

Multistate Tax Commission



TO: PPWG – UNIFORMITY COMMITTEE LIAISON GROUP
MEMBERS

FROM: ALAN H. FRIEDMAN, CONVENOR

SUBJECT: UNITARY BUSINESS DEFINITIONS

DATE: June 22, 1999

I have been out of the state for most of the past week and found two documents when I returned that I wanted to pass on to the full Group. Attached to this memo is a suggested provision regarding “instant unity” and an e-mail from Mark Wainwright of Utah. The “instant unity” provision is one that the old PPWG had considered and which had received substantial support.

Mark’s e-mail provides some good food for thought that we will not be able to digest fully during our teleconference on June 23rd, given the short notice provided for you by this memo. But, after our teleconference, I will make changes that seem appropriate from the discussion and circulate the redraft to members of the Group as soon as possible. Any interested party may then provide written comments/suggestions/objections to the language of both the Dependency/Contribution Test and the Three Unities Test drafts. I request that such submissions be made on or before July 15, 1999, so that I can review and forward them on with a brief Report to the Uniformity Committee. The Uniformity Committee meets on July 26th to address this, among other agenda items. I will seek its direction then as to its wishes regarding this effort and report same to you.

Again, tomorrow, call into 703-736-7037 at 1:30 PM (Eastern) for our teleconference. I anticipate the call to last somewhere between an hour and an hour and one-half.

Once again, I extend my deepest appreciation to all of you who have been attentive to this most important work. I am sure your efforts will form a sound basis for the further development of a definition of a “unitary business” that can be widely adopted.

(Instant Unity provision worked on by PPWG-Definition of Unitary Business)

INSTANT UNITY - PRESUMPTIONS

a. Newly-Acquired Corporations

When a corporation acquires another corporation, a presumption shall exist against a finding of unity between the two corporations during the first reporting period. Any party may overcome such presumption against unity by providing sufficient evidence demonstrating that the corporations were unitary. If such presumption is rebutted, then the corporations will be considered unitary as of the time such evidence so demonstrated.

b. Newly-Formed Corporations.

When a corporation forms another corporation, a presumption shall exist in favor of a finding of unity between the two corporations during the first reporting period. Any party may overcome such presumption in favor of unity by providing sufficient evidence demonstrating that the corporations were not unitary. If such presumption is rebutted, then the entities will be considered as not being unitary as of the time such evidence so demonstrated.

E-mail from Mark Wainwright of June 16, 1999:

This e-mail contains Utah's definition of "common ownership" and also offers comments/suggestions on the June 17, 1999 draft of the Three Unities Test.

During the June 9th teleconferences, I mentioned Utah's statutory definition of common ownership for combined reporting purposes. You asked that I forward the statutory language to you. Following are two subsections from Utah's corporate franchise tax "Definitions" section (Utah Code Ann. § 59-7-101). The first subsection set forth below, subsection (7), is the definition of "common ownership." The second, subsection (2), is the definition of "affiliated group." I have included subsection (2) since it is referenced in the definition of "common ownership." I have reversed the order of the definitions from that in the Utah Code for this purpose.

(7) (a) "Common ownership" means the direct or indirect control or ownership of more than 50% of the outstanding voting stock of:

- (i) a parent-subsidary controlled group as defined in Section 1563, Internal Revenue Code, except that 50% shall be substituted for 80%;
- (ii) a brother-sister controlled group as defined in Section 1563, Internal Revenue Code, except that 50% shall be substituted for 80%; or
- (iii) three or more corporations each of which is a member of a group of corporations described in Subsection (2)(a)(i) or (2)(a)(ii), and one of which is:
 - (A) a common parent corporation included in a group of corporations described in Subsection (2)(a)(i); and
 - (B) included in a group of corporations described in Subsection (2)(a)(ii).

* * * *

(2) (a) "Affiliated group" means one or more chains of corporations that are connected through stock ownership with a common parent corporation that meet the following requirements:

- (i) at least 80% of the stock of each of the corporations in the group, excluding the common parent corporation, is owned by one or more of the other corporations in the group; and
- (ii) the common parent directly owns at least 80% of the stock of at least one of the corporations in the group.

(b) "Affiliated group" does not include corporations that are qualified to do business but are not otherwise doing business in this state.

(c) For purposes of this subsection, "stock" does not include nonvoting stock which is limited and preferred as to dividends.

(Utah Code Ann. § 59-7-101 (7) and (2))

I also offer the following comments on the June 17, 1999 draft of the Three Unities Test:

1. In Alternative B of paragraph B(2)(a), the word "which" should be taken out.
2. In paragraph B(2)(e), I suggest changing the end of the last sentence to read "directly related to, reasonably necessary to, or beneficial to the income-producing activities of the unitary business." I believe that it is a relevant factor if the joint, shared, or common activity is "beneficial to" the income-producing activities of the unitary business.
3. I am concerned that the introductory language of paragraph C(2) is too narrow to encompass some of the examples which follow. I do not think the introductory language currently reaches the use of common third party service providers. Examples (b) and (n) illustrate use of common providers. I suggest changing "receives services, support, guidance or direction from common staff resources, personnel or functions" to "benefits or receives services, support, guidance or direction from common staff resources, personnel, or functions or from common third party providers." In offering this suggestion, I hope I am not reading the current language, "common staff resources, personnel, or functions," too narrowly. I also have a problem seeing how the second sentence of paragraph (f), where P sweetens its retirement plan to approximate S's plan, fits within the introductory language. Is the relevant factor in this example the sweetening of the plan or adding a provision that permits service in either entity to qualify as service under either plan? Would you also need to show that some staff took advantage of the bridge between P & S, or that P & S benefited from the easy transfer of employees between P & S?
4. I suggest changing example C(3)(a) to read: "One or more officers or directors of P are also officers or directors of S."
5. I am concerned that the introductory language of paragraph C(3) is too narrow to encompass example (c) which deals with inter-entity transactions. To be consistent with my suggested change to the introductory language of C(2), I'd suggest adding the words "benefits or" before "receives services, support, guidance or direction." This doesn't reach my concern about providing for the situation addressed in example (c). I have no suggested solution, but hope I that someone from a

jurisdiction where they regularly apply the three unities test may be in a better position to suggest how to address inter-entity transactions.

Thanks for your continued efforts, Alan. I'm planning on participating in the teleconference on Wednesday. If you need clarification or wish to discuss this prior to that time, please feel free to call me at (801) 366-0366.