State and Local Tax Update

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Agenda

2. False Claims Act Suits – Attacks from the Flanks
3. State Implications of Federal Tax Reform – Conformity with IRC
5. State Tax Implications of IRC § 163(j)
6. Tax Reform – What to Expect Next?
7. Transfer Pricing
8. States Move To Market-Based Sourcing
9. Alternative Apportionment
South Dakota v. Wayfair, Inc.

- Historical Quill nexus rule: a taxpayer must have physical presence in a state to be required to collect use tax in that state
- Arguably, since the Supreme Court had not provided a different rule for income tax, the physical presence standard applied to income tax as well
South Dakota v. Wayfair, Inc. (cont’d)

- South Dakota challenged the Quill standard with a statute requiring sellers (including remote sellers) with at least 200 transactions or $100,000 in sales to South Dakota residents to collect the state sales tax

- Wayfair and other online retailers challenged this law
South Dakota v. Wayfair, Inc. (cont’d)

- On June 21, 2018, the Supreme Court held that physical presence was no longer required for a corporation to be compelled to collect use tax, reversing the Quill physical presence requirement.

- Implications.
  - Other states are adopting similar statutes.
  - Effect on income tax nexus requirements is unclear.
Will states attempt to apply Wayfair retroactively?
  - Would this be unconstitutional?

Will states adopt lower thresholds?

Will revenue departments give companies lead time to develop administrative systems and procedures?
Companies will have to develop systems and administrative procedures.

- Uniform national procedures even if minimum nexus standards are net in some states but not in others?

Should companies resist lower thresholds?

Should companies resist efforts by states to apply Wayfair retroactively, particularly in states that already authorized collection by statute?

How should sales before the threshold is reached be treated?
2. False Claims Act and *Qui Tam* Whistleblower Cases

- A “*qui tam*” action allows a lawsuit to be brought in the name of a purported defrauded government entity by a person with independent knowledge of the facts.

- Federal whistleblower statute generally used for government contractors or Medicare fraud; excludes tax matters under the IRC.
  - IRS has its own special whistleblower procedures for federal tax issues.

- Similar state whistleblower statutes enacted (widely divergent applicability to state taxes).
Whistleblower Suits and Class Actions

- **Undercollection**: *Qui Tam* Whistleblower Cases
- **Overcollection**: Class Actions
- **Example**: Tax on delivery charges
  - 150 lawsuits in Illinois – *qui tam* whistleblower suits for undercollection
  - Papa John’s cases in Florida and Illinois – class actions for overcollection
Qui Tam Whistleblower Cases (cont'd)

- Whistleblower History
  - Nexus for Internet sellers (hundreds of cases filed in Illinois, Tennessee, Nevada)
  - Shipping and handling charges (150 lawsuits in Illinois)
  - E-commerce sales of alcohol (Illinois)
  - 911 taxes (multiple jurisdictions)
  - Unclaimed property: Card Compliant (Delaware)
Requirements for *Qui Tam* Plaintiffs:

- If there has been a prior public disclosure, allegations must be “based upon” independent knowledge and *qui tam* plaintiff must be “original source.”
- Not required to be “insiders;” may proceed on behalf of government in declined cases.
Illinois Qui Tam Cases

- Hundreds of nuisance-type “fraud” suits filed by one law firm
- Most active state for state tax whistleblower claims
- First round (2003): Out-of-state Internet retailers not collecting sales tax
- Second round (2011): Internet retailers not collecting sales tax on Illinois-destination shipping and handling charges
- Third round (2014): Wine shippers and retail liquor companies not collecting sales/gallonage tax on Internet sales/shipping charges
Illinois Qui Tam Cases

  - “[T]he State has primary responsibility for conducting the qui tam action, and the State has authority to dismiss the case over the relator's objection. When the State so dismisses the action, ‘the presumption is that the state is acting in good faith and, barring glaring evidence of fraud or bad faith by the state, it is the state’s prerogative to decide which case to pursue, not the court’s.’”
Illinois Qui Tam Cases (cont’d)

  - “Defendant's duty to inquire as to whether a tax was required to be collected in one of many states where it ships its product, when it was employing the services of two tax preparers and consultants, is limited and is not intended to be a burdensome obligation.”
  - Reckless disregard “lies on a scale between gross negligence and intentional harm. This standard is meant to reach defendants who intentionally close their eyes, hide their heads in the proverbial sand, and do not make simple inquires which would inform them that false claims are being made.”

