

Chapter 806: NONRESIDENT INDIVIDUAL INCOME TAX

SUMMARY: This rule provides income tax guidance for nonresident individuals in the following areas:

- Determination of Maine-source income;
 - Deduction of Maine losses;
 - Attribution and apportionment of income, tax additions and tax credits to Maine;
 - Returns, worksheets and schedules to be used for filing;
 - Determination of taxable income and tax credits for spouses filing as single individuals; and
 - Income tax withholding obligations.
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Outline of Contents:

- .01 Definitions
 - .02 Income subject to Maine income tax
 - .03 Income not subject to Maine income tax
 - .04 Deduction of losses
 - .05 Special sourcing rules
 - .06 Income tax credits
 - .07 Return of nonresident or part-year resident individual
 - .08 Maine taxable income computation for spouses filing as single individuals
 - .09 Maine tax additions and tax credits for spouses filing as single individuals
 - .10 Maine income tax withholding obligations
 - .11 Application date
-

.01 Definitions

- A. Code.** “Code” means the United States Internal Revenue Code of 1986 and amendments to that Code as of the date stated in 36 M.R.S. § 111(1-A).
- B. Intangible property.** “Intangible property” means a right or possession of a nonphysical or abstract nature that has value, or a financial asset that has no

intrinsic value but that represents value. Intangible property includes but is not limited to copyrights, patents, licenses, bills of exchange, trademarks, business books and records, business goodwill, covenants not to compete, securities, bonds, notes, insurance policies, and accounts receivable.

- C. **Pass-through entity.** “Pass-through entity” means a corporation that for the applicable tax year is treated as an S corporation under the Code, or a general partnership, limited partnership, limited liability partnership, limited liability company, trust or similar entity that for the applicable tax year is not taxed at the entity level for federal income tax purposes. “Pass-through entity” does not, for Maine income tax purposes, include a financial institution subject to tax under 36 M.R.S., Chapter 819.
- D. **Research and development.** “Research and development” means activities performed in the experimental or laboratory sense if they are intended to discover information that would eliminate uncertainty concerning the development or improvement of a product, formula, invention, process, technique, or patent, but excludes quality control testing and inspection, advertising or promotions, efficiency or consumer surveys, management studies, research in connection with literary, historical or similar projects, or the acquisition of another’s patent, model, production, or process.
- E. **Tangible personal property.** “Tangible personal property” means personal property that has physical existence. It can be seen, weighed, measured, felt, touched or in any other manner perceived by the senses, but does not include anything that constitutes intangible property as defined in subsection A above.
- F. **Temporary business presence.** “Temporary business presence” means a presence in the State on other than a systematic or regular basis, either directly or through agents or employees for purposes of conducting business.

.02 **Income subject to Maine income tax**

- A. **Generally.** Income received by a nonresident is attributable to and taxable by Maine when the income is derived from or connected with sources in Maine (“Maine-source income”). The itemized and standard deductions, credits, income modifications, and personal exemptions applicable to residents also apply to nonresidents. A loss realized by a nonresident is attributable to Maine when the loss is derived from or connected with sources in Maine (“Maine-source loss”). Each nonresident partner of a partnership, member of a limited liability company (“LLC”) categorized as a partnership, and shareholder of an S Corporation is subject to Maine income taxation on Maine-source income allocable to the nonresident from the partnership, LLC or S Corporation. Estates of nonresident decedents and nonresident trusts are also subject to tax if Maine-source income has been received.

- B. Compensation for personal services.** Except as provided by federal law, compensation received for personal services performed in Maine, regardless of where paid, is Maine-source income. Personal service compensation includes, but is not limited to, wages, salaries, taxable benefits such as annual and sick leave, commissions, fees, or payment in kind. Personal services performed in Maine include sick time and vacation time earned while working in Maine. In the case of compensation for personal services, unless excluded from the definition of “income” under the Code, the taxpayer must report all Maine-source income even though the taxpayer does not receive the entire amount of such income. For example, amounts withheld by an employer for federal income taxes, FICA contributions, medical insurance plans, or other similar withholding deductions must be included in Maine-source income; on the other hand, compensation contributed to a 401(k) plan is not subject to Maine taxation. Unemployment compensation received by a nonresident that is derived from employment in Maine is Maine-source income.

