordingly, gross receipts of \$1,600,000

$$(\$2,000,000/3,000,000 = 66\frac{2}{3}\% \times \$2,400,000)$$

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are included in the numerator of the sales factor of the taxpayer to the extent of its partnership interest.

(B) If the percentage of completion method is used, the sales factor includes only that portion of the gross contract price which corresponds to the percentage of the entire contract which was completed during the partnership year to the extent of the taxpayer's partnership interest.

EXAMPLE:

A construction partnership which had elected the percentage of completion method of accounting entered into a long-term construction contract. At the end of its current year (the

second since starting the project) it estimated that the project was 30% completed during the year. The bid price for the project was \$9,000,000 and it had received \$2,500,000 from progress billings as of the end of its current year. The amount of gross receipts for the current partnership year is \$2,700,000 (30% of \$9,000,000) regardless of whether the accrual method or the cash method for accounting for receipts and disbursements is used. The taxpayer will include a portion of such gross receipts in its sales factor to the extent of its partnership interest.

(C) If the completed contract method of accounting is used, the sales factor includes a portion of the gross receipts (progress billings) received or accrued, whichever is applicable, during the partnership year attributable to each contract to the extent of the taxpayer's partnership interest.

EXAMPLE 1:

A construction partnership which had elected the completed contract method of accounting entered into a long term construction contract. By the end of its current year (the second since starting the project) it had billed, and accrued on its books a total of \$5,000,000 of which \$2,000,000 had accrued in the first year the contract was undertaken, and \$3,000,000 had accrued in the current (second) year. The amount of gross receipts for the current partnership year is \$3,000,000. The taxpayer will include a portion of such gross receipts in its sales factor to the extent of its partnership interest.

EXAMPLE 2:

Same facts as in Example 1 except that the partnership keeps its books on the cash basis, and as of the end of its current year had received only \$2,500,000 of the \$3,000,000 billed during the current year. The amount of gross receipts for the current partnership year is \$2,500,000. The taxpayer will include a portion of such gross receipts in its sales factor to the extent of its partnership interest.

(D) The sales factor for each taxpayer except as noted above in subparagraphs (B) and (C), is computed in the same manner regardless of the long term contract method of accounting elected by the partnership and is computed for each partnership year even though business income is computed separately under the completed contract method of accounting.

(6) Completed Contract Method Special Computation. The completed contract method of accounting requires that the reporting of income (or loss) be deferred until the year the

construction contract is completed and accepted. Accordingly, a separate computation is made for each such contract completed during the partnership year both within and without this state in order to determine the amount of distributive income which is attributable to sources within this state.

The amount of distributive income (or loss) from each contract which is derived from sources within this state using the completed contract method of accounting is computed as follows:

(A) In the partnership year the contract is completed the income (or loss) therefrom is computed and the taxpayer's distributive share determined.

(B) The taxpayer's distributive share of income (or loss) determined at (A) is apportioned to this state by the following method:

(i) A fraction is determined for each year the contract was in progress. The numerator is the taxpayer's partnership interest in construction costs paid or accrued each year the contract was in progress. The denominator is the total of all such construction costs for the project to the extent of the taxpayer's interest in the partnership.

(ii) Each percentage determined in (i) is multiplied by the taxpayer's apportionment formula percentage for that particular year as determined in subsection (f) and paragraphs (3), (4) and (5) above of this regulation.

(iii) The product determined at (ii) for each year the contract was in progress is totaled. The taxpayer's distributive share of income (or loss) on the contract determined at (A) is multiplied by the total percentage. The resulting income (or loss) is the amount of business income from such contract from sources within this state.

EXAMPLE:

The A corporation, engaged in long term construction contracts, was also a partner in a construction partnership which elected to use the completed contract method of accounting for long term contracts. The partnership was engaged in one long term contract (Contract M in state X). During 1972 the partnership completed Contract M in state X at a profit of \$900,000. The A corporation's distributive share of the profit is \$300,000. The apportionment percentages of the taxpayer as determined in subsection (f) and paragraphs (3), (4) and (5) above of this regulation and the percentages of construction costs as determined in subparagraph (B) above for each year Contract M in state X was in progress are as follows:

Apportionment percentages

	1970	1971	1972
(A Corporation)	30%	20%	40%
Percentages of construction costs of Contract M each year			
to total construction costs			
to the extent of A Corporation's interest in the partnership	20%	50%	30%

