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MEMORANDUM

To: Income and Franchise Tax Uniformity Subcommittee
Wood Miller, Chairman, Income and Franchise Tax Subcommittee;

From: Bruce Fort, Counsel, Multistate Tax Commission

Date: June 2, 2009

Subject: Proposed Amendment to Model Regulation IV.18.(a); Use of Equitable Apportionment Formulas

A telephonic meeting of the Income Tax and Uniformity Subcommittee is scheduled for June 3, 2009 at 2 p.m. Eastern Time. The dial-in number is 1-888-809-4012, Passcode 101912#. The purpose of the meeting is to provide an update on our efforts to devise an acceptable modification to current model regulation IV.18.(a), and potentially, to vote on whether to adopt a modified proposal as a recommendation to the full uniformity committee.

Last March, the I&FT Uniformity Subcommittee split its votes evenly between two proposed amendments to the current model regulation, one fairly restrictive on the use of Section 18 equitable apportionment (but still less restrictive than the current model regulation), and a second proposal which contained no restrictions outside of those implicit or explicit in the statute itself. The drafting committee was given direction to come up with a proposal that might prove acceptable to all of the subcommittee's members.

Two proposed variations are submitted below for purposes of discussion. Both of these latest proposals were intended to give state tax administrators flexibility in the interpretation and application of the regulation in light of the states' divergence of experience with the use of Section 18. The first proposal retains the requirement for an "unusual" fact pattern in granting use of an alternative formula, while the second proposal eliminates that requirement but retains the phrase "only in limited and specific cases." A copy of our current model regulation is reprinted below with the paragraph which would be replaced by the modified language highlighted.

Current Model Regulation:

Reg. IV.18.(a). Special Rules: In General. Article IV.18. provides that if the allocation and apportionment provisions of Article IV 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:

- (1) separate accounting;
- (2) the exclusion of any one or more of the factors;
- (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

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 fact situations (which ordinarily will be unique and non recurring) produce incongruous results under the apportionment and allocation provisions contained in Article IV.

In the case of certain industries such as air transportation, rail transportation, ship transportation, trucking, television, radio, motion pictures, various types of professional athletics, and so forth, the foregoing regulations in respect to the apportionment formula do not set forth appropriate procedures for determining the apportionment factors. Nothing in Article IV.18. or in this Regulation IV.18. shall preclude [the tax administrator] from establishing appropriate procedures under Article IV.10. to 17. for determining the apportionment factors for each such industry, but such procedures shall be applied uniformly.

Newest Proposals [Brackets indicated omitted language]:

- 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.**
- 2. 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 case (which ordinarily will be unique and non-recurring)*] **where** [*unusual*] **the apportionment and allocation provisions contained in Article IV produce incongruous results.**

We look forward to hearing from you all tomorrow.