With respect to incentive stock options, nonstatutory stock options, and employee stock purchase plans, compensation for personal services performed in Maine generally includes, for nonresident employees working in Maine at the time the employee is granted the right to a stock option plan, the amount that represents the fair market value of the stock on the date exercised (*i.e.* when the employee has purchased the stock) that exceeds the option price of the stock at the time the option is granted. When the period between the grant of a stock option and the time the option is exercised straddles employment within and without the state of Maine, an adjustment must be made in accordance with section .05, subsection A below; the compensation sourced to Maine must be included in Maine adjusted gross income during the same tax year the income is included in federal adjusted gross income. For purposes of stock option plans described in this paragraph, income derived from personal services is compensation even if the amount is reported as a capital gain on the federal income tax return.

- C. Income from a trade or business.** All income derived from or connected with the carrying on of a trade or business within Maine is Maine-source income. Generally, a nonresident has a trade or business in Maine if:
1. The nonresident, directly or through agents or employees or through a pass-through entity in which the nonresident is a shareholder, member, or partner, maintains or operates or shares in maintaining or operating a desk, room, office, shop, store, warehouse, factory, or any other place in Maine where business affairs are systematically and regularly conducted; or
 2. The nonresident, directly or through agents or employees or through a pass-through entity in which the nonresident is a shareholder, member, or partner, is present for business in Maine on other than a systematic or

regular basis and earns or derives gross income during the taxable year from contractual or sales-related activities.

D. Income from ownership of real or tangible personal property. All income derived from the ownership of real or tangible personal property located in Maine is Maine-source income; however, unless the property was employed in a business, trade, profession, or occupation carried on in this State, interest income earned from the sale of such property will not be subject to Maine income tax. Maine-source income includes rents derived from and gains from a federally taxable sale or exchange of:

1. Real property located in Maine;
2. Tangible personal property having a situs in Maine; or
3. Any interest in a Maine time-share or similar arrangement.

E. Income from the sale of a partnership interest. The income from the sale of a partnership interest on or after July 1, 2005, by a nonresident is sourced to Maine to the extent of the ratio of the partnership's tangible property located in Maine to the partnership's tangible property located everywhere in the United States, determined based on original cost. "Original cost" for purposes of this subsection and 36 M.R.S. § 5142(3-A) is defined in Rule 801.09(D). Tangible property includes real estate, inventory, and equipment that is owned or rented by the partnership. If more than 50% of the partnership's assets consist of intangible property, the gain or loss is allocated to Maine based on the sales factor of the partnership for the prior tax year. "Sales" for purposes of computing the sales factor are defined in Maine Rule 801. "Property" for purposes of computing the ratio of property located in Maine to property located everywhere is defined in Maine Rule 801. Maine-source income does not include income from the sale of a limited partnership's interest in an investment partnership where more than 80% of the value of the partnership's total assets consists of intangible personal property held for investment, except that such property cannot include an interest in a partnership unless that partnership is itself an investment partnership.

If the apportionment provisions set forth in this subsection do not fairly represent the extent of the partnership's business activity in this State, the taxpayer may petition for, or the State Tax Assessor ("Assessor") may require, in respect to all or any part of the partnership's business activity, the employment of any other method to effectuate an equitable apportionment to this State of the partner's income from the sale of the partnership interest. See 36 M.R.S. § 5142(3-A). The provisions of this subsection also apply to an LLC, unless it elects at the federal level to be taxed as an entity other than a partnership. See 36 M.R.S. § 5180(1).

F. Gambling activity/lottery winnings. Winnings received by a nonresident from the Maine Lottery or the Tri-State Lotto (Maine, New Hampshire, Vermont) are

Maine-source income if the winning ticket was purchased in Maine on or after July 13, 1993. Maine-source income also includes proceeds from any gambling activity conducted in Maine, lottery tickets purchased in Maine (except as provided in the previous sentence), and payments received from third parties as consideration for the transfer of rights to future proceeds related to gambling activity in Maine or lottery tickets purchased in Maine.

G. Minimum taxability thresholds. Notwithstanding the provisions of subsections B and C above and to the extent the income is not excluded from Maine income tax by section .03 below, a nonresident individual with compensation earned in Maine or income from a temporary business presence in Maine is subject to income taxation on that income as provided by this subsection.

