



MULTISTATE TAX COMMISSION

Maximizing the synergies of multi-state tax cooperation

To: MTC Uniformity Committee

From: Sheldon Laskin, Acting General Counsel

Date: May 22, 2014

Subject: Executive Committee Directions to Uniformity Committee to Revise UDITPA Art. IV.18 Draft Proposal

The Executive Committee has returned the following provisions of Section 18 to the Uniformity Committee, with instructions to make the indicated revisions to the draft.

1. Adopt the Hearing Officer's proposed Art.IV.18(c), which would impose the burden of proof on the party (either the taxpayer or the tax administrator) seeking to apply an alternative apportionment of the taxpayer's income. The Executive Committee also indicated that the burden of proof should be placed on the taxpayer if the revenue department applied alternative apportionment as a result of the taxpayer's changing its long-standing filing status.

Possible issues to resolve as identified by staff: What is the definition of "long-standing?" What should the standard of proof be in alternative apportionment cases?

2. Adopt the Hearing Officer's proposed Art.IV.18(d), which would bar the tax administrator from imposing a penalty on the taxpayer solely because the taxpayer reasonably relied on the UDITPA allocation and apportionment provisions but the tax administrator requires the taxpayer to use an alternative apportionment method. The Executive Committee also indicated that the tax administrator should be allowed to apply a penalty in alternative apportionment cases, as long as the penalty is unrelated to the taxpayer's reasonable reliance on the UDITPA provisions (i.e., substantial underpayment of tax).

Issue to resolve as directed by Executive Committee: Is the qualifier "solely" as contained in the Hearing Officer's draft sufficiently clear to allow the imposition of penalties where the tax administrator's decision to impose a penalty is unrelated to the taxpayer's reasonable reliance in the UDITPA apportionment provisions? If not, what additional language is necessary to clarify this issue?

Draft

Suggested Revisions to the Hearing Officer's Section 18 Proposed Amendments, as adopted by the Executive Committee (July 16, 2014)

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 and 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 foregoing, if the tax administrator can show that in any two of the prior five tax years, the taxpayer had used an allocation or apportionment method or methods other than those required by this Article or rules or regulations issued pursuant to subsection (b), then the tax administrator shall not bear the burden of proof in imposing a different method pursuant to (a).

[Proposed alternative 2] (i) Notwithstanding the foregoing, if the tax administrator can show that in any two of the prior five tax years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for such other tax years, then the tax administrator shall not bear the burden of proof in imposing a different method pursuant to (a).

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~~ penalty with reference to the 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.¹

¹ The work group is not sure that the Executive Committee in fact returned Section 18.(e) to the Uniformity Committee for further work. If it did so, the Executive Committee did not provide any instructions to the Uniformity Committee regarding Section 18.(e). In any event, the suggested revision in the text is a minor technical change that is consistent with the Hearing Officer's draft of Section 18.(e).

3. Adopt the Hearing Officer's proposed Art.IV.18(e), which bars the tax administrator from retroactively revoking its prior approval of alternative apportionment unless there has been a material misrepresentation of, or material change in, the facts provided by the taxpayer upon which the tax administrator reasonably relied.

No issues requiring resolution of this point were identified by the Executive Committee or staff.