DEPARTMENT OF TAXATION

Amendments to Chapter 18-235
Hawaii Administrative Rules

June 29, 1998

SUMMARY

1. §18-235-38-06 is amended.

2. A new §18-235-38-06.04 is added.

3. A new §18-235-38-06.05 is added.

§18-235-38-06 Apportionment of income for special industries. The director finds that neither the apportionment formula of section 235-29, HRS, nor the separate accounting method clearly or accurately reflects the correct taxable income in Hawaii of taxpayers doing business within and without Hawaii in the industries listed in the following table. Accordingly, income of these taxpayers shall be apportioned under the methods in the section listed opposite the name of the industry in the following table.

Special industry	Section
Air carriers	18-235-38-06.02
Construction contractors	18-235-38-06.03
Ocean carriers	18-235-38-06.01
Publishing	18-235-38-06.05
Radio broadcasting	18-235-38-06.04
Television broadcasting	18-235-38-06.04

[Eff 9/3/94; am 3/11/96; am **JUL 25, 1998**] (Auth: HRS §§231-3(9), 235-38, 235-118) (Imp: HRS §235-38)

§18-235-38-06.04 Television and radio broadcasting. (a) When a person in the business of broadcasting film or radio programming, whether through the public airwaves, by cable, direct or indirect satellite transmission, or any other means of communication, either through a network (including owned and affiliated stations) or through an affiliated, unaffiliated, or independent television or radio broadcasting station, has income from sources both within and without Hawaii, the amount of business income from sources within Hawaii shall be determined pursuant to sections 235-21 to 235-39, HRS, or the Multistate Tax Compact (section 255-1, HRS), except as modified by this section.

(b) For definitions, rules, and examples for determining whether income shall be classified as business or nonbusiness income, see sections 18-235-21-01 to 18-235-21-04.

(c) In this section, unless the context clearly requires otherwise:

"Film" or "film programming" means any and all performances, events, or productions telecast on television, including news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, through the use of video tape, disc, or any other type of format or medium.

Each episode of a series of films produced for television shall constitute a separate film notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

"Outer-jurisdictional property" means tangible personal property, such as orbiting satellites, undersea transmission cables, and the like, that are owned or rented by the taxpayer and used in the business of telecasting or broadcasting, but that are not physically located in any particular state.

"Radio" or "radio programming" means any and all performances, events, or productions that are broadcast on radio, including news, sporting events, plays, stories, or other literary, commercial, educational, or artistic works, through the use of an audio tape, disc, or any other format or medium.

Each episode of a series of radio programming produced for radio broadcast shall constitute a separate radio programming notwithstanding that the series relates to the same principal subject and is produced during one or more tax periods.

"Release" or "in release" means the placing of film or radio programming into service. A film or radio program is placed into service when it is first broadcast to the primary audience for which the program was created. Thus, for example, a film is placed in service when it is first publicly telecast for entertainment, educational, commercial, artistic, or other purposes. Each episode of a television or radio series is placed in service when it is first broadcast. A program is not placed in service merely because it is completed and therefore is in a condition or state of readiness and availability for broadcast, or merely because it is previewed to prospective sponsors or purchasers.

"Rent" includes license fees or other payments or consideration provided in exchange for the broadcast or other use of film or radio programming.

"State" includes the District of Columbia, the Commonwealth of Puerto Rico, or any possession or territory of the United States.

A "subscriber" to a cable television system is the individual residence or other outlet which is the ultimate recipient of the transmission.

"Telecast" or "broadcast" (sometimes used interchangeably with respect to television) means the transmission of television or radio programming, respectively, by an electronic or other signal conducted by radio waves, microwaves, wires, lines, coaxial cables, wave guides, fiber optics, satellite transmissions, or by any other means, directly or indirectly to viewers or listeners.

(d) The property factor shall be determined in accordance with sections 235-30 to 235-32, HRS, and the rules thereunder; the payroll factor in accordance with sections 235-33 to 235-34, HRS, and the rules thereunder; and the sales factor in accordance with sections 235-35 to 235-37, HRS, and the rules thereunder; except as modified by this section.

(e) The following rules relate to the property factor.

(1) The following rules apply with respect to the property factor in general.

(A) In the case of rented studios, the net annual rental rate shall include only the amount of the basic or flat rental charge by the studio for the use of a stage or other permanent equipment such as sound recording equipment and the like; except that additional equipment rented from other sources or from the studio not covered in the basic or flat rental charge and used for one week or longer (even though rented on a day-to-day basis) shall be included. Lump-sum net rental payments for a period which encompasses more than a single income year shall be assigned ratably over the rental period.

