



MULTISTATE TAX COMMISSION

MINUTES
Income & Franchise Tax Uniformity Subcommittee Teleconference
Wednesday, October 22, 2008
3:30 p.m. Eastern Time

I. Welcome and Introductions. Wood Miller, Chair, opened the meeting. The following were in attendance:

Name	State or Affiliation	Name	State or Affiliation
Wood Miller, Chair	MO	Ted Spangler	ID
Richard Cram	KS	Lynn Chenoweth	ID
Rod Marrelli	UT	Rebecca Abbo	NM
Frank Hales	UT	Fred Campbell-Kraven	CA-FTB
Eric Smith	OR	Carl Joseph	CA-FTB
Phil Horowitz	CO	Mary Loftsgard	ND
Michael Mason	AL	Lennie Collins	NC
Brenda Gilmer	MT	Andy Sabol	NC
Jennifer Hayes	KY Legislature	Jana Leslie	COST
John Allan	Jones Day		
MTC Staff			
Shirley Sicilian	Bruce Fort	Roxanne Bland	

II. Public Comment Period.

There was no public comment.

III. Uniformity Project – MTC Model Regulation IV.18(a).

The Subcommittee discussed the compiled responses to the survey sent by Bruce Fort.

Question 2. The Subcommittee directed the drafting committee to draft an amendment as suggested by the question.

Question 3. The Subcommittee directed the drafting committee to draft an amendment as suggested by the question.

Question 4. The Subcommittee did not reach a conclusion on this question.

Question 5. The Subcommittee directed the drafting committee not to draft an amendment on this point. It noted that if any such amendment were to be made, it should distinguish between use of section 18 for purposes of an ad hoc application vs. a regulation.

Question 6. The Subcommittee directed the drafting committee not to draft an amendment on this point. The question was whether there should be language to try to anticipate tax planning and make clear section 18 can be used to address it. Shirley Sicilian, MTC, noted tax planning can be viewed as intentional distortion in this context. What is the point of making that distinction? Would intentional distortion trigger a lowered standard for invoking section 18? Phil Horowitz, Colorado, pointed out that if the regulation were to condition anything on intentional distortion, there would be a need to prove intent. Brenda Gilmer, Montana, commented that that would be adding complexity and asked what would be gained in return for that complexity compared to what we have now. If tax planning techniques resulted in something other than fair attribution of income, then it's already covered under section 18. Ted Spangler, Idaho, noted that Idaho voted "yes" on the survey, but they are not concerned about different ways you could get distortion – the issue is simply distortion whether it is intentional, through tax planning, or not. Bruce Fort, MTC, explained the question was simply whether we wanted a sentence in the regulation to specifically address tax planning or not. Eric Smith, Oregon, clarified that Oregon is very cautious in allowing use of section 18. Oregon imposes, or accepts a request for, only a handful of deviations a year.

Question 7. The Subcommittee directed the drafting group to draft an amendment as suggested by the question. Carl Joseph, CA-FTB, pointed out that throw back and throw out are not distortion in the section 18 sense and not grounds for section 18 relief. Brenda Gilmer, Montana, thought that the Montana courts would most likely hold that in no event can an agency do anything by regulation that affects the taxpayer's or the department's ability under the statute to provide relief where the apportionment formula does not fairly reflect the taxpayer's activity in the state. Montana Courts would probably allow the taxpayer to make a case that, looking at whole picture, there is not a fair reflection of activity in the state. Bruce Fort, MTC, gave the example of the Pfizer case in New Jersey, where throw-back resulted in 100% of that entity's income being apportioned to New Jersey. Fred Campbell- Kraven, California, noted that throw out and throw back are not intended to be fair reflections of activity. They are intended to accomplish a different purpose under the statute – address nowhere income. So as long as they do not result in unconstitutional distortion, they should be read as a reflection of those other policies, and an exception to the "fair reflection" policy. Phil Horowitz, Colorado, pointed out the throw back and throw out concepts are similar to the policy behind the base state and residency concepts. In that way, they serve as a backstop against no-where income. Ted Spangler, Idaho, summarized that to the extent that any distortion arises from throw back or throw out, it is arising in the course of achieving another statutory objective (minimizing nowhere income) and as long as there is no constitutional violation by gross distortion, it should be allowed.

Question 8. The Subcommittee directed the drafting group to draft an amendment as suggested by the question.

Question 9. The Subcommittee directed the drafting group to draft an amendment as suggested by the question. Phil Horowitz, Colorado, suggested it would be a good idea to require that taxpayer's petition for distortion relief on the originally filed return and at a minimum to require disclosure of any deviation from standard formula. Oregon noted that now that they had a better understanding of the question, they would change their answer to "yes." Wood Miller, Missouri, said he could see some kind of guidance would be helpful. He noted that there should be an equivalent requirement imposed on the state, and that a timely state adjustment should be made on audit. Bruce Fort, MTC, noted that there is also a question of whether the determination should be left to agency discretion or can be reviewed de novo by trial court subject to abuse of discretion. Ted Spangler, Idaho, time restriction would make impossible to raise section 18 relief once in litigation because nothing for court to review.

Question 10. The Subcommittee briefly discussed the "other suggestions" responses to the survey.

Bruce Fort, MTC, noted the subcommittee had not specifically addressed whether the current regulation should be used as a starting point or scrapped entirely; by way of example, whether the current "prevention of incongruous results" standard should be retained. The subcommittee appeared to favor using the current language as a starting point. While some defended the "incongruous results" standard, others believed it was a difficult concept to apply and might be inconsistent with the statute.

The Subcommittee agreed with Brenda Gilmer, Montana, that language should be added to explain how the regulation hangs together and how it resolves conflicts between different statutes – not adopting something new but how resolved in event of conflict (e.g. the rules on prop factor or real estate and lease of tangible property.)

IV. Adjourn