1. A nonresident individual is subject to Maine income tax on compensation that is Maine-source income earned through the performance of personal services in Maine as an employee only if the individual was present in Maine performing the personal services for more than 12 days during the taxable year and directly earned or derived more than \$3,000 of gross income during the taxable year in Maine from all sources.
2. A nonresident individual is subject to Maine income tax on Maine-source income that is derived from a temporary business presence in Maine only if the individual had a temporary business presence in Maine for more than 12 days during the taxable year and earned or derived more than \$3,000 of gross income during the taxable year from contractual or sales-related activities.

The days worked in Maine that count toward the taxability threshold need not be consecutive. Any portion of a day spent performing personal services in Maine is counted as a full day. For taxable years of less than 12 months, day references must be prorated based on the number of months of the taxable year over 12 multiplied by the day threshold.

H. Up to 24 days performing certain personal services not counted towards the 12-day minimum taxability threshold. Up to 24 days spent by a nonresident individual in the State performing the following services as an employee will not count towards the 12-day threshold in .02(G)(1).

1. **Any personal service performed in connection with presenting or receiving employment-related training or education.** These services include providing instruction at or attending seminars, hands-on training, on-the-job training, or other types of educational opportunities required by or related to the nonresident's employment.
2. **Any personal service performed in connection with a site inspection, review, analysis of management, or any other supervision:**

- (a) At a company-owned facility on behalf of a company not headquartered in Maine; or
 - (b) At a Maine-based affiliated or subsidiary company on behalf of its parent.
3. **Any personal service performed in connection with research and development at a facility based in Maine or in connection with the installation of new or upgraded equipment or systems at that facility, including:**
- (a) Conducting research and development at that facility; or
 - (b) Installing or repairing any equipment or systems used for purposes of research and development at that facility.
4. **Any personal service performed as part of a project team working on the attraction or implementation of new investment in a facility based in Maine.** These services include financial or business planning, engineering, construction, testing, permitting, inspection, or any other service provided by members of a project team whose purpose is to bring in or implement new investment of money or resources in an existing or new Maine-based facility or in the expansion, renovation, development, or construction of the Maine-based facility itself.

.03 Income not subject to Maine income tax

The following types of income earned or derived by nonresidents are not subject to Maine income tax:

- A. Certain intangible income.** Except for the provisions of section .02, income from intangibles, such as annuities, interest, dividends, copyrights, patents, and gains from the sale or exchange of intangibles (other than the sale of partnership interests), when not related to a trade, business, profession or occupation carried on in Maine;
- B. Certain military pay.** Compensation paid by the United States of America to its uniformed military personnel for services rendered on active duty, including members of the Army, Navy, Air Force, Coast Guard, and Marines who are assigned to a military air base, naval station, or any facility in Maine, public or private, to which they must report under service orders (see the federal Servicemembers Civil Relief Act);
- C. Military spouses.** Income earned from services performed in Maine by a nonresident spouse of a servicemember if the spouse is a nonresident in Maine

solely to be with a servicemember who is in Maine in compliance with that servicemember's orders;

- D. Certain transportation employees.** Earnings paid to nonresident transportation workers whose wages are exempt from Maine taxation by federal law, including interstate railroad and motor carrier employees who perform services for their employer in more than one state (49 U.S.C.S. §§ 11502 and 14503); and
- E. Exempt retirement income.** Retirement income, including pensions and deferred compensation received after termination of employment, that is exempt from state income taxes pursuant to United States law (4 U.S.C.S. § 114).
- F. Certain nonresidents working in Maine under interlocal agreements.** Beginning in tax year 2011, income earned by a nonresident employee of a political subdivision of an adjoining state performing services in Maine in accordance with an interlocal agreement under 30-A M.R.S., Chapter 115 is not considered Maine-source income, so long as the work performed does not displace a Maine resident employee.
- G. Income directly related to a declared state disaster or emergency.** For tax years beginning on or after January 1, 2013, employee compensation or income from a trade or business in Maine that is directly related to a declared State disaster or emergency, but only if:
 - 1. The nonresident is present in the State during the taxable year solely for the performance of services or the conducting of business during a declared state disaster or emergency period; and
 - 2. The services were requested by the State, a county, city, town or political subdivision of the State or a registered business as defined in 10 M.R.S., Chapter 1201.
- H. Other income.** Any other income earned by a nonresident that is protected from Maine taxation by federal law.