  - “Significantly more than an error, mistake, or ordinary negligence is required ... to demonstrate reckless disregard in the context of a False Claims Act violation.”
  - Held that a finding of “reckless disregard” requires a relator “to prove that defendant ignored obvious warning signs, buried its head in the sand, and refused to learn information from which its duty to pay money to the State would have been obvious.”
New York State False Claims Act

- New York State False Claims Act applies to tax matters
- Key elements.
  - Applies to conduct that is fraudulent or in “reckless disregard” of the tax law.
  - Administered by the Attorney General, not the NYS Department of Taxation and Finance or the NYC Department of Finance.
  - Private whistleblowers can bring actions.
  - Treble damages.
  - 10-year statute of limitations.
  - Public disclosure is likely.
New York State False Claims Act Defenses

- Taxpayer’s position is correct.
- Taxpayer did not act in “reckless disregard” of the law.
  - Reliance on opinion of outside advisor.
  - Followed best practices compliance procedures.
  - Internal research memoranda.
  - Prior audit by DTF or DOF (if the issues were developed in depth).
- Whistleblower did not have access to non-public information.
- Whistleblower was an in-house lawyer who could not disclose confidential information.
New York State False Claims Act Defensive Planning

- Review basis of and support for current positions.
  - Review should include positions on federal returns that could become state issues because of state conformity to federal tax law
- Prepare legal memoranda supporting tax positions
- Do the same analysis before preparing future tax returns

- On February 27, 2014, the New York Supreme Court, Appellate Division, unanimously affirmed denial of Sprint’s motion to dismiss the state’s claim that Sprint intentionally failed to properly collect sales tax on its bundled wireless telephone services; the state is seeking more than $300 million in unpaid taxes and penalties.

- In October of 2015, the New York Court of Appeals upheld the denial, and remanded the case back to the Supreme Court for further proceedings and held that an “objectively reasonable” interpretation of the tax statute does not preclude action.

- May 4, 2016 – NY Supreme Court denied Sprint’s motion to dismiss and held that three year tax statute of limitations did not bar FCA suits.
New York ex rel. Danon v. Vanguard Group Inc.

- Former Vanguard employee/lawyer turned “whistleblower” (Danon) alleged that Vanguard is operating as an illegal tax shelter, intentionally evading $1 billion in federal and $20 million in New York income taxes over the last decade.

- In October 2014, Vanguard moved to dismiss the suit. In November of 2015, the Supreme Court granted Vanguard’s motion to dismiss.

- The Supreme Court did not address the substance of the suit, but granted the motion based on the relator’s ethical violations of the New York attorney code of conduct by providing confidential information.
New York State False Claims Act
Recent Developments (cont'd)

- New York ex rel. Rasmusen v. Citigroup, Inc.
  - Professor Eric Rasmusen of Indiana University brought a $2.4 billion case against Citigroup, alleging that Citigroup avoided a limitation on NOLs under federal tax law. The IRS had approved Citigroup’s position.
  - The arguments in the Citigroup case, like Vanguard, rely heavily on arguments that the companies’ positions violated federal tax law via New York’s conformity to specific federal tax provisions.
  - In essence, the relators are able to use the New York False Claims Act to litigate the taxpayers’ federal income tax positions. Federal law does not allow False Claims Act cases with respect to federal income taxes.
  - Attempt to remove case to U.S. District Court for the Southern District of New York failed.
  - The courts dismissed the case because the claim was based on publicly available information (App. Div., 1st Dep’t, June 28, 2018.)