The A corporation's distributive share of partnership income from Contract M attributable to this state for 1972 is \$84,000 computed as follows:

	1970	1971	1972	Total
Apportionment Percentage.....	30%	20%	40%	
Percent of Construction Costs:	20%	50%	30%	100%

Product.....	6.00%	10.00%	12.00%	<u>28%</u>
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28% of \$300,000 = \$84,000

(i) Apportionment of Business Income-Long-Term Construction Contracts. If the activities of the partnership and the taxpayer do not constitute a unitary business under established standards, disregarding ownership requirements and the partnership is engaged in long-term construction contracts reporting income therefrom under the percentage of completion or completed contract method of accounting, the taxpayer's distributive share of partnership income(or loss) attributable to this state shall be determined as follows:

(1) When the partnership is engaged in a construction project entirely within this state, the determination of its business income shall be made in accordance with the method of accounting elected by the partnership for reporting income from long-term contracts and the taxpayer's distributive share shall be reported as business income from sources within this state derived from a separate trade or business.

(2) Where the partnership is engaged in construction both within and without this state, the determination of the amount of business income therefrom attributable to the taxpayer derived from sources within this state shall be made in accordance with the method of reporting for such long-term construction contract as elected by the partnership and as set forth in Section 25137-2 applicable to corporations engaged in long-term construction contracts, as if the partnership were a corporation.

(3) Where the partnership is engaged in a construction project entirely without this state, the determination of the taxpayer's distributive share of such business income shall be made as though the taxpayer were engaged in a separate trade or business, no portion of which is carried on within this state.

(j) Effective date. The revisions to subsections (a), (f) and (h) shall apply prospectively as of the effective date of these changes.

NOTE: Authority cited: Section 19503, Revenue and Taxation Code.
Reference: Section 25137, Revenue and Taxation Code.

Section 17951-4 is amended to read:

§ 17951-4. Income from a Business, Trade or Profession.

(a) If a nonresident's business, trade or profession is carried on entirely without the state, no portion of the net income therefrom is derived from sources within this state. If, on the other hand, the nonresident's business, trade or profession is conducted wholly within the state, the entire net income therefrom is derived from sources within this state.

(b) If a nonresident's business, trade or profession is conducted partly within and partly without the state, and the part within the state is so separate and distinct from and unconnected with the part without the state such that the respective business activities are not part of a unitary business, trade or profession, only the net income from the business, trade or profession within the state is derived from sources within this state. Thus, if a nonresident owns a hotel in California and an unrelated manufacturing business elsewhere, and is not significantly involved in the management of the hotel, only the net income from the hotel in California is derived from sources within this state.

(c) If a nonresident's business, trade or profession is a sole proprietorship which carries on a unitary business, trade, or profession within and without the state, the amount of net income derived from sources within this state shall be determined in the manner described below.

(1) The total business income of the unitary business shall be determined by subtracting from the gross income of the unitary business those deductions allowed by the law (See Articles 6 and 9 of Chapter 3 (Section 17201, Revenue and Taxation Code, and following)) which are attributable to that unitary business. If expenses relate to both business income and other income, the expenses shall be assigned to the respective income amounts as provided in Title 18, Cal. Code Regs., § 25120(d).

(2) The amount of such business income derived from sources within this state shall be determined in accordance with the provisions of the apportionment rules of the Uniform Division of Income for Tax Purposes Act, Sections 25120 to 25139, inclusive, Revenue and Taxation Code, and the regulations thereunder, except as otherwise provided in subsection (g), below, relating to professional service organizations.

(3) The source of net income which is not business income shall be determined in accordance with the sourcing rules of Sections 17951 through 17955, Revenue and Taxation Code, and the regulations thereunder, and not by reference to the nonbusiness allocation rules of the Uniform Division of Income for Tax Purposes Act, Sections 25120 to 25139, inclusive, Revenue and Taxation Code, and the regulations thereunder.

(d) If a nonresident is a partner in a partnership which carries on a unitary business, trade or profession within and without this state, the source of the partner's distributive share of partnership income derived from sources within this state shall be determined in the manner described below.

