

Multistate Tax Commission Hearing Officer Report – Equitable Apportionment

November 19, 2013

In brief

As part of the Multistate Tax Commission's continuing effort to revise UDITPA provisions, the Hearing Officer issued his report on October 25, 2013. This Insight summarizes the Executive Committee's proposed revisions; commentary made during the March 28, 2013, public hearing; and the Hearing Officer's recommendations regarding revisions to UDITPA's alternative apportionment provisions.

[[Report of the Hearing Officer, Multistate Tax Compact Article IV \[UDITPA\] Proposed Amendments](#), Multistate Tax Commission (10/25/13)]

In detail

The Multistate Tax Commission (MTC) is proposing revisions to its model Uniform Division of Income for Tax Purposes Act (UDITPA). The MTC is focusing on the following five areas: (1) sales factor numerator sourcing for sales of services and intangibles, (2) sales definition, (3) factor weighting, (4) business income definition, and (5) equitable apportionment.

In December 2012, the MTC's Executive Committee approved proposed UDITPA revisions for public hearing. These revisions were the subject of a March 28, 2013, public hearing held by the Hearing Officer, University of Connecticut Law School Professor Richard Pomp. On

October 25, 2013, the Hearing Officer issued his Report, which provides a background to the amendments, a summary of the proposals' substantive features, a review of public testimony provided at the hearing, and the Hearing Officer's comments, recommendations, and proposals.

The following summarizes the Report's findings regarding equitable apportionment. We address the other four areas in separate Insights.

Committee recommendations – Equitable Apportionment

The recommended change adds the following to UDITPA section 18:

- if UDITPA's allocation and apportionment provisions do not fairly represent the extent of business activity engaged by a taxpayer engaged in a particular industry, transaction, or activity, the tax administrator may establish appropriate rules or regulations for determining alternative allocation and apportionment methods
- a regulation adopted is to be applied uniformly, except as provided in the current provisions of Section 18(a), which allow for alternate apportionment and allocation if business activity is not fairly represented.

Hearing officer comments

Comments by Professor Pomp include:

- The purpose of the suggested change relates to doubt regarding whether existing language authorizes states to issue regulations.
- Debate exists over whether alternative apportionment should address only limited situations or whether it may address industry-wide transactions. The draft would grant the executive branch the power to promulgate industry-wide regulations, granting a tax administrator discretion to set aside statutory apportionment rules and substitute an alternative of broad application, not specifically endorsed by the legislature.
- While the Hearing Officer endorses the Draft's delegation of regulatory authority to tax administrators, his preference is to have the MTC continue its leadership role in promulgating industry-wide regulations.

Professor Pomp offered the following suggestions for additional changes to UDITPA section 18:

- The burden of proof should be on the party invoking alternative apportionment; additionally, the burden should be the same for either the taxpayer or the tax administrator.
- There should be no penalties for taxpayers following statutory apportionment and allocation provisions, unless such reliance is unreasonable.
- Alternative apportionment should not be revoked retroactively; tax administrators should not be able to reject a return already filed using an agreed-upon apportionment.

Additional reading

Click on the following links to read our summary of the Multistate Tax Commission Hearing Officer's Report regarding:

- [market sourcing](#)
- [sales definition](#)

- [factor weighting](#)
- [business income](#)

The takeaway

The Multistate Tax Commission's effort to amend Article IV of the Multistate Tax Compact remains controversial. While the Hearing Officer's lengthy report offers many detailed recommendations, it nonetheless leaves significant unresolved issues, including important definitional standards. The Hearing Officer anticipates the promulgation of regulations to address many of these ambiguities, leading one to believe this process will continue for quite some time. Added to these uncertainties is the ongoing litigation involving the binding nature of the Article III election to apportion income using an equally weighted three factor formula. It appears, therefore, that taxpayers and state revenue agencies eager to have certainty with regard to corporate income tax apportionment provisions may have to exercise patience while these issues work their way through the various administrative and legal processes.

Let's talk

If you have any questions regarding the MTC's proposed amendments to UDITPA's alternative apportionment please contact:

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