



MULTISTATE TAX COMMISSION

Working Together Since 1967 to Preserve Federalism and Tax Fairness

Financial Institutions Apportionment
Property Factor Issues for Discussion
(3-26-2012)

1. Clarify “change of material fact”

- a. Current Language:** §4(i) *Period for which properly assigned loan remains assigned.* A loan that has been properly assigned to a state shall, absent any change of material fact, remain assigned to said state for the length of the original term of the loan. Thereafter, said loan may be properly assigned to another state if said loan has a preponderance of substantive contact to a regular place of business there.
- b. Problem to be Addressed:** The term “change of material fact” in the loan assignment rule is undefined. A question has arisen as to whether the sale of a loan or pool of loans to another entity within the same controlled group of corporations as the seller constitutes a material change of fact. Both taxpayers and tax administrators would benefit from objective criteria to determine when there has been a material change of fact.
- c. Issues and Options:**

- i. Should the model explicitly describe how sale of loans within the same controlled group will be treated? **YES:**

(i)(1) The direct or indirect [acquisition or] transfer of a loan or a pool of loans to or from an entity that is within the same controlled group of corporations at the time of the acquisition or transfer is not a change of material fact. But, this prohibition does not, by itself, preclude other possible changes of fact from being considered in determining whether there has been a change of material fact.

- ii. Should treatment of other transaction types also be explicitly described, such as:

1. The acquisition of the stock of an entity that owns loans. **YES – addressed as “direct or indirect” in (i)(1)**
2. The acquisition of a loan or pool of loans from an entity that is not within the same controlled group of corporations. **Language under consideration:**

(i)(2) The direct or indirect acquisition or transfer of a loan or a pool of loans to or from an entity that is not within the same controlled group of corporations at the time of the acquisition or transfer is a change of material fact.

3. How does the “length of the original term of the loan” apply for credit card payments, renewals, etc.? [e.g., if a loan has no fixed term, then should the “term of the loan” be the term of the agreement between the financial institution and the borrower, or the expiration date of the card, etc.?)

[FIST is looking into industry practice/experience.]

4. Is it clear that the “Thereafter” limitation applies to (re)assignments after a change of material fact as well as to (re)assignments after the original term of the loan? Or is it necessary to clarify in (i) or (i)(2) that (re)assignments after a change of material fact are also to be “based solely on the preponderance of the acquirer’s substantive contacts with the acquired loans [from FIST proposal for new (j)],” or to a state that “has a preponderance of substantive contact to a regular place of business there [from CA FTB proposal],” or something to that effect?

[The group may have concluded at an earlier meeting that unless a change is made relative to question 3, no change is necessary relative to question 4.]

5. Does the proposal properly handle securitizations where title transfers for book purposes but not for tax purposes (non-tax events)?

[FIST is looking into whether this fact pattern occurs with banks. FIST poses the question whether, if the fact pattern does occur, it may already be covered in the draft since 4(b) provides that the property factor includes property the income or expenses of which are included in the computation of the apportionable income base for the tax year. If it is a non-tax event, then the income from the loans is included in the apportionable tax base and the loans are included in the property factor. Also, FIST noted on the last call that the value of loans and credit card receivables mentions charge-offs for federal income tax purposes – thus again indicating that you look to the tax treatment of the loans.]

iii. Should “controlled group” be defined? Group members have suggested alternatives -

1. A definition specifically for financial institution apportionment “change of material fact” purposes:

For purposes of this subsection, “controlled group of corporations” means “controlled group of corporations” as defined in Section 1563(a) of the Internal Revenue Code, except that:

(A) “More than 50 percent” shall be substituted for “at least 80 percent” each place it appears in Section 1563(a)(1) of the Internal Revenue Code.

~~(B) The determination shall be made without regard to subsections (a)(4) and (e)(3)(C) of Section 1563 of the Internal Revenue Code.~~

OR

2. Alternative language for combine reporting and non-combined reporting
 - a. Combined reporting:

For purposes of this subsection, “controlled group of corporations” means ‘controlled group of corporations’ as defined in Section 1563(a) of the internal Revenue Code, except that the definition that the state uses for defining unitary ownership or control shall be substituted for “at least 80 percent” each place it appears in Section 1563(a)(1) of the Internal Revenue Code.
 - b. Non-combined reporting:

For purposes of this subsection, “controlled group of corporations” means ‘controlled group of corporations’ as defined in Section 1563(a) of the internal Revenue Code.

OR

3. A drafter’s note instructing that states refer to existing statutory definitions, as follows:
 - a. Combined reporting states: use the same definition that the state uses for defining “ownership or control”
 - b. Non-Combined reporting states:
 - i. If have an add-back statute: use definition of “related” or “affiliated” entity.
 - ii. If no add-back statute: For purposes of this subsection, “controlled group of corporations” means For purposes of this subsection, “controlled group of corporations” means “controlled group of corporations” as defined in [1563\(a\) of the Internal Revenue Code](#), except that “more than 50 percent” shall be substituted for “at least 80 percent” each place it appears in Section 1563(a)(1) of the Internal Revenue Code.

2. Update and Clarify the SINAA loan assignment rule (will be fleshed out further)

- a. What should the rule apply to? (e.g., a loan, a group of loans, how to determine the group?)
- b. What should the rule be?
 - i. Which activities? (add and/or subtract from “SINAA”)?
 - ii. How to measure the activities (e.g., employees, costs, etc.)?
 - iii. How to weight the activities (equal weight, self weight, etc.)?
- c. What changes are then needed for the presumptions? (section 4(g)(1)(B)-(C))