(1) Except as provided, the total business income of the partnership shall be apportioned at the partnership level in accordance with the apportionment rules of the

Uniform Division of Income for Tax Purposes Act, Sections 25120 to 25139, Revenue and Taxation Code, and the regulations thereunder. Each partner's distributive share of the partnership business income apportioned to this state is income derived from sources within this state.-When the income of the partnership is determined to be business income, utilizing the tests for business income contained in Revenue and Taxation Code section 25120(a), Revenue and Taxation Code section 17952 is not applicable in determining the source of income allocated to the nonresident taxpayer by the partnership.

(2) If the partnership and the business activity of the partner are part of one unitary business, then the rules of Regulation section 25137-1(f) apply and the apportionment of the partnership business income is done at the partner level for the unitary partner or partners. Each partner's distributive share of the partnership business income apportioned to this state is income derived from sources within this state.

~~(3)~~ The source of guaranteed payments received by a nonresident partner from a partnership shall be determined as if the guaranteed payments were a distributive share of partnership business income.

~~(4)~~ The source of a partner's distributive share of items which do not constitute business income shall be determined in accordance with the sourcing rules of Sections 17951 through 17955, Revenue and Taxation Code, and the regulations thereunder, as if the income producing activity were undertaken by the partner in its individual capacity.

~~(5)~~ Except as provided in subsection (d)~~(5)~~, the business activity of a partnership will not ordinarily be considered part of a unitary business with another business activity of one or more of its partners. However, if necessary to properly reflect the income or loss of the partnership or its partners, the Franchise Tax Board shall have the discretion to treat the business activity of a partnership and a business activity of one or more of its partners as part of a single unitary business, but only after conducting a comparable uncontrolled price examination in the manner provided by Section 23801(d)(1), Revenue and Taxation Code. For this purpose, the term "business activity" includes the partner's interest in the business activity of a sole proprietorship, another partnership, a limited liability company and an S corporation. If the Franchise Tax Board determines that unitary combination is appropriate under this subsection, the business income of the unitary activity shall be apportioned in accordance with the rules prescribed under subsection (d)~~(5)~~(A), without regard to the 20 percent limitation described therein.

~~(6)~~ Exception for 20 percent or more interests. Subsection (d)~~(4)~~ shall not apply to partners who own, directly or indirectly, a 20 percent or more capital or profits interest in a partnership. For purposes of this section, the ownership of a capital or profits interest in a partnership shall be determined under the rules of subsection (d)~~(5)~~(B).

(A) If a partner owns a 20 percent or more interest, as described in subsection (d)~~(5)~~, and the business activity of the partnership is unitary with another business activity of the partner as that phrase is described in subsection (d)~~(4)~~, the income of the unitary activity shall be combined at the partner level and apportioned to this state under the provisions of the Uniform Division of Income for Tax Purposes Act,

Sections 25120-25139 inclusive, Revenue and Taxation Code, and the regulations thereunder. In determining the amount of business income apportioned to this state, the partner shall combine the business income from unitary sole proprietorships and its distributive or pro rata shares of business income from 20 percent or more interests in unitary partnerships and S corporations. For purposes of the preceding sentence, the combined business income of a unitary partnership or S corporation shall be limited to the distributive or pro rata share of business income of the partner or shareholder from interests actually (not constructively) owned. The combined unitary business income shall be apportioned to this state under the provisions of the Uniform Division of Income for Tax Purposes Act, Sections 25120-25139, Revenue and Taxation Code, and the regulations thereunder, at the partner level. For that purpose, the partner shall aggregate its payroll, property and sales from unitary sole proprietorships and its proportionate share of payroll, property, and sales, whichever is applicable, from unitary partnerships and S corporations in which the partner or shareholder owns a 20 percent or more interest to arrive at a single apportionment percentage. That percentage is applied to the combined unitary business income computed under this subsection to determine the partner's business income from sources within this state.

(B) For purposes of this subsection (d)(~~56~~), the actual or constructive ownership of a capital or profits interest in a partnership shall be determined in accordance with the following rules:

1. An interest in partnership capital or profits which is owned, directly or indirectly, by or for a corporation, partnership, estate, or trust shall be considered as being owned proportionately by or for its shareholders, partners, or beneficiaries.
2. An individual shall be considered as owning the interest in partnership capital or profits owned, directly or indirectly, by or for his or her family.
3. The family of an individual shall include only his or her brothers and sisters (whether by the whole or half blood), spouse, ancestors, and lineal descendants, and
4. An interest in partnership capital or profits constructively owned by a person by reason of the application of subsection (d)(~~56~~)(B)1. shall, for the purpose of applying subsections (d)(~~56~~)(B)1. or (d)(~~56~~)(B)2., be treated as actually owned by such person, but an interest in partnership capital or profits constructively owned by an individual by reason of the application of subsection (d)(~~56~~)(B)2. shall not be treated as owned by him for the purpose of again applying either of such subsections in order to make another the constructive owner of such interest in partnership capital or profits.

