



Ohio Revised Code

Section 5733.069 Credit allowed for increase in export sales.

Effective: September 29, 1997

Legislation: House Bill 215 - 122nd General Assembly

(A) As used in this section:

(1) "Average of the payroll factor and the property factor" means one-half multiplied by the sum of the payroll factor and the property factor.

(2) Subject to divisions (C) and (H) of this section, "export sales" means sales used in determining the denominator of the sales factor under division (B)(2)(c) of section 5733.05 of the Revised Code, as long as the sales meet the requirements of division (A)(2)(a) of this section and either or both of divisions (A)(2)(b) and (c) of this section.

(a) The gross receipts with respect to the sales qualify as foreign trading gross receipts as defined under section 924 of the Internal Revenue Code and regulations prescribed thereunder, except not including foreign trading gross receipts defined under section 924(a)(5) of the Internal Revenue Code and regulations prescribed thereunder. In addition, for the purposes of division (A)(2)(a) of this section, section 924 of the Internal Revenue Code is considered to apply to any taxpayer, not just an FSC as that term is defined under section 922 of the Internal Revenue Code.

(b) In the case of sales of tangible personal property, the taxpayer establishes by preponderance of the evidence that the property is not received by the purchaser within the United States. If the property is delivered by common carrier or by other means of transportation, the place at which the property is ultimately received after all transportation has been completed shall be considered as the place at which the property is received by the purchaser. Direct delivery in the United States, other than for purposes of transportation, to a person or firm designated by the purchaser constitutes delivery to the purchaser in the United States. Direct delivery outside the United States to a person or firm designated by the purchaser does not constitute delivery to the purchaser in the United States, regardless of where title passes or other condition of sale.

In addition, the taxpayer also establishes by clear and convincing evidence one of the following:



(i) With respect to sales of tangible personal property to a related member, within the twelve-month period subsequent to the delivery to the related member, the related member in turn sells the property, or leases it for a period of at least five years, and delivers the property in the same form or as a component part of other property to a purchaser or lessee who is not a related member. In addition, during the twenty-four-month period commencing with the date of such sale or lease by the related member, the purchaser or lessee or a related member of the purchaser or lessee does not receive, use, or consume the property, either in the same form or as a component part of other property, within the United States, and does not directly or indirectly sell or lease the property, either in the same form or as a component part of other property, for use or consumption in the United States.

(ii) With respect to all other sales of tangible personal property, during the twenty-four-month period commencing with such sale, the purchaser or a related member of the purchaser does not receive, use, or consume the property, either in the same form or as a component part of other property, in the United States, and does not directly or indirectly sell the property, either in the same form or as a component part of other property, for use or consumption in the United States.

(c) In the case of sales of services, the taxpayer establishes by preponderance of the evidence that the purchaser uses or consumes the services or the object of the services in a location other than the United States. If a purchaser will receive and use or consume the services or the object of the services both within and outside the United States, the sale is considered to be a sale of services or of the object of the services used or consumed outside the United States by the purchaser only to the extent of such proportionate use or consumption outside the United States. The taxpayer shall establish by preponderance of the evidence that the services or the object of the services was ultimately received and used or consumed outside the United States. Direct or indirect sales of services or the object of services to a related member do not meet the requirements of division (A)(2)(c) of this section unless the taxpayer establishes by preponderance of the evidence that within the twelve-month period subsequent to the sale to the related member, the related member in turn sold and delivered or rendered the services or the object of the services to a person who is not a related member and such person ultimately received and used or consumed the services or the object of the services outside the United States. In no event shall a sale of services qualify as an export sale if the taxpayer or the taxpayer's related member directly or indirectly acquired such services from a



person who is not a United States person and if the taxpayer or the taxpayer's related member in turn directly or indirectly sold such services in substantially the same form. For purposes of this section, services are sold in substantially the same form where more than fifty per cent of the fair market value of such services sold is attributable to services directly or indirectly purchased by the taxpayer or by the taxpayer's related member from a person who is not a United States person.

(3) "Incremental increase in export sales" means one-half the difference obtained by subtracting the amount of the taxpayer's export sales for the second preceding taxable year from the amount of the taxpayer's export sales for the taxable year.

If the taxpayer's taxable year is a period of greater than or less than three hundred sixty-five days, or three hundred sixty-six days for a taxable year that includes February twenty-nine, the amount of the export sales for that taxable year shall be adjusted and restated to an annualized amount.

(4) Subject to divisions (C), (F)(1), (H), and (I) of this section, "Ohio payroll increase factor" means twelve and one-half multiplied by the difference obtained by subtracting two one-hundredths from the largest of the following quotients:

(a) The numerator of the payroll factor for the taxable year minus the numerator of the payroll factor for the immediately preceding taxable year, divided by the numerator of the payroll factor for the immediately preceding taxable year;

(b) The numerator of the payroll factor for the taxable year minus the numerator of the payroll factor for the second preceding taxable year, divided by the numerator of the payroll factor for the second preceding taxable year;

(c) The numerator of the payroll factor for the taxable year minus the numerator of the payroll factor for the third preceding taxable year, divided by the numerator of the payroll factor for the third preceding taxable year.