- 2 attorneys conducted their own survey of sales tax collections at several Starbucks outlets and concluded that Starbucks was under-collecting sales tax on warmed and “to go” foods. They sued under the FCA after the Attorney General declined to get involved.

- The court dismissed their complaint, concluding:
  - Their survey was not scientifically done or supported by expert testimony.
  - There was no evidence that Starbucks knowingly avoided or recklessly disregarded the law.
Class Action Suits

- **Delivery/Shipping/Handling Charges**
  - Papa Johns Cases (delivery charges)
  - Iowa - Bass v. J.C. Penney Co., 880 N.W.2d 751 (Iowa 2016) (alleging unlawful collection of sales tax on shipping and handling charges)

- **Whole Foods, Target, Costco cases (manufacturers’ coupons)**
Class Action Suits

- New York - Estler v. Dunkin’ Brands, Inc., et al., _____ F. 3d _____ (2nd Cir. 2017) (dismissing claim that Dunkin’ Donuts improperly collected sales tax on prepackaged coffee on ground that refund claims by buyers was exclusive remedy)
3. State Implications of Federal Tax Reform—Conformity with IRC

- The starting point for computing most state income taxes is federal taxable income, as defined in the IRC

- Methods of conforming to the IRC
  - Rolling conformity
  - Colo. Rev. Stat. § 39-22-103: "'Internal revenue code' means the provisions of the federal 'Internal Revenue Code of 1986', as amended, and other provisions of the laws of the United States relating to federal income taxes, as the same may become effective at any time or from time to time, for the taxable year."

- Static conformity
  - Cal. Rev. & Tax. Cd. § 17024.5(a)(1): "The terms 'Internal Revenue Code,' 'Internal Revenue Code of 1954,' or 'Internal Revenue Code of 1986,' for purposes of this part, mean Title 26 of the United States Code, including all amendments thereto as enacted on the specified date for the applicable taxable year as follows: For taxable years beginning on or after January 1, 2015 ... January 1, 2015."

- Full vs. Partial conformity
  - Many states conform to the IRC but decouple from specific provisions (i.e., bonus depreciation in IRC § 168(k))
State Implications (cont’d)

- Federal tax reform should not have an automatic impact in states with laws that conform to the IRC as in effect before December 23, 2017
  - i.e., California, Hawaii, North Carolina, and South Carolina

- However, states are updating conformity to the IRC
  - Recent legislation includes Georgia HB 918; West Virginia HB 4135 and SB 265; and Idaho HB 355 and HB 463
Some states are affirmatively decoupling from some or all provisions of federal tax reform.

Many states already decouple from the accelerated depreciation rules of IRC section 168(k) so the favorable expensing provisions of federal tax reform will not have an impact in those states unless they affirmatively decide to adopt them.
IRC § 965 imposes a one-time tax on a deemed repatriation of accumulated earnings of foreign subsidiaries as part of a move to a quasi-territorial:

- Post-1986 E&P of controlled foreign corporation included in federal income in 2017: IRC § 965(a) (by operation of IRC § 951)
- Partial deduction to lower effective tax rate on inclusion: IRC § 965(c)
- Election to pay resulting tax liability in installments over 8 years: IRC § 965(h)
International Provisions (cont’d)

- State impact of IRC § 965:
  - Conformity
    - Some state laws already decouple from IRC § 965 (i.e., Hawaii and South Carolina)
    - The effective date of state law conformity with IRC may significantly limit the state impact of IRC § 965
  - Relevance of statutory dividends received deduction (“DRD”) provisions
    - In some states, it is unclear whether IRC § 965 income is a dividend for purposes of state DRDs
    - Full v. partial DRDs
    - Is it possible to take DRD and IRC § 965(c) deduction?
    - Remember, IRC § 965 income is not Subpart F income as defined by IRC § 952
    - Typically apply only to corporate shareholders and not to individuals.
  - Potential constitutional issues—should these receipts be included in the apportionment formula? Should the foreign subsidiaires’ factors be included?
State responses to IRC § 965

- Legislation in New York provides that IRC § 965 income is excluded from the state corporate income tax base as “other exempt income” and disallows the IRC § 965(c) deduction.

