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Vice President & General Counsel
(202) 484-5215
kfrieden@cost.org

April 25, 2014

Via E-Mail

Julie P. Magee
Chair, Executive Committee
Multistate Tax Commission

Re: COST's Support for Hearing Officer's Recommendations on Section 18

Dear Chairperson Magee and other members of the Executive Committee:

On behalf of the Council On State Taxation (COST), I write to encourage the Multistate Tax Commission's (MTC) Executive Committee to support the recommendations made by the MTC's Hearing Officer Professor Richard Pomp for changes to the proposed amendment to Art. IV. § 18 of the Multistate Tax Compact on Equitable Apportionment.

COST believes that the Hearing Officer's recommendations reflect thoughtful and pragmatic solutions to some key administrative issues that routinely impact both taxpayers and tax administrators in alternative apportionment situations. The Hearing officer made his recommendations after a lengthy period of consultation with experts from government, industry, practitioner and academic ranks. Accordingly, COST believes his proposals reflect a broad consensus in the tax community on this subject.

The Hearing Officer's four recommended changes to Section 18 are the following:

- The party invoking alternative apportionment should have the burden of proof that the statutory conditions for alternative apportionment have been satisfied – with the same standard applying to taxpayers and to the tax administrator.
- If the tax administrator requires a taxpayer to use an alternative apportionment method, the tax administrator will be prohibited from imposing a penalty on a taxpayer that complied with the statutory apportionment method.
- The tax administrator will be prohibited from retroactively revoking his or her prior approval of a taxpayer's alternative apportionment method, absent a change in fact or a taxpayer misrepresentation.
- The tax administrator will be required to adopt a regulation if the tax

administrator invokes alternative apportionment for an industry or a transaction or activity of general applicability.

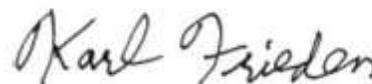
COST recently surveyed its membership and found that there is strong across the board support for all four of the Hearing Officer's recommended changes to Section 18. COST has long supported proposals aimed at improving state tax administration by providing more clarity and a level playing field for both taxpayers and state tax administrators. COST views the Hearing Officer's recommended improvements to the Section 18 provisions on alternative apportionment as consistent with similar procedural safeguards that COST has long advocated, including even-handed statutes of limitations for refunds and assessments, equalized interest rates on refunds and assessments, and transparency in guidance and rulings. (See *The Best and Worst of State Tax Administration: COST Scorecard on Tax Appeals & Procedural Requirements*, Lindholm, Hogroian, and Nicely, December 2013).

The Hearing Officer's Report received wide circulation in the tax media, in government and business, and among tax practitioners. The topic of "alternative apportionment" has more visibility now than at virtually any other time. With few exceptions, every national or regional conference addressing state and local tax issues has a panel to discuss recent developments in the use of alternative apportionment by both state tax administrators and taxpayers. With the momentous shift among the states in corporate apportionment formulas from three equally weighted factors to a single sales factor and from cost of performance sourcing to market sourcing, the requests for invoking "alternative apportionment" to better reflect a taxpayer's income in a given jurisdiction have increased significantly.

The growth in the use of "alternative apportionment" highlights the importance of developing reasonable and balanced rules for determining its appropriateness in a given case. While several states have already adopted rules similar to the Hearing Officer's recommendations in statutes or in case law, most states have no rules or lack clarity in their positions. Therefore, it is very important that this issue be addressed as part of any other changes being made to Section 18. In state tax administration, key "procedural or administrative" rules are often at the center of state tax disputes and should be included as integral elements of statutory provisions rather than relegated to ad hoc state by state rules or separate regulations.

COST respectfully urges you to accept all of the Hearing Officer's recommendations for changes to the proposed amendment to Art. IV. § 18 of the Multistate Tax Compact on Equitable Apportionment. It would be a sad denouement to this process if the MTC rejects all of the Hearing Officer's recommendations, and as he commented in a recent *State Tax Today* article, if the Commission can't find in his report "a nugget worth incorporating" into its proposed amendments to Art. IV of the Compact.

Sincerely,



Karl Frieden

Cc: COST Board of Directors