(B) No value or cost attributable to any outer-jurisdictional and film or radio programming property shall be included in the property factor.

(2) The following rules apply with respect to the property factor denominator.

(A) All real property and tangible personal property (other than outer-jurisdictional and film or radio programming property), whether owned or rented, that is used in the business shall be included in the denominator of the property factor.

(B) Audio or video cassettes, discs, or similar media containing film or radio programming and intended for sale or rental by the taxpayer for home viewing or listening shall be included in the property factor at their original cost. To the extent that the taxpayer licenses or otherwise permits others to manufacture or distribute cassettes, discs, or other media containing film or radio programming for home viewing or listening, the value of the cassettes, discs, or other media shall include the license, royalty, or other fees received by the taxpayer capitalized at a rate of eight times the gross receipts derived therefrom during the income year.

(C) Outer-jurisdictional and film or radio programming property shall be excluded from the denominator of the property factor.

(3) The following rules apply with respect to the property factor numerator.

(A) With the exception of outer-jurisdictional and film or radio programming property, all real and tangible personal property owned or rented by the taxpayer and used in Hawaii during the tax period shall be included in the numerator of the property factor as set forth in section 18-235-30-04.

(B) Outer-jurisdictional and film or radio programming property shall be excluded from the numerator of the property factor.

Example: XYZ Television Co. has a total value of all of its property everywhere of $500,000,000, including a satellite valued at $50,000,000 that was used to telecast programming into Hawaii and $150,000,000 in film property of which $1,000,000 worth was located in Hawaii the entire year. The total value of real and tangible personal property, other than film programming property, located in Hawaii for the entire income year was valued at $2,000,000. The movable and mobile property described in subparagraph (e)(3)(A) has a value of $4,000,000. That property was used in Hawaii for 100 days. The property factor is determined as follows:

Value of property permanently in Hawaii:	$2,000,000
Value of mobile and movable property (100/365 x $4,000,000):	1,095,600
Total value of property to be included in Hawaii's property factor numerator without apportionment of outer-jurisdictional and film property:	$3,095,600
Total value of property everywhere:	$500,000,000
Less value of satellite:	(50,000,000)
Less value of film property:	(150,000,000)
Total value of property to be used in denominator:	$300,000,000

Property factor
($3,095,600/$300,000,000): .0103

(f) The following rules relate to the payroll factor.

(1) The denominator of the payroll factor shall include all compensation, including residual and profit participation payments, paid to employees during the income year, including that paid to directors, actors, newscasters, and other talent in their status as employees.

(2) With respect to the payroll factor numerator, compensation for all employees shall be attributed to the state or states as may be determined under sections 18-235-33-01 to 18-235-34-01.

(g) The following rules relate to the sales factor.

(1) The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts excluded under section 18-235-38-03.

(2) The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within Hawaii, including the following.

(A) Gross receipts, including advertising revenue, from television, film, or radio programming in release to or by a television station (independent or unaffiliated) or network of stations for broadcast shall be attributed to Hawaii in the ratio (hereafter "audience factor") that the audience for the station (or owned and affiliated

stations in the case of networks) located in Hawaii bears to the total audience for the station (or owned and affiliated stations in the case of networks).
The audience factor for television or radio programming shall be determined by the ratio that the taxpayer's in-state viewing (listening) audience bears to its total viewing (listening) audience. The audience factor shall be determined either by reference to the books and records of the taxpayer or by reference to published rating statistics, provided the method used by the taxpayer is consistently used from year to year for this purpose and fairly reflects the taxpayer's activity in Hawaii.

(B) Gross receipts from film programming in release to or by a cable television system shall be attributed to Hawaii in the ratio (hereafter "audience factor") that the subscribers for such cable television system located in Hawaii bears to the total subscribers of such cable television system. If the number of subscribers cannot be accurately determined from the books and records maintained by the taxpayer, the audience factor ratio shall be determined on the basis of the applicable year's subscription statistics located in published surveys, provided that the source selected is consistently used from year to year for that purpose.