  • The exclusion does not apply to individual shareholders.

- The Illinois Department of Revenue issued guidance providing that, under current law, the DRD applies to 965 income (net of the 965 deduction). The Illinois DRD can be a 70 percent, 80 percent or 100 percent deduction depending on the taxpayer's percentage share of ownership of the foreign subsidiary subject to the repatriation provisions.
Global intangible low-taxed income (“GILTI”)

- Purpose: to discourage U.S. companies from moving business operations to low-tax foreign countries

- Federal rule:
  
  - U.S. corporation must include in income certain income of a foreign corporate affiliate that (1) is taxed abroad at a rate lower than the U.S. rate and (2) that exceeds a 10% return on the affiliate’s tangible property. IRC § 951A
  
  - U.S. corporation can deduct 50% of its GILTI (thereby reducing the effective tax rate). IRC § 250(a)(1)(B)
    
    - Individual shareholders do not get the benefit of this deduction.
International Provisions (cont’d)

- State impact of GILTI:
  - Conformity
    - IRC § 951A
      - Some state laws already decouple from IRC § 951A (i.e., Hawaii and South Carolina)
    - IRC § 250 (GILTI deduction)
      - Is the starting point for computing the state tax base before or after special deductions?
      - Look at the statutes and not only the forms!
  - Relevance of statutory DRD provisions
    - It is less likely than with IRC § 965(a) income that GILTI will be considered a dividend because it is not limited to the foreign corporation’s earnings and profits.
    - Full v. partial DRDs
    - Is it possible to take the DRD and the IRC § 250 deduction?
  - Potential constitutional issues—should these receipts be included in the apportionment formula? In the denominator only? What about the factors of the foreign corporation?
International Provisions (cont’d)

- **State responses to GILTI**
  - Legislation in New York provides that IRC § 951A income and the GILTI deduction in IRC § 250 is included in the state tax base.
  - The Illinois Department of Revenue issued guidance providing that, under current law, the DRD applies to 951A income (net of the IRC § 250 deduction).
  - Legislation in Georgia provides that Georgia’s DRD for dividends received from foreign corporations applies to GILTI. The legislation disallows the IRC § 250 deduction.
Deduction for foreign-derived intangible income ("FDII")

- **Purpose:** The FDII deduction effectively creates a new preferential tax rate for income derived by domestic corporations from serving foreign markets. Intended to reduce the incentive to move foreign operations abroad.

- This is done by providing a 37.5% deduction for income above a 10% return on tangible property.
International Provisions (cont’d)

- **State impact:**
  - The FDII deduction is a “special deduction” under the IRC.
  - Does the state conform to special deductions?

  - Generally, if the starting point for computing the state tax base is federal taxable income before special deductions, the state would have to specifically amend its law to allow for the FDII deduction.

  - On the other hand, if the starting point for computing the state tax base is federal taxable income after special deductions, the state would have to amend its statute to disallow the FDII deduction.

  - Look at the statutes not only the tax return!

- **Policy note:** states may feel that they do not need to provide an added incentive to that provided by the federal government. They may assume that companies which are not persuaded by the federal incentive to stay in the U.S. will probably not decide to stay because of a state incentive.
5. State Tax Implications of IRC § 163(j)

- IRC section 163(j): Deduction for business interest cannot exceed the sum of:

  (A) The business interest income of the taxpayer for the taxable year, plus

  (B) 30 percent of the taxpayer’s adjusted taxable income for the taxable year

- Purpose: to prevent double deduction resulting from the new expensing rules.