.04 Deduction of losses

A loss that is deducted in computing the nonresident's federal adjusted gross income is automatically included in that taxpayer's Maine adjusted gross income for the same tax year. If the loss is a "Maine-source loss," it is allocated to Maine when computing income from a trade or business in Maine on Schedule NR or Schedule NRH. A loss realized by a nonresident is attributable to Maine when the loss is derived from or connected with sources in Maine ("Maine-source loss").

- A. **Net operating loss.** A net operating loss that is derived from or connected with the carrying on of a trade or business in Maine is a Maine-source loss.
- B. **Capital loss.** A capital loss that is derived from the ownership or disposition of any interest in real or tangible personal property located in Maine is a Maine-source loss.
- C. **Rental loss.** A rental loss derived from real or tangible personal property located in Maine is a Maine-source loss.
- D. **Carryback or carryforward.** Since Maine adjusted gross income is derived from federal adjusted gross income and the Code provides for the carry back or carry forward of certain losses, a taxpayer may carry back (except as provided in the next paragraph) or carry forward a loss on the Maine return only if that loss is carried back or carried forward on the taxpayer's federal return for the same tax year, excluding losses disallowed in 2009, 2010, and 2011. If the only Maine-source items in federal adjusted gross income are losses, and those Maine losses are fully absorbed by income derived from sources outside of Maine, the Maine losses cannot be carried back or carried forward for Maine purposes.
 - 1. **Net operating losses realized after 2001.** Net operating losses realized after 2001 that are carried back for federal income tax purposes are not allowed for Maine income tax purposes in the carryback year. The disallowance is effected through an addition income modification in the carryback year. The amount of the addition income modification may be used as a subtraction modification in the loss year (assuming there are sufficient Maine income tax income additions in that year) or in tax years subsequent to the year of the loss, but only to the extent not previously used to offset Maine income. Only that portion of the carry back loss that is sourced to Maine may be used to reduce federal adjusted gross income in the loss year or carryforward years. The net operating loss amount must be used within the allowable net operating loss carryover period.
 - 2. **Tax years beginning in 2009, 2010, and 2011.** Maine disallows carryforwards in 2009, 2010, and 2011. Any federal carryforward in those years must be offset with a corresponding addition modification. The addition modifications for a federal carryback or carryforward can be recaptured in years subsequent to the year of the loss, beginning with tax year 2012, through subtraction modifications. The recapture modifications must be reduced by any Maine income that is offset in the year of the loss. 36 M.R.S. § 5122(1)(DD) and (2)(CC).
- E. **Negative or zero federal adjusted gross income.** If the nonresident taxpayer's federal adjusted gross income is negative or zero for the taxable year and the taxpayer has recognized Maine-source income, there will be no Maine tax on that income.

.05 Special sourcing rules

- A. Allocation or apportionment required.** When a nonresident earns or derives income, including income from pass-through entities or sole proprietorships, from sources both within Maine and elsewhere, an allocation or apportionment of the income must be made to determine the amount of Maine-source income. The following provisions set forth the rules for the determination of a nonresident's Maine-source income; for the purpose of this section, the term "income" includes, in the alternative, the term "loss." A nonresident may submit an alternative method of allocation with respect to his or her income and explain that method in full on the return, subject to review and modification by the Assessor. An alternative basis for the apportionment of business income under subsection F below may be requested as provided under 36 M.R.S. § 5211(17). Apportionment of items of income from the rendering of purely personal services by employees, salespersons, athletes, and entertainers is addressed in this section of the Rule.
- B. Employees generally.** When a nonresident employee can establish the exact amount of pay received for services performed in Maine, that amount is the amount of Maine-source income. When no such exact determination of amounts earned or derived in Maine is possible, the income must be apportioned to Maine. Gross income wherever earned (determined as if the nonresident were a resident) is multiplied by a fraction, the numerator of which is the number of days spent working in Maine and the denominator of which is the total working days. The result is the amount of the nonresident's Maine-source income. Days in which the employee was not at work, such as holidays, sick days, vacations, and paid or unpaid leave, are not included when computing total working days. When a working day is spent working partly in Maine and partly elsewhere, it is treated as one-half of a day spent working in Maine.
- C. Salespersons.** The Maine-source income of a salesperson or other employee whose compensation is based in whole or in part upon commissions is computed as follows: The gross income earned from sales everywhere (determined as if the nonresident were a resident) is multiplied by a fraction, the numerator of which is the amount of sales made within Maine and the denominator of which is the amount of sales everywhere. For the purposes of this calculation, the "amount of sales" is determined under the same method by which the amount of sales is determined for purposes of calculating the employee's commissions. The determination of whether sales are made within Maine or elsewhere is based upon where the salesperson performs the activities in obtaining the order, not the location of the formal acceptance of the contract.
- D. Professional Athletes.**
- 1. Exhibition and regular season games.** Nonresident professional athletes must include in income the entire amount of compensation received for games played in Maine. In the case of a nonresident athlete not paid