If the numerator of the payroll factor for a taxable year represents payroll for a period of greater than or less than three hundred sixty-five days, or three hundred sixty-six days for a taxable year that includes February twenty-nine, for purposes of this section the numerator for that taxable year shall



be adjusted and restated to an annualized amount. If neither the taxpayer nor its related members were subject to the tax imposed by section 5733.06 of the Revised Code for any of the three immediately preceding tax years, the numerator of the payroll factor for any such year shall be considered to be one dollar.

In no event shall the Ohio payroll increase factor be greater than one or less than zero.

(5) Subject to divisions (C), (F)(2), and (H) of this section, "Ohio property increase factor" means ten multiplied by the largest of the following quotients:

(a) The numerator of the property factor for the taxable year minus the numerator of the property factor for the immediately preceding taxable year, divided by the numerator of the property factor for the immediately preceding taxable year;

(b) The numerator of the property factor for the taxable year minus the numerator of the property factor for the second preceding taxable year, divided by the numerator of the property factor for the second preceding taxable year;

(c) The numerator of the property factor for the taxable year minus the numerator of the property factor for the third preceding taxable year, divided by the numerator of the property factor for the third preceding taxable year.

If neither the taxpayer nor its related members were subject to the tax imposed by section 5733.06 of the Revised Code for any of the three immediately preceding tax years, the numerator of the property factor for any such year shall be considered to be one dollar.

In no event shall the Ohio property increase factor be greater than one or less than zero.

(6) Subject to divisions (H) and (I) of this section, "payroll factor" has the same meaning as in division (B)(2)(b) of section 5733.05 of the Revised Code with any adjustments, exclusions, or alterations made in accordance with division (B)(2)(d) of that section.

(7) "Pre-tax profit from the incremental increase in export sales" means fifteen per cent of the



incremental increase in export sales, except that the taxpayer may establish by preponderance of the evidence that the pre-tax profit margin from such sales is an amount exceeding fifteen per cent but not exceeding fifty per cent. For purposes of this section, the pre-tax profit margin shall be determined on a product line by product line basis, and equals the quotient of the taxpayer's taxable income with respect to the product line before operating loss deduction and special deductions, as required to be reported for the taxable year under the Internal Revenue Code, divided by the taxpayer's sales for the product line less sales returns, allowances, and discounts.

Nothing in division (A)(7) of this section shall be used or construed to support a request under division (B)(2)(d) of section 5733.05 of the Revised Code.

(8) Subject to division (H) of this section, "property factor" has the same meaning as in division (B)(2)(a) of section 5733.05 of the Revised Code with any adjustments, exclusions, or alterations made in accordance with division (B)(2)(d) of that section.

(9) "Related member" has the same meaning as under division (A)(6) of section 5733.042 of the Revised Code without regard to division (B) of that section.

(10) "Tentative credit" means the credit under division (B) of this section without regard to the limitations set forth in division (D) of this section.

(11) "United States" means the United States and its territories and possessions.

(12) "United States person" has the same meaning as under section 7701(A)(30) of the Internal Revenue Code.

(B) A nonrefundable credit is allowed against the tax imposed by section 5733.06 of the Revised Code. The credit shall be claimed in the order required under section 5733.98 of the Revised Code. Subject to divisions (C), (D), and (G) of this section, the credit equals the sum of the following:

(1) For tax years 1993 to 2000, ten per cent of the product obtained by multiplying all of the following together:



- (a) The pre-tax profit from the incremental increase in export sales for the taxable year;
 - (b) The average of the property factor and the payroll factor for the taxable year;
 - (c) The greater of the Ohio payroll increase factor or the Ohio property increase factor.
- (2) For tax years 1994 to 2005, the sum of any amounts carried forward from tax years 1993 to 2000 in accordance with division (E) of this section.
- (C)(1) In the case of a taxpayer having a related member or a group of taxpayers having a related member, the credit available under this section to the taxpayer or group of taxpayers shall be computed as if the taxpayer or all taxpayers of the group and all such related members were a consolidated, single taxpayer. The credit shall be allocated to such taxpayer or to such group of taxpayers in any amount elected for the tax year by the taxpayer or group. Such election shall be revocable and amendable during the period described in division (B)(1) of section 5733.12 of the Revised Code. Nothing in this section shall be construed to treat as an export sale a sale by a related member who is not a United States person if such sale would not qualify as an export sale without regard to the consolidation requirement set forth in this section.
- (2) For purposes of this section, a taxpayer's or related member's export sales and the numerators and denominators of the taxpayer's or related member's payroll and property factors shall include the taxpayer's or related member's proportionate shares of the export sales and numerators and denominators of the payroll and property factors, respectively, for all pass-through entities. For purposes of applying division (C)(2) of this section, the tax commissioner shall be guided by the concepts set forth in section 41(f)(2) of the Internal Revenue Code and regulations prescribed thereunder. Nothing in this section shall be construed to limit or disallow pass-through treatment of a pass-through entity's income, deductions, credits, or other amounts necessary to compute the tax imposed by section 5733.06 of the Revised Code and the credits allowed by this chapter.
- (D) In no circumstance shall the credit provided by this section be less than zero.