EXAMPLE: Individual X is engaged in a sole proprietorship with business income of \$100,000. In addition, X directly owns a 15% capital interest in

Partnership P. X's sister Y also owns a 10% capital interest in P. X's distributive share of business income from P is \$30,000, and his sister's distributive share of business income from P is \$20,000. P and X's sole proprietorship are engaged in a unitary business. Under subsection (d)(~~56~~)(B), X is treated as constructively owning Y's interest in the partnership. Thus X's aggregate owned or constructively owned interest in P is 25%. Accordingly, X is subject to the apportionment provisions of subsection (d)(~~56~~)(A). However, under subsection (d)(~~56~~)(A), X will combine and apportion only the sum of his \$100,000 proprietorship income and his actual distributive share of business income of \$30,000 from P. The 20 percent test used to determine the applicability of subsection (d)(~~56~~) does not affect the amount of partnership income taken into account in computing income actually derived from sources within this state.

(e) If a nonresident is the sole member of a limited liability company whose separate existence is disregarded for tax purposes under Section 23038, Revenue and Taxation Code, and which carries on a unitary business, trade or profession within and without this state, the source of the member's limited liability company income derived from sources within this state shall be determined in accordance with the sole proprietorship provisions of subsections (c) and (g). If a nonresident is a member of a limited liability company which is classified as a partnership for tax purposes under Section 23038, Revenue and Taxation Code, and which carries on a unitary business, trade or profession within and without this state, the source of the member's distributive share of limited liability company income derived from sources within this state shall be determined in accordance with the partnership provisions of subsections (d) and (g). The provisions of (c), (d) or (g), as the case may be, shall not be construed to apply to the determination of "total income from all sources reportable to this state" for purposes of determining the annual fee imposed on a limited liability company under Section 17942, Revenue and Taxation Code.

(f) If a nonresident is a shareholder of an S corporation (as described in Section 17087.5, Revenue and Taxation Code) which carries on a unitary business, trade or profession within and without this state, the amount of the nonresident's pro rata share of S corporation income derived from sources within this state shall be determined in the same manner as if the S corporation were a partnership. Except for subsection (d)(~~56~~)(B), the provisions of subsections (d)(1) and (d)(3) through (~~56~~) are specifically incorporated by reference. In lieu of subsection (d)(~~56~~)(B), for purposes of determining whether a nonresident shareholder has a 20 percent or more interest in an S corporation, the rules for constructive ownership of stock provided in Section 267(c) of the Internal Revenue Code shall apply. The provisions of subsection (g), relating to the computation of the payroll factor for professional service organizations, shall not apply in the case of S corporations. The source of an S corporation's items of nonbusiness income for purposes of the tax imposed on the S corporation under Part 11, Division 2, Chapter 4.5 of the Revenue and Taxation Code, shall have no relevance in determining the source of items of nonbusiness income for purposes of taxing a nonresident shareholder.

(g) For taxable years beginning on or after January 1, 2013, all business income is subject to the single sales factor apportionment formula pursuant to Section 25128.7, Revenue and Taxation Code, unless subdivision (b) of Section 25128, Revenue and Taxation Code,

applies. If a sole proprietorship or partnership described in subsections (c) or (d) is engaged in the practice of a profession within the meaning of subsection (h), below, the payroll factor, where applicable, of the applicable apportionment formula shall include 60% of the net income of a sole proprietorship or 60% of the distributive share of partnership income of each partner rendering professional personal services to the partnership. For purposes of the payroll factor the net income of a sole proprietorship and a partner's distributive share of partnership income shall consist only of income properly classifiable as business income. The amount so determined is deemed to be compensation paid to an employee for purposes of the payroll factor only. If a partner does not render professional services to the partnership, no part of such partner's distributive share of partnership income shall be taken into account in the payroll factor. The amount deemed to be compensation paid to an employee shall be included in the denominator of the payroll factor and in the California numerator of the payroll factor if the principal location of such partner is in this state. Guaranteed payments to a partner who renders professional services to a partnership engaged in the practice of a profession (within the meaning of subsection (h) below) shall be treated as part of the partner's distributive share of partnership income and has a source in this state in the same manner as a distributive share properly classified as business income and shall be apportioned under subsection (d), as modified under subsection (g). In computing the payroll factor of a partner who renders professional services to such a partnership and receives a guaranteed payment, 60 percent of the sum of the partner's distributive share of partnership income properly classified as business income, and the partner's guaranteed payment, shall be deemed to be compensation paid to an employee. The amount deemed to be compensation shall be included in the denominator of the payroll factor and in the California numerator of the payroll factor if the principal location of such partner is in this state.