(C) Receipts from the sale, rental, licensing, or other disposition of audio or video cassettes, discs, or similar media intended for home viewing or listening shall be included in the sales factor as provided in sections 235-36 and 235-37, HRS, and the rules thereunder. [Eff **JUL 25, 1998**] (Auth: HRS §§231-3(9), 235-38, 235-118) (Imp: HRS §235-38)

§18-235-38-06.05 Publishing. (a) Except as specifically modified in this section, when a person in the business of publishing, selling, licensing, or distributing newspapers, magazines, periodicals, trade journals, or other printed material has income from sources both within and without Hawaii, the amount of business income from sources within Hawaii from that business activity shall be determined pursuant to sections 235-21 to 235-39, HRS, or the Multistate Tax Compact (section 255-1, HRS), except as modified by this section.

(b) In this section, unless the context clearly requires otherwise:

"Outer-jurisdictional property" means tangible personal property, such as orbiting satellites, undersea transmission cables, and the like, that are owned or rented by the taxpayer and used in the business of publishing, licensing, selling, or otherwise distributing printed material, but are not physically located in any particular state.

"Print or printed material" includes the physical embodiment or printed version of any thought or expression, such as a play, story, article, column, or other literary, commercial, educational, artistic, or other written or printed work. The determination of whether an item is, or consists of, print or printed material shall be made without regard to its content. Printed material may take the form of a book, newspaper, magazine, periodical, trade journal, or any other form of printed matter, and may be contained on any medium or property.

"Purchaser" and "subscriber" mean the individual, residence, business, or other outlet which is the ultimate or final recipient of the print or printed material. Neither of these terms includes a wholesaler or other distributor of print or printed material.

"Terrestrial facility" shall include any telephone line, cable, fiber optic, microwave, earth station, satellite dish, antenna, or other relay system or device that is used to receive, transmit, relay, or carry any data, voice, image, or other information that is transmitted from or by any outer-jurisdictional property to the ultimate recipient of the information.

(c) Business income shall be apportioned using the following rules.

(1) The following rules relate to the property factor.

(A) All real property and tangible personal property, including outer-jurisdictional property, whether owned or rented, that are used in the business shall be included in the denominator of the property factor.

(B) The following rules relate to the property factor numerator.

(i) All real and tangible personal property owned or rented by the taxpayer and used in Hawaii during the tax period shall be included in the numerator of the property factor.

(ii) Outer-jurisdictional property owned or rented by the taxpayer and used in Hawaii during the tax period shall be included in the numerator of the property factor in the ratio that the value of the property attributable to its use by the taxpayer in business activities in Hawaii bears to the total value of the property attributable to its use in the taxpayer's business activities everywhere.

The value of outer-jurisdictional property to be attributed to the numerator of the property factor of Hawaii shall be determined by the ratio that the number of uplinks and downlinks (sometimes referred to as "half-circuits") that were used during the tax period to transmit from Hawaii and to receive in Hawaii any data, voice, image, or other information bears to the total number of uplinks and downlinks, or half-circuits, that the taxpayer used for transmissions everywhere.

If information regarding uplink and downlink or half-circuit usage is not available, or if that measurement of activity is not applicable to the type of outer-jurisdictional property used by the taxpayer, the value of such property to be attributed to the numerator of the property factor of Hawaii shall be determined by the ratio that the amount of time (in terms of hours and minutes of use), or any other measurement of use of outer-jurisdictional property that was used during the tax period to transmit from Hawaii and to receive in Hawaii any data, voice, image, or other information, bears to the total amount of time or other measurement of use that was used for transmissions everywhere.

(iii) Outer-jurisdictional property shall be considered to have been used by the taxpayer in its business activities within Hawaii when that property, wherever located, is employed by the taxpayer in any manner in the publishing, sale, licensing, or other distribution of books, newspapers, magazines, or other printed material and any data, voice, image, or other information is transmitted to or from Hawaii either through an earth station or terrestrial facility located in Hawaii.

Example: One example of the use of outer-jurisdictional property is where the taxpayer either owns its own communications satellite or leases the use of uplinks, downlinks, circuits, or time on a communications satellite for the purpose of sending messages to its newspaper printing facilities or employees in a state. The state or states in which any printing facility that receives the satellite communications is located and the state from which the communications were sent, under this section, would apportion the cost of the owned or rented satellite to their respective property factors based upon the ratio of the in-state use of the satellite to its total usage everywhere.

