

Date: March 7, 2013

To: Multistate Tax
Commission

From: Peter L. Faber

Re: Proposed Amendments to Apportionment Provisions

I have some technical comments on the draft amendments to Article IV. These comments are submitted in my individual capacity and do not necessarily reflect the views of my firm or of any of our clients.

Let me preface these comments by saying that I take no position on whether it is appropriate or desirable to amend the provisions. These comments are technical in nature.

Proposed Article IV.1(a)(i) provides that apportionable income means “all income that is apportionable under the Constitution of the United States and is not allocated under the laws of this state...” The language then goes on to specifically discuss income from transactions in the regular course of business and income from tangible and intangible property. If the operative provision is that any income that is constitutionally apportionable will be apportioned, you do not need subparagraphs (A) and (B). In fact, those paragraphs could be viewed as limiting the generality of the basic proposition that all income that is constitutionally apportionable should be apportioned. As you know, this and similar language has given rise to extensive litigation over the years. Under the “constitutional” approach, it is unnecessary and could be viewed as watering down the comprehensiveness of the constitutional principle with the result that taxpayers and revenue departments will be encouraged to argue that there should be other limitations. I would delete subparagraphs (A) and (B).

If, notwithstanding this recommendation, the subparagraphs are included, I question whether it is appropriate to include in apportionable income income that “was” related to the operation of the taxpayer’s trade or business. Is there no time limit on this? If property had been used in the taxpayer’s business operations fifty years ago but had been held purely as an investment since then, its sale should not produce business income. I realize that it is hard to decide where to draw the line, but surely the line should be drawn somewhere.

Article VI.17(a) provides that intangible property will be treated as used in the taxing state “if the geographic area includes all of part of this state.” This could result in sufficient multiple counting if the geographic area of use included five states and each state took the position that the property was being used within its borders.

Article IV.18 contains the alternative apportionment provisions. I do not comment on the proposed changes, but I suggest that it would be appropriate for the statute to provide, as is well

established in the case law, that the burden of proof rest with any party asserting alternative apportionment, including the department of revenue, and that the alternative apportionment methodology should generally be consistent with the spirit of the statutory apportionment methodology.