

Comments on the Multistate Tax Commission’s Proposed Draft Amendments to Its Model General Allocation and Apportionment Regulations

AMERICAN BAR ASSOCIATION SECTION OF TAXATION*

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I. Introduction

In 2014, the Multistate Tax Commission (“MTC”) adopted amendments to its model Compact Article IV. The MTC’s model Compact Article IV contains the Uniform Law Commission’s model Uniform Division of Income for Tax Purposes Act (“UDITPA”) almost word-for-word. These 2014 amendments are the MTC’s recommendations to state legislatures and tax departments about how best to “update” states’ enactments of the Compact and states’ enactments of UDITPA provisions, particularly with respect to the sourcing of services and intangibles. Draft model amendments to the MTC’s model general allocation and apportionment regulations (the “Proposed Draft Amendments”), currently under consideration at the MTC, would interpret the 2014 Compact Article IV amendments.

At its January 29, 2016 meeting, the MTC Executive Committee directed that a public hearing be held on the Proposed Draft Amendments. The Proposed Draft Amendments had been approved by the MTC’s Uniformity Committee on December 11, 2015 and referred to the Executive Committee for its consideration.

*Principal responsibility for preparing these Comments was exercised by John H. Gadon and Shirley K. Sicilian, Co-chairs, Task Force on Apportionment & Mediation of the State and Local Tax Committee of the Section of Taxation (the “SALT Committee”). The Comments were authorized by the Executive Committee of the SALT Committee and reviewed by Jaye Calhoun, Chair of the SALT Committee, John Barrie of the Section’s Committee on Government Submissions, Stewart Weintraub, Council Director for the Committee, and Peter Blessing, the Section’s Vice Chair (Government Relations). These Comments were submitted on behalf of the American Bar Association Section of Taxation to the Multistate Tax Commission on March 1, 2016. They have not been approved by the House of Delegates or Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the position of the American Bar Association. Minor editorial and stylistic changes have been made to comport with the style and format of *The Tax Lawyer*.

In March this year, the ABA Section of Taxation made comment on the draft model regulations.

II. Recommendation

The SALT Committee appreciates the opportunity to comment on the Proposed Draft Amendments. Our Comments are limited to a recommendation that the amended model regulations include a provision to facilitate the resolution of apportionment issues where the same receipts from sales of services or intangibles are sourced to multiple states due to differences in those states' apportionment methods.

We recommend an addition of the following provision to the Proposed Draft Amendments:

Whenever a taxpayer is subjected to different sourcing methodologies regarding intangibles or services, by the [State Tax Agency] and one or more other state taxing authorities, the taxpayer may petition for, and the [State Tax Agency] shall participate in, and encourage the other state taxing authorities to participate in, non-binding mediation in accordance with the alternative dispute resolution rules promulgated by the Multistate Tax Commission from time to time, regardless of whether all the state taxing authorities are members of the Multistate Tax Compact.

This recommendation is based on an identical provision in section 810-27-1-4-.17.01(2)(d) of the Alabama Administrative Code (Alabama has also amended section 17 of its version of the UDITPA based on MTC's new model section 17 sourcing statute).¹ The goal is to provide a mechanism for both taxpayers and states to address the impact of non-uniform state apportionment methodologies.

We believe such a mechanism is needed and strongly desirable. There is now greater non-uniformity among states with respect to sourcing receipts from intangibles and services than at any time since states adopted UDITPA. While the majority of states still apply the cost-of-performance method to source these receipts, numerous states have moved to some form of market-based sourcing. Further, states that have adopted market-based sourcing have chosen a number of different sourcing methodologies. Some states now source these receipts based on where services are provided or intangibles are used, others on where the benefit of the service or intangible is received, and still others on where the taxpayer's billing or main office is located. As a result, the same receipts from the sale of services or intangibles could be sourced to multiple states.

The proposed mediation provision furthers the MTC's goals of promoting state income tax uniformity and facilitating the settlement of apportionment disputes, while respecting the right and authority of states to adopt their own apportionment methodologies.²

¹ See ALA. CODE §§ 40-18-22, 40-27-1 art. IV.17 (2014).

² See MULTISTATE TAX COMPACT art. I.1-2 (Multistate Tax Comm'n 2015).

Any mediation would be nonbinding. However, nearly all states have the statutory authority to apply alternate apportionment methodology in appropriate circumstances. The avoidance of duplicate taxation is a key and laudatory goal.³ Nonbinding mediation does not mandate uniformity or ensure that the receipts will not be sourced to more than one state. It does, however, provide a mechanism to address these issues and for the affected states and taxpayers to discuss and attempt to resolve them in a manner satisfactory to all parties. That is entirely consistent with, and would further, the MTC's mission.

³ See MULTISTATE TAX COMPACT art. I.4 (Multistate Tax Comm'n 2015).