EXAMPLE: The A-B-C company is a partnership performing accounting services within and without this state. There are three partners, A, B, and C. Partners A and B render professional services to the partnership. Partner C is not active in the partnership business. Partner A is a resident of this state, and Partners B and C are nonresidents. For purposes of this example, each partner's principal location is in his or her respective state of residence. The partners' distributive shares of profit or loss are: A, 50%; B, 30%; and C, 20%. In addition, Partner B receives a guaranteed payment of \$10,000. Partnership profits after the deduction for the guaranteed payment are \$60,000 for the year. Of that amount, \$50,000 is business income and \$10,000 is nonbusiness income from a California real estate rental. All of the nonbusiness income is sourced to this state for purposes of this example. The partnership's income apportionment percentage for this state is determined as follows:

	<u>Everywhere</u>	<u>This State</u>	<u>%</u>
Property	\$200,000	\$70,000	35
Sales	150,000	64,500	43
Sales	150,000	64,500	43
Payroll:			
Employees	56,000	21,000	
Partners:			
A—\$50,000 x 50% x 60%	15,000	15,000	
B—[(50,000 x 30%)			

+ \$10,000] X 60%	<u>\$15,000</u>	<u>-0-</u>	
Total Payroll	<u>\$86,000</u>	<u>\$36,000</u>	<u>41.86</u>
			162.86
Apportionment percentage (162.86 ÷ 4)			40.72%
The partnership's business income from sources within this state is:			
Business income (\$50,000 x 40.72%)			\$20,360

Partner A

As a resident, Partner A is taxed on that partner's entire distributive share of ABC's income, irrespective of the source of the income:

A's share of partnership business income (\$50,000) x 50%	\$25,000
A's share of partnership nonbusiness rental income (\$10,000 x 50%)	\$5,000
A's income taxed by this state	<u>\$30,000</u>

As nonresidents, Partners B and C are taxed on their distributive share of partnership income from sources within this state, determined as follows:

Partner B

Partner B's share of Partnership business income from sources within this state (\$20,360 x 30%)	\$6,108
Partner B's guaranteed payment \$10,000 x 40.72%	\$4,072
Partner B's share of nonbusiness rental income (\$10,000 x 30%)	\$3,000
Partner B's Income from sources within this state	<u>\$13,180</u>

Partner C

Partner C's share of Partnership business income from sources within this state (\$20,360 x 20%)	\$4,072
Partner C's share of nonbusiness rental income (\$10,000 x 20%)	\$2,000
Partner C's Income from sources in this state	<u>\$6,072</u>

(h) The practice of law, accounting, medicine or the performance of personal services in scientific and engineering discipline and the practice of any other profession in which capital is not a material income producing factor and in which more than 80% of business gross income for the taxable year is derived from personal services actually rendered by the individual or partners shall be deemed a profession for purposes of subsection (g), above.

(i) Rules and Definitions. To give effect to the foregoing, the following rules and definitions will be applied:

(1) Other Professions Defined. For purposes of this regulation, the term "other profession" includes any occupation or vocation in which a professed knowledge of some department of science or learning, gained by a prolonged course of specialized instruction and study, is used by its practical application to the affairs of others, either advising, guiding or teaching them, and in serving their interests or welfare in the practice of an art or science founded on it. The word "profession" implies attainments in professional knowledge as distinguished from mere skill and the application of knowledge to uses for others as a vocation. The performing of services dealing with the conduct of business itself, including the promotion of sales or services of such

business and consulting services, does not constitute the practice of a profession even though the services involve the application of a specialized knowledge.