Assume that ABC Newspaper Co. owns a total of $400,000,000 of property everywhere and that, in addition, it owns and operates a communication satellite for the purpose of sending news articles to its printing plant in Hawaii, as well as for communicating with its printing plants and facilities or news bureaus, employees, and agents located in other states and throughout the world. Also assume that the total value of its real and tangible personal property that was permanently located in Hawaii for the entire income year was valued at $3,000,000. Assume also that the total original cost of the satellite is $100,000,000 for the tax period and that of the 10,000 uplinks and downlinks of satellite transmissions used by the taxpayer during the tax period, 200 or 2 per cent are attributable to satellite communications received in and sent from Hawaii. Assume further that the company's mobile property has an original cost of $4,000,000 and was used in Hawaii for 95 days.

The property factor is determined as follows:

Value of property permanently in Hawaii:	$3,000,000
Value of mobile property (95/365 x $4,000,000):	$1,041,096
Value of satellite property used in-state (.02 x $100,000,000):	$2,000,000
Total value of property attributable to state:	$6,041,096
Property factor ($6,041,096/$500,000,000)	0.012082

(2) The payroll factor shall be determined in accordance with sections 235-33 and 235-34, HRS, and the rules interpreting those sections.

(3) The following rules apply with respect to the sales factor.

(A) The denominator of the sales factor shall include the total gross receipts derived by the taxpayer from transactions and activity in the regular course of its trade or business, except receipts that may be excluded under sections 18-235-35-01 to 18-235-36-02, section 18-235-38-03, or subparagraph (B).

(B) The numerator of the sales factor shall include all gross receipts of the taxpayer from sources within Hawaii, including, but not limited to, the following.

(i) Gross receipts derived from the sale of tangible personal property, including printed materials, delivered or shipped to a purchaser or a subscriber in Hawaii.

(ii) Except as provided in clause (c)(3)(B)(iii), gross receipts derived from advertising and the sale, rental, or other use of the taxpayer's customer lists or any portion of them shall be attributed to Hawaii as determined by the taxpayer's “circulation factor” during the tax period. The circulation factor shall be determined for each individual publication by the taxpayer of printed material containing advertising, and shall be equal to the ratio that the taxpayer's in-state circulation to purchasers and subscribers of its printed material bears to its total circulation to purchasers and subscribers everywhere.

The circulation factor for an individual publication shall be determined by reference to the rating statistics as reflected in such sources as Audit Bureau of Circulations or other comparable sources, provided that the source selected is consistently used from year to year for this purpose. If none of the foregoing sources are available, or, if available, none is in form or content sufficient for these purposes, then the circulation factor shall be determined from the taxpayer's books and records.

(iii) When specific items of advertisements can be shown, upon clear and convincing evidence, to have been distributed solely to a limited regional or local geographic area in which Hawaii is located, the taxpayer may petition, or the department may require, that a portion of such receipts be attributed to the sales factor numerator of Hawaii on the basis of a regional or local geographic area circulation factor and not upon the basis of the circulation factor as provided in clause (c)(3)(B)(ii). This attribution shall be based upon the ratio that the taxpayer's circulation to purchasers and subscribers located in Hawaii of the printed material containing specific items of advertising bears to its total circulation of the printed material to purchasers and subscribers located within that regional or local geographic area. This alternative attribution method shall be permitted only upon the condition that these receipts are not double counted or otherwise included in the numerator of any other state.

(iv) If the purchaser or subscriber is the United States Government or the taxpayer is not taxable in a State, the gross receipts from all sources, including the receipts from the sale of printed material, from advertising, and from the sale, rental, or other use of the taxpayer's customer lists, or any portion of them that would have been attributed by the circulation factor to the numerator of the sales factor for that State, shall be included in the numerator of the sales factor of Hawaii if the printed material or other property is shipped from an office, store, warehouse, factory, or other place of storage or business in Hawaii.

[Eff JUL 25, 1998] (Auth: HRS §§231-3(9), 235-38, 235-118) (Imp: HRS §235-38)

Department of Taxation

Amendments to chapter 18-235, Hawaii Administrative Rules (HAR), on the summary page, dated June 29, 1998, were adopted on June 29, 1998, after public notice was published in the Honolulu Advertiser, the Honolulu Star Bulletin, the Garden Island, the Maui News, and the Hawaii Tribune-Herald on May 29, 1998.

These amendments shall take effect ten days after filing with the Office of the Lieutenant Governor.

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Ray K. Kamikawa
Director of Taxation

APPROVED:

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Benjamin J. Cayetano
Governor
State of Hawaii

Date: **7/13/98**

APPROVED AS TO FORM:

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Deputy Attorney General

JUL 15 1998

Filed