specifically for the game played in Maine, the following apportionment formula must be used: The income earned and subject to the Maine income tax is the total compensation earned during the taxable year, including incentive payments, bonuses, and extras, but excluding signing bonuses and league playoff money. Total compensation is multiplied by a fraction, the numerator of which is the number of exhibition and regular season games the athlete played (or was available to play for the athlete's team, as, for example, with substitutes) in Maine during the taxable year, and the denominator of which is the total number of exhibition and regular season games that the athlete was obligated to play under contract or otherwise during the taxable year, including games in which the athlete was excused from playing because of injury or illness.

2. **Playoff games.** For playoff games played in Maine, the amount of league playoff money earned by the professional athlete for playing or being available to play in such games is also income subject to apportionment under the following formula: League playoff money earned and subject to the Maine income tax is the total league playoff compensation earned during the taxable year multiplied by a fraction, the numerator of which is the number of playoff games the athlete played or was available to play in Maine during the taxable year, and the denominator of which is the total number of playoff games which the athlete's team played during the taxable year, including playoff games in which the athlete was excused from playing because of injury or illness.
3. **Signing bonuses.** Any amount received by a nonresident professional athlete as a signing bonus is excluded from the income subject to Maine apportionment.

- E. **Entertainers.** The Maine-source entertainment income of nonresident entertainers is the entire amount received for performances, engagements or events that occurred in Maine. In the case of a nonresident entertainer who is not paid specifically for a performance in Maine, the following apportionment formula must be used: The income earned and subject to the Maine income tax is the entertainer's total annual compensation multiplied by a fraction, the numerator of which is the number of performances the entertainer performed (or was available to perform, as, for example, with understudies) in Maine, and the denominator of which is the total number of performances which the entertainer was obligated to perform under contract or otherwise during the taxable year.
- F. **Self-employed nonresidents and nonresident owners of pass-through entities carrying on a trade or business in Maine and elsewhere.** Self-employed nonresidents and nonresident owners of pass-through entities carrying on a trade or business both within Maine and elsewhere must apportion their income in accordance with 36 M.R.S. § 5211 and Rule 801 in order to determine the amount of Maine-source income. See 36 M.R.S. § 5192.

.06 Income tax credits

Most income tax credits available to a resident individual are also available to a nonresident individual; however, personal income tax credits, such as the credit for child care expenses (36 M.R.S. § 5218) and the retirement and disability credit (36 M.R.S. § 5219-A), must be prorated based upon the ratio of the taxpayer's Maine-source income to entire federal adjusted gross income as modified by 36 M.R.S. § 5122. The total amount of income tax credits based upon a business being operated in Maine by the nonresident taxpayer (business credits) may be claimed without proration, subject to the limitations contained in the statute for the credit or credits involved. (See 36 M.R.S., Chapter 822.)

.07 Return of nonresident or part-year resident individual

Nonresidents and part-year residents must file the Maine resident long form supplemented by Schedule NR or Schedule NRH. Schedules NR and NRH are used to separate Maine-source income or loss from non-Maine-source income or loss and to compute the nonresident credit. A copy of the federal income tax return (Form 1040) and Schedule A (if itemized deductions are claimed on the Maine return) must be attached. The taxpayer must submit a copy of any other federal forms or schedules that the Assessor deems necessary to determine Maine-source income.