- Only applies to corporations with gross receipts of more than $25 million
State impact

- State level computation
  - While it is not clear in the statute, the IRS has determined that the 163(j) limitations are computed on a consolidated group basis.
  - In both combined-filing states and separate-filing states that conform to § 163(j), alternative computations may be needed to determine the interest expense limitation in each state.
    - In separate return states, a different computation will be needed to determine the interest limitation for each corporate taxpayer that files within the state.
    - In combined-filing states, the state combined group may not be the same as the federal consolidated group, thus resulting in the need for additional interest expense limitation computations to adjust for differences between the federal and state groups.

- How does 163(j) interact with related-party interest addback provisions?
- Will the carried-forward interest be computed on a pre- or post-apportionment basis?
- States that decouple from the expensing rules should not adopt the interest deduction limitations.
6. What to Expect Next?

- Many states proposed and/or enacted legislation regarding conformity with the IRC and with specific provisions of federal tax reform in this year’s legislative cycle.

- We expect many more states to pass legislation addressing tax reform in the next legislative cycle.

- What can you do?
  - Monitor proposed legislation in the states that matter to your business.
    - Plan from multi-state perspective – a lot of states have similar laws.
  - Join industry group efforts and coalitions to be sure your company’s concerns are heard.
  - The STAR (State Taxes After Reform) Partnership was formed to help the business community navigate the state legislative, executive, and regulatory reaction to federal tax reform.
    - More information available at: https://www.star-partners.org/
7. Transfer Pricing at the State Level

- States increasingly jumping on this bandwagon
- Issues can arise when there are transactions between affiliated entities that are not part of the same state filing group
- Not all states follow the federal 482 regulations
- Most states have the statutory authority to adjust the income of taxpayers when the income as reported does not properly reflect the business income or activities of the taxpayer
- Aggressive audits
Transfer Pricing (cont’d)

- Becoming a battle of the experts
- Recent litigation – taxpayer wins
  - Walmart Puerto Rico
  - DC Chainbridge cases
  - See’s Candies
- MTC Initiative
8. States Move To Market-Based Sourcing

- **Historical Apportionment Formulas**
  - 3-factor formula (property, payroll, and sales)
  - Sales factor
    - Receipts from sales of tangible property always sourced to destination
    - Receipts from services sourced based on cost-of-performance (i.e., where income-producing activity occurs)
    - Under cost-of-performance sourcing, receipts are generally allocated to fewer states
  - Many states use only the sales factor.
    - Ignores roles of labor and capital in generating income.
    - An economic development strategy.
Market-Based Sourcing (cont’d)

- Market-Based Sourcing Formulas
  - Used to source receipts from services and receipts from sales of intangibles
  - Market-based sourcing based on customer location
    - For example, receipts sourced to the state where the benefit of the service or intangible is received by the customer.
    - May be hard to determine.
Market-Based Sourcing (cont’d)

- More than half of the states have adopted a market-based sourcing regime for services and intangibles
- Other state revenue departments attempt to use market-based sourcing without statutory support
Market-Based Sourcing (cont’d)

- Practical Considerations
  - Constitutional issues
  - “Look through sourcing” – sourcing to customers’ customers
    - Example: services provided to mutual funds.
9. Alternative Apportionment

- Most states have some sort of discretionary authority to require a taxpayer to use an alternative apportionment formula.
- UDIPTA section 18
- Provides for the use of alternative apportionment “[i]f the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer’s business activity in the state.”
Alternative Apportionment

- Generally permits the use of one or more alternative methods if the apportionment provisions “do not fairly represent” the taxpayer’s business activity in the state.
- No requirement that the taxpayer be attempting to avoid taxes.
- References separate accounting, exclusion/inclusion of one or more factors, or “employment of any other method to effectuate an equitable allocation and apportionment” of taxpayer’s income.
- Generally available to both the taxpayer and the state.
- Sometimes requires special election/procedure.
- “appropriate only in limited and unusual circumstances (which ordinarily will be unique and nonrecurring)”
The drafters of UDITPA contemplated that alternative apportionment would be an unusual remedy and that it would not be invoked routinely.

