

**Suggested Revisions to the Hearing Officer’s Section 18 Proposed Amendments, as adopted  
by the Executive Committee**

18. (c) The party petitioning for, or the [tax administrator] requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer’s income pursuant to subsection (a) must prove by [Drafter’s note: insert standard of proof here]: (1) that the allocation or apportionment provisions of this Article do not fairly represent the extent of the taxpayer’s activity in this State; and (2) that the alternative to such provisions is reasonable. The same burden of proof shall apply whether the taxpayer is petitioning for, or the [tax administrator] is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer’s income.

[Proposed alternative 1] (i) Notwithstanding the provisions of the foregoing paragraph, the burden of proof shall be on the taxpayer if the [tax administrator] is requiring the use of an alternative apportionment formula as the result of the taxpayer’s changing its longstanding [or consistent] application of the provisions of this Article<sup>1</sup> as established by the taxpayer’s previously filed returns.

[Proposed alternative 2] (i) Notwithstanding the provisions of the foregoing paragraph, A taxpayer that has utilized any other method of allocation or apportionment in the tax year immediately preceding the current tax year, and in the current tax year utilizes the allocation and apportionment provisions of this Article, the burden of proof is on the taxpayer to prove that the change is an equitable allocation and apportionment of the taxpayer’s income.”

(ii) Adoption of a regulation after public hearing pursuant to subsection 18(b) shall be presumed to meet the [tax administrator’s] burden of proof as provided for in subsection 18(c) for any industry or transaction covered by the regulation.

18.(d) If the [tax administrator] requires any method to effectuate an equitable allocation and apportionment of the taxpayer’s income, ~~he or she~~ the [tax administrator] cannot impose any civil or criminal penalties on tax due that is attributable to the taxpayer’s reasonable reliance solely because the taxpayer reasonably relied on the allocation and apportionment provisions of this Article in filing a return.

18. (e) A taxpayer that has received written permission from ~~been permitted by~~ the [tax administrator] to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer’s income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the [tax administrator] reasonably relied.

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<sup>1</sup> What does “Article” mean in this context? Technically, Article IV includes Section 18 itself. Is the reference meant to mean Section 17? If not, do we really mean to cite to all of Article IV? Michael Fatale suggests dropping the phrase “application of this Article” entirely and instead substitute a reference to the taxpayer changing its factor apportionment methodology, without reference to “this Article” at all.