(2) **Capital as a Material Income Producing Factor.** Whether capital is a material income producing factor in the production of the income of a profession (other than law, medicine, dentistry or architecture) is to be determined by the use to which the capital is put. Ordinarily, the use of capital in a professional activity or occupation will not be considered as a material income producing factor if it is used only to defray current operating expenses such as paying salaries of assistants, rent, traveling and other incidental expenses or for investment in furniture, machines, tools and equipment essential to the carrying on of the professional activity. Capital is a material income producing factor if a substantial portion of the gross income from the occupation is attributable to the employment of capital in the business. This is ordinarily the case where substantial inventory or substantial investment in plant, machinery or other equipment is required.

(3) **Gross Income Derived From Personal Services of an Individual or Partner.** For purposes of determining whether more than 80% of the unincorporated business gross income is derived from personal services actually rendered by an individual or partner, gross income from the professional practice will be deemed derived from the personal services rendered by an individual or partner if such income is personal service income as distinguished from income attributable to the sale of property or to the use of capital and such income represents fees or charges for professional services personally rendered by the individual or partner or professional fees or charges for services which are attributable to the professional activities of the individual or partner. In cases where an individual or partner employs assistants to perform part of the professional work, fees or charges relating to the services of the assistants will be attributed to the individual or partner provided the individual or partner (A) gives personal attention to the work of the business, (B) consults with clients or patients, (C) devises the work program, outlines work methods and guides and directs the work procedure of the employees in the activity, and (D) supervises the formulation of advice, conclusions and reports to clients or patients as the person responsible for the services performed by the business or establishment; or provided that some combination of the foregoing and/or other activities shows that the services of the employees are merely incidental to the practice of the profession by the individual or partner. Where the profession is carried on by a sole proprietorship or partnership, income or fees relating to work performed by employees will be attributable to an individual or partner only if, in addition to the conditions enumerated above with respect to individuals or partners, it is shown that the clients or patients are advised by an individual or partner and look to an individual or partner as being responsible for the services performed.

For example, where an accounting partnership employs assistants to do much of the detail work of making surveys, studies, audits, or other work ordinarily and customarily performed as an incident to the practice of the profession involved, income from professional charges based on services of the assistants will be deemed to be income derived from the services of the partners if a partner accepts the engagement or employment, supervises and directs the work, confers with clients, and prepares and edits or completes and approves the reports. Where the nature and character of the

service rendered by the assistants is such that the services are rendered without any substantial control by a partner, such services will not be considered attributable to the partner for the purposes of this subsection.

(j) (1) This regulation shall apply to taxable years beginning on or after January 1, 1976, except that the amendments to subsections (c)(3), (d)(4), (e) and (f), to the extent that these subsections adopt the sourcing rules of Sections 17951 through 17955, Revenue and Taxation Code, and the regulations thereunder, and not the nonbusiness allocation rules of the Uniform Division of Income for Tax Purposes Act, Sections 25120 to 25139, inclusive, Revenue and Taxation Code, and the regulations thereunder, shall apply to the computation of taxes for taxable years of sole proprietors, partners, members and shareholders beginning on or after January 1, 2001, and the amendments to subsections (d)(5), (d)(6), (e) and (f), to the extent that the business activity of a partnership, limited liability company or S corporation will not ordinarily be considered part of a unitary business activity with another business activity unless the partner, member or shareholder owns directly or indirectly a 20 percent or more capital or profits interest in a partnership, limited liability company or S corporation, or the Franchise Tax Board determines that such combination is appropriate after conducting a comparable uncontrolled price examination, shall apply to the computation of taxes for taxable years of sole proprietors, partners, members and shareholders beginning on or after January 1, 2001. In the case of the computation of additions to tax under Section 18682, Revenue and Taxation Code, for failure to pay estimated tax, and the assessment of withholding liability and penalties under Sections 18815, 18684.2, 18685, and 19409, Revenue and Taxation Code, the amendments to subsections (c)(3), (d)(~~34~~), (d)(45), (d)(~~56~~), (e) and (f) which apply to taxable years beginning on or after January 1, 2001, shall also apply for taxable years of sole proprietors, partners, members and shareholders beginning on or after January 1, 2001.

(2) The revision to subsection (d) shall apply prospectively as of the effective date of these changes.

NOTE: Authority cited: Sections 17954 and 19503, Revenue and Taxation Code.

Reference: Sections 17041, 17854, 17951 and 25128, Revenue and Taxation Code.