It was assumed that the statutory formula would usually reach the correct results.
Alternative Apportionment

- Professor William Pierce, the principal draftsperson of UDITPA, stated that:
  
  - “Section 18 permits … some other method … where unreasonable results ensue from the operation of the other provisions of the Act. … Of course, departures from the basic formula should be avoided except where reasonableness requires. Nonetheless, some alternative method must be available to handle the constitutional problems as well as the unusual cases.”

  - “In many types of service functions, [the section 17 IPA/COP] approach appears adequate. However, there are many unusual fact situations connected with this type of income and probably the general provisions of Section 18 should be utilized for these cases.”

Alternative Apportionment

- A number of states have determined that alternative apportionment may only be required in unusual cases.
    - “The central question under [the alternative apportionment provision] is not whether some quantitative comparison has produced a large-enough “distortive” figure. Rather, the question is whether there is an unusual fact situation that leads to an unfair reflection of business activity under the standard apportionment formula.”
  - See also, e.g., Union Pac. Corp. v. Idaho State Tax Comm’n, 83 P.3d 116, 120-121 (Idaho 2004); Roger Dean Enterprises, Inc. v. State, Dep’t. of Rev., 387 So.2d 358 (Fla. 1980); Deseret Pharm. Co. v. State Tax Comm’n, 579 P.2d 1322 (Utah 1978)
Many state courts have also recognized that alternative apportionment is an exceptional remedy.

  
  • “The alternative formula is the exception . . . . Merely because the use of an alternative form of computation produces a higher business activity attributable to [the taxing state], is not in and of itself a sufficient reason for deviating from the legislatively mandated formula.”

- See also, e.g., Deseret Pharm. Co., Inc. v. State Tax Comm’n, 579 P.2d 1322, 1326 (Utah 1978); Donald M. Drake Co. v. Dep’t of Rev., 500 P.2d 1041, 1044 (Or. 1972).

The Mississippi statute provides that alternative apportionment can be used “only in limited and unique nonrecurring circumstances....” Miss. Code Ann. §27-7-23(c)(2)(C).
The Multistate Tax Commission has changed its view on this. It’s original model regulation IV.18(a) provided:

**Original:** “…only in specific cases where unusual fact situations (which usually will be unique and non-recurring) produce incongruous results…”

It then changed its mind:

**As Amended:** “…only in limited and specific cases where the apportionment and allocation provisions contained in Article IV produce incongruous results…”
Alternative Apportionment

- Standards for Application:
  - The standard for distortion should be lower than the constitutional “out of all appropriate proportion” standard set forth in Hans Rees’ Sons v. North Carolina ex rel. Maxwell, 283 U.S. 123, 135 (1931).
  - *F.W. Woolworth Co. v. Director, Div. of Taxation*, 213 A.2d 1 (N.J. 1965) (finding that alternative apportionment is available when the level of distortion is not unconstitutional).
Alternative Apportionment

- Standards for Application:
  - However, some states allow for alternative apportionment only when constitutional distortion is present.
    - Mich. Comp. Laws § 206.667(3) (providing for alternative apportionment where “the business activity attributed to the taxpayer in this state is out of all appropriate proportion to the actual business activity transacted in this state and leads to a grossly distorted result or would operate unconstitutionally to tax the extraterritorial activity of the taxpayer.”).
Alternative Apportionment

- Alternative apportionment may be used more often as more states adopt single-sales-factor (SSF) apportionment.
- SSF ignores the contributions of labor and capital to the production of income.
  - As a result, state revenue departments may become more aggressive (and taxpayers may become more assertive) in arguing that the statutory formula does not reflect where income is earned.
  - Taxpayers should such assertion. SSF represents the state’s economic development policies. The legislature has made a judgement that creating jobs is more important than accurately reflecting.

