



Section of Taxation

4th Floor
1050 Connecticut Ave., N.W.
Washington, DC 20005-1022
202-662-8670
FAX: 202-662-8682
E-mail: tax@americanbar.org

March 1, 2016

Brian Hamer
Hearing Officer
Multistate Tax Commission
444 North Capitol Street, N.W., Suite 425
Washington, DC 20001

Re: Comments on Proposed Draft Amendments to General Allocation and Apportionment Regulations

Dear Mr. Hamer:

Enclosed please find comments on the Multistate Tax Commission's proposed draft amendments to its model general allocation and apportionment regulations ("Comments"). These Comments are submitted on behalf of the American Bar Association Section of Taxation and have not been approved by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

The Section of Taxation would be pleased to discuss the Comments with you or your staff if that would be helpful.

Sincerely,

George C. Howell, III
Chair, Section of Taxation

Enclosure

CCs: Gregory S. Matson, Executive Director, Multistate Tax Commission
Helen Hecht, General Counsel, Multistate Tax Commission
Elliott Dubin, Director of Policy Research, Multistate Tax Commission

OFFICERS

Chair

George C. Howell, III
Richmond, VA

Chair-Elect

William H. Caudill
Houston, TX

Vice Chairs

Administration

Charles P. Rettig
Beverly Hills, CA

Committee Operations

Thomas J. Callahan
Cleveland, OH

Continuing Legal Education

Joan C. Arnold
Philadelphia, PA

Government Relations

Peter H. Blessing
New York, NY

Pro Bono and Outreach

C. Wells Hall, III
Charlotte, NC

Publications

Julie A. Divola
San Francisco, CA

Secretary

Catherine B. Engell
New York, NY

Assistant Secretary

Katherine E. David
San Antonio, TX

COUNCIL

Section Delegates to the

House of Delegates

Richard M. Lipton
Chicago, IL

Susan P. Serota
New York, NY

Last Retiring Chair

Armando Gomez
Washington, DC

Members

Megan L. Brackney
New York, NY

Lucy W. Farr
New York, NY

Mary A. McNulty
Dallas, TX

John O. Tannenbaum
Hartford, CT

Stewart M. Weintraub
West Conshohocken, PA

Alan I. Appel
New York, NY

Larry A. Campagna
Houston, TX

T. Keith Fogg
Villanova, PA

Kurt L.P. Lawson
Washington, DC

Cary D. Pugh
Washington, DC

John F. Bergner
Dallas, TX

Thomas D. Greenaway
Boston, MA

Roberta F. Mann
Eugene, OR

Carol P. Tello
Washington, DC

Gary B. Wilcox
Washington, DC

LIAISONS

Board of Governors

Pamela A. Bresnahan
Washington, DC

Young Lawyers Division

Travis A. Greaves
Washington, DC

Law Student Division

Melissa M. Gilchrist
Hamtramck, MI

DIRECTOR

Janet J. In
Washington, DC

Washington, DC

**AMERICAN BAR ASSOCIATION
SECTION OF TAXATION**

**COMMENTS ON THE MULTISTATE TAX COMMISSION'S
PROPOSED DRAFT AMENDMENTS TO ITS
MODEL GENERAL ALLOCATION AND APPORTIONMENT REGULATIONS**

These comments (“Comments”) are submitted on behalf of the American Bar Association Section of Taxation (the “Section”). They have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association.

Principal responsibility for preparing these Comments was exercised by John H. Gadon and Shirley K. Sicilian, Co-chairs, Task Force on Apportionment & Mediation of the State and Local Tax Committee of the Section of Taxation (the “SALT Committee”). The Comments were authorized by the Executive Committee of the SALT Committee and reviewed by Jaye Calhoun, Chair of the SALT Committee, John Barrie of the Section’s Committee on Government Submissions, Stewart Weintraub, Council Director for the Committee, and Peter Blessing, the Section’s Vice Chair (Government Relations).

Although the members of the Section of Taxation who participated in preparing these Comments have clients who would be affected by the principles addressed by the Comments or have advised clients on the application of such rules, no such member (or the firm or organization to which such member belongs) has been engaged by a client to make a government submission with respect to, or otherwise to influence the development or outcome of, the specific subject matter of these Comments.

Contacts: John H. Gadon
 gadonj@lanepowell.com
 (503) 778-2130

 Shirley K. Sicilian
 ssicilian@kpmg.com
 (202) 533-3466

Date: March 1, 2016

INTRODUCTION

At its January 29, 2016 meeting, the Multistate Tax Commission's ("MTC") Executive Committee directed that a public hearing be held on the proposed draft amendments to the MTC's model general allocation and apportionment regulations (the "Proposed Draft Amendments"). The Proposed Draft Amendments had been approved by the MTC's Uniformity Committee on December 11, 2015 and referred to the Executive Committee for its consideration.

COMMENTS

The SALT Committee appreciates the opportunity to comment on the Proposed Draft Amendments. Our Comments are limited to a recommendation that the amended model regulations include a provision to facilitate the resolution of apportionment issues where the same receipts from sales of services or intangibles are sourced to multiple states due to differences in those states' apportionment methods.

We recommend an addition of the following provision to the Proposed Draft Amendments:

Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the [State Tax Agency] and one or more other state taxing authorities, the taxpayer may petition for, and the [State Tax Agency] shall participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution rules promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

This recommendation is based on an identical provision in Alabama Admin. Code r. 810-27-1-4.17.01(d). (Alabama has also amended § 17 of its version of the Uniform Division of Income for Tax Purposes Act ("UDITPA") based on MTC's new model § 17 sourcing statute.¹) The goal is to provide a mechanism for both taxpayers and states to address the impact of non-uniform state apportionment methodologies.

We believe such a mechanism is needed and strongly desirable. There is now greater non-uniformity among states with respect to sourcing receipts from intangibles and services than at any time since states adopted UDITPA. While the majority of states still apply the cost-of-performance method to source these receipts, numerous states have moved to some form of market-based sourcing. Further, states that have adopted market-based sourcing have chosen a number of different sourcing methodologies. Some states now source these receipts based on where services are provided or intangibles used, others on where the benefit of the service or intangible is received, and still others on where the taxpayer's billing or main office is located. As a result, the same receipts from the sale of services or intangibles could be sourced to multiple states.

¹ See Ala. Code §§ 40-18-22 and 40-27-1, Art. IV.17 (2014).

The proposed mediation provision furthers the MTC's goals of promoting state income tax uniformity and facilitating the settlement of apportionment disputes, while respecting the right and authority of states to adopt their own apportionment methodologies.²

Any mediation would be nonbinding. However, nearly all states have the statutory authority to apply alternate apportionment methodology in appropriate circumstances. The avoidance of duplicate taxation is a key and laudatory goal.³ Nonbinding mediation does not mandate uniformity or ensure that the receipts will not be sourced to more than one state. It does, however, provide a mechanism to address these issues and for the affected states and taxpayers to discuss and attempt to resolve them in a manner satisfactory to all parties. That is entirely consistent with, and would further, the MTC's mission.

² See Multistate Tax Compact Article I, §§ 1 and 2.

³ See Multistate Tax Compact Article I, § 4.