

July 28, 1997

Mr. W. Val Oveson, Chairman  
Utah State Tax Commission  
210 North 1950 West  
Salt Lake City UT 84134

RE: MTC proposed definitions of  
unitary business and business/nonbusiness income

Dear Val:

The Idaho State Tax Commission's staff, its legal counsel, and I have reviewed the MTC draft regulations defining a unitary business and business/nonbusiness income. The drafts are of high quality and are an improvement over the existing regulations. Some refinement remains to be done. Here are Idaho's comments.

Definition of unitary business

- Line 185: We feel that an in-house advertising department can be an economy of scale and hence a fact favoring unity.
- Lines 153, 178-179, 194, 199-205: Consider deleting "significant" and "substantial" because a lower threshold, when combined with other indicia, could still constitute unity.
- Lines 209-212: We feel that intercompany financing can be a unitary fact, where the lender contributes and the borrower depends. If the lender has a good credit rating and passes lower borrowing costs to the related borrower, the lending may also indicate an economy of scale.
- Line 231: More thought should be given to whether centralized management between diverse businesses is sufficient to create unity.
- Line 273: The presumption of unity within a single entity should be eliminated. It would be too easy to create unity by merging two entities into one.

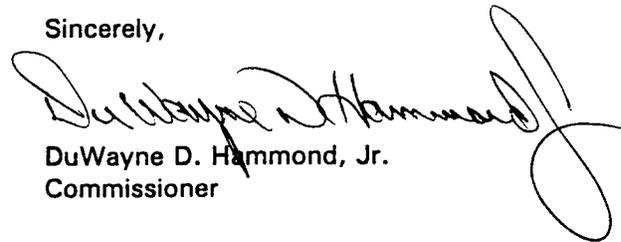
Definitions of business and nonbusiness income

- Overall comment. We read the comments of the AICPA, published in State Tax Notes in August of 1996. The AICPA recommended that the MTC ought to interpret the Supreme Court's "operational function" versus "investment function" dichotomy (*Allied-Signal*), and discard the "business/nonbusiness" distinction as outdated and confusing. We disagree; we believe that it is not the MTC's job to interpret the Constitution. So long as UDITPA and the Multistate Tax Compact are in place, the MTC must stick to interpreting those laws. Since those laws embody the business/nonbusiness distinction, the MTC regulation should interpret it.

- IV.1.(a).(2). The Idaho State Tax Commission interprets UDITPA to contain both the transactional and functional test. We acknowledge that an MTC regulation containing these two tests will probably not be suitable for those states whose courts have not adopted the two-test interpretation. Those states will need to modify the MTC regulation appropriately.
- IV.1.(a).(4).(E). As many commentators noted, provision needs to be made for property that is converted from a business to a nonbusiness use. After a certain lapse of time or other event, gain on such property ought to become eligible for nonbusiness treatment.
- IV.1.(a).(5). The discussion of the relation of the two tests to the Constitution needs to be rewritten. The operational function test of *Allied-Signal* should be mentioned as an alternative to the unitary business principle as a limitation on apportionability.
- IV.1.(c).(3), Example (vi). We are uncomfortable with a test for business income that looks to whether funds are "available for future operation of the taxpayer's unitary business." This test seems too close to the "corporate purpose" test that was discredited by the U.S. Supreme Court in *ASARCO*. Even nonbusiness income can be available to the owner for deployment in the unitary business. We would reach a business income result on the facts given, but on the ground that (1) the funds are in an interest-bearing account that is highly liquid, evidencing no intent to invest it passively in a permanent or semi-permanent kind of investment, and (2) income is presumed to be business income, and no facts supporting nonbusiness treatment are shown.

Thanks for providing the opportunity to comment. Keep up the good work. Mr Geoff Thorpe will represent Idaho at the PPWG meeting in Whitefish.

Sincerely,



DuWayne D. Hammond, Jr.  
Commissioner

cc: Mr.Paull Mines, General Counsel  
Multistate Tax Commission