If the tentative credit for a tax year for a taxpayer and any related members is greater than two hundred fifty thousand dollars or the aggregate tax due for the taxpayer and any related members



after taking into account any other nonrefundable credits that precede the credit under this section in the order required under section 5733.98 of the Revised Code, then the credit allowed for the tax year for the taxpayer and any related members shall not exceed the lesser of two hundred fifty thousand dollars or the aggregate tax due for the taxpayer and any related members after taking into account any other nonrefundable credits that precede the credit under this section in that order.

(E)(1) Pursuant to division (B)(2) of this section, the greater of the amount described in division (E)(1)(a) or the amount described in division (E)(1)(b) of this section shall be allowed as a nonrefundable credit in each ensuing tax year:

(a) The excess, if any, of the tentative credit for the tax year over two hundred fifty thousand dollars;

(b) The excess, if any, of the tentative credit for the tax year over the aggregate tax due for the tax year for the taxpayer and any related members, after taking into account any other nonrefundable credits for the tax year that precede the credit under this section in the order required under section 5733.98 of the Revised Code.

(2) Any such amount allowed as a credit in an ensuing tax year shall be deducted from the balance carried forward to the next ensuing tax year. Such credit shall be taken into account prior to the allowance of any credit for such tax year under division (B)(1) of this section. In no event shall any amount or any portion of any amount described in division (E)(1)(a) or (b) of this section be allowed in tax year 2006 or any subsequent tax year.

(F)(1) With respect to the computation of the Ohio payroll increase factor, divisions (A)(4)(b) and (c) of this section shall not apply to tax years 1993 and 1994, and division (A)(4)(c) of this section shall not apply to tax year 1995.

(2) With respect to the computation of the Ohio property increase factor, divisions (A)(5)(b) and (c) of this section shall not apply to tax years 1993 and 1994, and division (A)(5)(c) of this section shall not apply to tax year 1995.

(G) The aggregate credit allowed to the taxpayer and any related members for tax years 1993 to 2005 shall not exceed three million two hundred fifty thousand dollars.



(H)(1) If a taxpayer or a taxpayer's related member acquires the major portion of a trade or business of another person or the major portion of a separate unit of a trade or business of another person, then for purposes of applying this section for any tax year subsequent to the end of the taxable year in which the acquisition occurred, the amount of the taxpayer's export sales, payroll, subject to division (I) of this section, and property for periods before the acquisition shall be increased by so much of such amounts paid or incurred by the previous owner of the acquired trade, business, or separate unit as is attributable to the portion of such trade, business, or separate unit acquired by the taxpayer or related member.

(2) If a taxpayer or a taxpayer's related member disposes of a major portion of a trade or business or the major portion of a separate unit of a trade or business in a transaction to which division (H)(1) of this section applies, and if the taxpayer or the related member furnished the acquiring person such information as is necessary for the application of division (H)(1) of this section, then for purposes of applying this section to any tax year subsequent to the end of the taxable year in which the disposition occurred, the amount of the taxpayer's export sales, payroll, subject to division (I) of this section, and property for periods before the disposition shall be decreased by so much of such amounts as is attributable to the portion of such trade, business, or separate unit disposed of by the taxpayer or related member.

(3) For purposes of applying this division, the tax commissioner shall be guided by the concepts set forth in section 41(f)(3) of the Internal Revenue Code and regulations prescribed thereunder.

(I) For purposes of this section, payroll and compensation do not include amounts in excess of two hundred thousand dollars directly or indirectly paid or accrued during the taxable year to an employee. For purposes of applying this division, the aggregate payroll and compensation directly or indirectly paid or accrued by the taxpayer and by the taxpayer's related members, if any, to an employee and to the employee's children, grandchildren, parents, and spouse, other than a spouse who is legally separated from the employee, shall be considered to be paid to the employee.

(J) With respect to allowing the credit provided by this section, the tax commissioner shall be guided by the doctrines of "economic reality," "sham transaction," "step transaction," and "substance over form." The taxpayer shall bear the burden of establishing by preponderance of the evidence that any



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transaction giving rise to a claimed credit did not have as a principal purpose the avoidance of any portion of the tax imposed by section 5733.06 of the Revised Code.

Nothing in this section shall be construed to limit solely to this section the application of the doctrines listed in this division.