

April 19, 2019

To the MTC Uniformity Committee:

With respect, I would like to offer the following comments to the uniformity committee for consideration in connection with the “Finnigan Model Draft 4-11-19.” In some part, I offer these comments from the vantage point of a state that – like several other states – relied upon the Model as existent when previously adopting combined reporting (which my state did for tax year 2009). At the same time, I note that regrettably I have not been able to be an active participant in this workgroup and so perhaps in these comments I am missing some important point.

First, I offer a technical suggestion. I think the proposed definitional change that would define a combined report as being a tax return should be backed out as I think that change is inconsistent with the terminology in most combined reporting states and more importantly conflicts with Section 3.D.4 of the Model, which infers that a combined report is not a tax return and that “[t]he [state] *combined report* of the combined group must be attached to the [state] *corporate income tax return*.”

Second and more substantively, I raise the question whether changes to the Model to effectuate the Finnigan sourcing principle necessarily require wholesale changes to the Model allowing for the sharing of NOL carry forwards and credits. My view is that the former change does not require the latter changes and I believe that this point is exemplified by the law in some states. So, I would suggest that if persons believe that the sharing of NOL carry forwards and credits *should be considered* by a state that adopts combined reporting when such reporting methodology includes the Finnigan principle, that the changes to the model merely note the logic that supports this conclusion (i.e., and not offer specific loss/credit sharing rules). One possibility would be that the group could capsulize the concepts embodied in the proposed provision in a white paper that states the basic principles that a state should consider. If it is determined that specific NOL carry forward and credit sharing rules do not need to be placed within the model, then my third comment below becomes moot.

Third, and related to my second point, if a determination is made that the changes to the model should be accompanied by specific NOL carry forward and credit sharing provisions, then I think it might be helpful to spend additional time considering those provisions. I say this not because the proposed rules strike me as wrong but because there are myriad ways in which NOL carry forwards and credits can and arguably should-be shared and numerous potentially-complex issues that I think could benefit from further consideration – including questions about how the rules relate to the pre-existing rules being used in the various states. Consideration of these points would be an exercise that I think might be different in kind from the prior charge of the work group to consider the addition of Finnigan to the Model, and could serve to attract state persons that are expert on these rules.

As an example with respect to the NOL carry forward rules, no specific rule is provided to the effect, as in other states, that NOL carry forwards can only be shared with corporations that were members of the combined group when the loss was incurred. Also, the draft rules suggest that a member's loss carry forward that pertains to a period prior to that member being brought into the combined group may be shared by group members – with no specific consideration as to whether that loss was derived from the unitary business. Similarly, the credit-sharing rule states that a credit belonging to one member of the group for a period prior to that member becoming part of the group can be shared with other members of the group (again without any unitary business restriction). Again, I don't think any of these provisions are necessarily "wrong," I just think there is a fair question as to whether these are the right provisions to now be enshrined in the model.

Thank you for your consideration.

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