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**Alternative Apportionment**

- **Consistency with spirit of the statutory apportionment formula.**
  - The legislature has made a judgment about how income should be apportioned to the state. Alternative apportionment methodologies should arguably be consistent with that judgment to the extent possible.
  - State revenue departments have not always adhered to this principle.
Alternative Apportionment

- Discretionary authority has been used in a cost-of-performance state to produce market-based sourcing
  - On audit, credit card companies and financial institutions
  - Advertising and publishers

The New York State Department of Taxation and Finance is asserting in audits of banks that deposits in the apportionment formula (which is based on deposits, payroll, and receipts) should be sourced to the residences of the depositors even though the statute refers to the place where the deposits are “maintained.”
The Tennessee Supreme Court ignored legislative policy in Vodaphone Americas Holdings, Inc. v. Roberts, ____ Tenn. ____ (2016).

- The statute allocated service income based on where the costs of performance were incurred.
- The court upheld the DOR’s use of market sourcing for two reasons:
  - COP ignored the location of the taxpayer’s customers.
  - COP resulted in most of the taxpayer’s income not being taxed by any state.
Alternative Apportionment

- **Burden of proof:**
  - The general rule is that the party seeking to depart from the statutory apportionment formula has the burden of proving that the formula does not accurately reflect the taxpayer’s in-state income.
  - This rule generally applies even if the revenue department is seeking alternative apportionment.
Alternative Apportionment

Burden of proof.


  • The Department, as the party seeking to deviate from the standard formula, must satisfy two burdens:
    - (1) standard statutory formula did not fairly represent CarMax West’s in-state business activity; and
    - (2) alternative formula is appropriate, and it is more appropriate than any other competing method.

  • “It is only logical that a party seeking to override the legislatively determined apportionment method bears the burden of proving that method is not appropriate and an alternative method more accurately reflects the taxpayer’s business activity within the state.”
Alternative Apportionment

- **Burden of proof.**
  - To the contrary, see Equifax Inc. v. Miss. Dep't of Revenue, 125 So.3d 36 (Miss. 2013).
    - The taxpayer filed using state’s statutory cost-of performance apportionment method, but the Mississippi DOR applied a “market approach” to the taxpayer under the state’s alternative apportionment provisions.
    - The Mississippi Supreme Court held that the taxpayer bears the burden to prove the state’s proffered alternative apportionment method is not reasonable.
    - This result was reversed by legislation.
Alternative Apportionment

- **Burden of proof.**
  - The burden of proof should be harder to meet if the statutory formula in question was designed for a specific industry and not for all businesses.
  - It can be expected that a formula intended to apply to all businesses will not work for some. One size cannot fit all.

Where the legislature has focused on a particular industry in crafting an apportionment formula, the presumption that it accurately reflects a company’s income should be particularly strong. See, e.g., Appeal of Fluor Corp., No. 93A-0719 (95-SBE-16) (Calif. SBE 1995); Appeal of Quick and Reilly Inc., No. 203953, 2004 WL 542899 (Calif. SBE 2004).
Alternative Apportionment

- Penalties.
  - A taxpayer that follows the statutory formula should not be subject to penalties if the revenue department successfully invokes alternative apportionment. One should not be penalized for obeying the law.
  - Nevertheless, the Mississippi Supreme Court in Equifax Inc. v. Miss. Dep't of Revenue, 125 So.3d 36 (Miss. 2013), imposed penalties on a taxpayer that followed the statutory formula when the Department of Revenue successfully invoked alternative apportionment.
  - This result was reversed by legislation, but only partially. Penalties can still be imposed if the taxpayer’s reliance on the statutory language is unreasonable. Miss. Code Ann. §27-7-23(c)(2)(D.).