.08 Maine taxable income computation for spouses filing as single individuals

A married individual who files as a single individual must file the Maine resident long form supplemented by Schedule NRH. In completing Schedule NRH, the following steps must be followed in order to calculate the filing spouse's share of the income, deductions, and other items, in order to separate Maine-source income or loss from non-Maine-source income or loss and to compute the nonresident credit:

- A. Individual's income share.** Earned income, including, but not limited to, income from wages, salaries, tips, and other items of value received from an employer for services performed or from self-employment is totally attributed to the spouse so compensated. For other income, if separate accounting has been maintained so that the income, expense and deductions can be separately determined and substantiated, the individual filing must report as if a separate federal return had been filed. Otherwise, the individual's share is 50% of all other income.
- B. Income ratio.** The ratio of the individual's share of total income is computed by dividing the individual's income share as determined in subsection A by the total income reported on the federal married joint return.
- C. Adjustments to income.** Adjustments to income appearing on the federal married joint return for Maine purposes is the actual distribution of adjustments, if

supported by adequate records. Otherwise, apportion adjustments according to the income ratio as determined in subsection B.

- D. Federal adjusted gross income.** Income adjustments determined pursuant to subsection C are deducted from income share determined pursuant to subsection A in order to determine the individual's federal adjusted gross income.
- E. Maine adjusted gross income.** The Maine adjusted gross income for the individual filing is determined by adding to the federal adjusted gross income calculated in subsection D the individual's other income share, if any, that is taxable by Maine but not at the federal level, and by deducting any amount included in the federal adjusted gross income that is taxable at the federal level but not by Maine.
- F. Maine deductions.** The individual must elect either the Maine standard deduction for single individuals or the amount of the married joint federal itemized deductions less applicable Maine modifications multiplied by the electing individual's income ratio (as determined pursuant to subsection B). Instead of applying the individual's income ratio to the joint itemized deductions, the taxpayer may elect to utilize actual itemized deductions, less applicable Maine modifications, attributable to him or her if supported by adequate records.
- G. Maine exemptions.** The filing individual is entitled to his or her exemption as authorized by 36 M.R.S. § 5126 plus the number of dependent exemptions from the federal married joint return multiplied by the electing individual's income ratio (as determined pursuant to subsection B). No amount may be claimed for the other spouse's personal exemption.

.09 Maine tax additions and tax credits for spouses filing as single individuals

Maine tax additions and Maine tax credits available if a joint return were filed are multiplied by the electing individual's ratio of Maine adjusted gross income to the Maine adjusted gross income of the joint return. If separate accounting has been maintained so that tax additions and tax credits can be separately determined and substantiated, the individual filing may report as if a separate federal return had been filed.

.10 Maine income tax withholding obligations

Maine law requires income tax to be withheld by the following entities for nonresidents:

- A. Employers and certain non-wage payers.** Any person who maintains an office or transacts business in Maine and who is required to withhold federal income tax from a particular payment must also withhold Maine income tax if the payment constitutes income that is not excluded from taxation under Maine law. See 36

M.R.S. §§ 5250 and 5255-B. Employers who are required to withhold Maine individual income tax from employees must withhold from the earnings of nonresident individuals who are present in Maine performing personal services, provided the minimum taxability thresholds contained in 36 M.R.S. § 5142 (8-B) are exceeded.

- B. Pass-through entities.** A pass-through entity with income apportioned to Maine must withhold Maine income tax from any nonresident's quarterly share of Maine-source income earned by that pass-through entity as provided in 36 M.R.S. § 5250-B.
- C. Buyers of real estate from nonresidents.** Buyers of Maine real property purchased from nonresidents must withhold an amount equal to 2.5% of the sale price to be used as an estimated tax payment towards any Maine tax liability on the gain realized from the sale. The buyer of the property must remit the real estate withholding to Maine Revenue Services using form REW-1. Exemptions or reductions in the withholding amount may apply in certain situations. See 36 M.R.S. § 5250-A(3).

For more information on income subject to Maine income tax withholding and determining the amounts to be withheld, see Rule 803.

.11 Application date

Unless otherwise indicated, this Rule applies to tax years beginning on or after January 1, 2011.

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