



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

To: Robynn Wilson, Chair
Members of MTC Income & Franchise Tax Uniformity Subcommittee

From: Shirley Sicilian, General Counsel

Date: November 18, 2011

Subject: Model Compact Art. IV.18 Amendments (Distortion Relief)

The Executive Committee has asked the Uniformity Committee to consider amendments to the model Compact Art. IV.18 (Distortion Relief). This memo provides:

- Background (section I and CCH materials provided separately)
- Draft language (section II)

I. Background

The Executive Committee requested Uniformity Committee review section 18 of the Compact and suggest revisions to clarify authority for adoption of industry-wide and issue-wide special apportionment rules. The Commission's current longstanding regulations acknowledge this authority by stating:

... 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 may 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.

Commission Regulations Art.IV.18(a)

John Warren, who represented the State of California at ULC during the drafting of UDITPA, recently remarked:

The original drafters probably thought of Section 18 as a tool to be used to avoid gross distortion under the facts of a particular taxpayer. The adopting states and the MTC, however, have chosen to use it in a much broader way. It has become the authority for devising special factors and formulas for whole industries, and this is to be applauded.

Written comments to the MTC 2005 Annual Meeting; Boise, Idaho

The Commission's efforts to modernize Section 17 and other Compact provisions will hopefully minimize the need to use section 18 in crafting special rules, and presumably relieve much of the pressure currently brought to bear on the equitable apportionment provisions. Nonetheless, the economy will certainly continue to change. There will always be a need to fill statutory gaps in taxation and policy. Ideally, these gaps should be filled uniformly across taxpayers, and not only on an ad-hoc basis. The authority to do so can be made clearer.

II. Draft Language

The Drafting Group¹ has developed the following language for the Committee's consideration.

Sec. 18. (a) 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:

- (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.

(b)(1) If the allocation and apportionment provisions of this Article do not fairly represent the extent of business activity in this State of taxpayers engaged in a particular industry or in a particular transaction or activity, the tax administrator may, in addition to the authority provided in section (a), establish appropriate regulations for determining alternative allocation and apportionment methods for such taxpayers.

(b)(2) A regulation adopted pursuant to this section shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the tax administrator may require, adjustment pursuant to Section 18(a).

¹ The drafting group includes Ben Miller and Melissa Potter (CA- FTB), Ted Spangler (ID), Gary Humphrey and Janielle Lipscomb (OR), Michael Fatale (MA), Joe Garrett (AL), and Commission Staff Shirley Sicilian and Bruce Fort. The drafting group has been regularly joined by Wood Miller (MO), Donnita Wald and Mary Loftsgard (ND), and Phil Horwitz (CO).