



MULTISTATE TAX COMMISSION

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MEMORANDUM

To: Wood Miller, Missouri Department of Revenue, Income and Franchise Tax
Uniformity Subcommittee Chairman

From: Bruce Fort, MTC Counsel

Date: July 17, 2008

Re: Proposed Amendment to MTC Model Regulation on Application of Equitable Apportionment Provisions under Multistate Tax Compact §IV.18.

At the Income and Franchise Tax Uniformity Subcommittee Meeting in Tucson on March 13, 2008, the Committee requested that work continue on proposals to amend Uniform Regulation IV.18.(a)1 to include a “menu” or “checklist” of considerations and choices for what should be included in a new model regulation. The Uniformity Subcommittee appointed a working group to consider proposals for amendments to the uniform regulation. The working group consists of Wood Miller, Missouri Department of Revenue (Chairman), Richard Cram, Kansas Department of Revenue, Leonore Heavey, Louisiana Department of Revenue, and Ted Spangler, Idaho Department of Revenue. That group met telephonically on July 16, 2008 and adopted the following as a list of potential issues and considerations which might be addressed in a proposed amendment to the current model regulation. That list is presented below for further discussion and consideration by the full Income and Franchise Tax Uniformity Subcommittee.

A. Article IV, § 18 of the Multistate Tax Compact:

18. If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

B. Current Model Regulation IV.18.a(1):

Article IV.18 permits a departure from the allocation and apportionment provisions of Article IV only in limited and specific cases. Article IV.18 may be invoked only in specific cases where unusual factual situations (which ordinarily will be unique and non-recurring) produce incongruous results under the apportionment and allocation provisions contained in Article IV.

C. List of Proposed Considerations and Issues for Proposed Amendment:

1. Procedural Issues:

(Section 18 provides that a taxpayer “may petition” for adjustment to the apportionment formula. The following considerations may arise as a result of that provision):

- (a) Should adjustment be allowed only if requested by the taxpayer on an original or amended return?
- (b) Should petition for adjustment be addressed to Tax Commissioner or Secretary with review limited to abuse of discretion, arbitrary or capricious standard?
- (c) Should petition be addressed to hearing officer or similar adjudicator?
- (d) Should request for adjustment be allowed as audit defense?
- (e) Should party seeking adjustment have the burden of proof (1) to show that current formula does not fairly reflect business presence; (2) to show that proposed formula is better?
- (f) Should burden of proof for (e)(1) be clear and convincing standard or preponderance of evidence?
- (g) Should determination on petitions be afforded the same confidentiality and publishing criteria as revenue rulings?
- (h) Should proof be required of similar filing positions in other states?
- (i) Should states be encouraged to respect decisions in other states with respect to relief sought?
- (j) Should decisions be applicable to prior and future tax years?

2. Substantive Issues:

- (a) Should §18 adjustment provisions apply to factual situations common to an entire industry or sector?

- (b) Should §18 adjustment provisions apply only to factual situations unique to a single taxpayer?
- (c) Should amended regulation explicitly authorize or encourage use of §18 equitable adjustment to address results of tax planning techniques, and if so, how should that be accomplished consistent with Section 18's limitations?
- (d) Should §18 adjustments be limited to instances of gross distortion?
- (e) Should elimination of factors be allowed where factors are not *de minimis* but may still cause distortion? That is, should relief be allowed where factors are significantly unequal in size?
- (f) Should §18 adjustments be allowed to address sales throw-out and sales throw-back situations?
- (g) Should individualized relief be allowed where industry has already been subjected to special apportionment rule under section 18?
- (h) Should amended regulation in general encourage use of §18 equitable adjustment or limit circumstances and conditions when adjustments can be allowed?