

Multistate Apportionment in the Electronic Age

Updating Article IV, §18 [Fair Representation of Business Activity]

Western States Association of Tax Administrators

Annual Meeting

2014

Boise, Idaho

R. Bruce Johnson

Chair, Utah State Tax Commission

Uniform Division of Income for Tax Purposes Act

Section 18. If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors;
- (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

MTC Proposed Additions to Compact Article IV, §18

[based on UDITPA]

1. Rules

Rules are specifically authorized to address “particular industries” or “particular transactions or activities”

2. Burden of Proof

a. The Party requesting or requiring the alternative method (whether the Taxpayer or the Tax Administrator) has the burden of proving:

i. That the statutory formula does not fairly represent the business activity, and

ii. That the alternative is reasonable.

b. The burden is the same for either Party

c. The Tax administrator doesn't have the burden if the Taxpayer used an alternative method in any 2 of 5 prior years.

3. Penalties

No penalties may be imposed if a tax deficiency is “attributable to the Taxpayer's reasonable reliance *solely* of the allocation and apportionment provisions of this Article”

4. Revocation

Written permission to use an alternative method may not be revoked retroactively unless there has been:

a. A material change in the facts on which the Tax Administrator relied,
or

b. A material misrepresentation of those facts by the Taxpayer.

Art. IV.18 (As proposed by MTC)

- (a) **[Original language.]** If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:
- (1) separate accounting;
 - (2) the exclusion of any one or more of the factors;
 - (3) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or
 - (4) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.
- (b) **[Rules for industries/activities]** (1) If the allocation and apportionment provisions of this Article do not fairly represent the extent of business activity in this State of taxpayers engaged in a particular industry or in a particular transaction or activity, the tax administrator may, in addition to the authority provided in section (a), establish appropriate rules or regulations for determining alternative allocation and apportionment methods for such taxpayers.
- (2) A regulation adopted pursuant to this section shall be applied uniformly, except that with respect to any taxpayer to whom such regulation applies, the taxpayer may petition for, or the tax administrator may require, adjustment pursuant to Section 18(a).
- (c) **[Burden of proof.]** The party petitioning for, or the [tax administrator] requiring, the use of any method to effectuate an equitable allocation and apportionment of the taxpayer's income pursuant to subsection (a) must prove by [Drafter's note: insert standard of proof here]: (1) that the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's activity in this State; and (2) that the alternative to such provisions is reasonable. The same burden of proof shall apply whether the taxpayer is petitioning for, or the [tax administrator] is requiring, the use of any reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income. Notwithstanding the previous sentence, if the tax administrator can show that in any two of the prior five tax years, the taxpayer had used an allocation or apportionment method at variance with its allocation or apportionment method or methods used for such other tax years, then the tax administrator shall not bear the burden of proof in imposing a different method pursuant to (a).
- (d) **[Penalties.]** If the [tax administrator] requires any method to effectuate an equitable allocation and apportionment of the taxpayer's income, the [tax administrator] cannot impose any civil or criminal penalty with reference to the tax due that is attributable to the taxpayer's reasonable reliance solely on the allocation and apportionment provisions of this Article.
- (e) **[Revocation.]** A taxpayer that has received written permission from the [tax administrator] to use a reasonable method to effectuate an equitable allocation and apportionment of the taxpayer's income shall not have that permission revoked with respect to transactions and activities that have already occurred unless there has been a material change in, or a material misrepresentation of, the facts provided by the taxpayer upon which the [tax administrator] reasonably relied.

UDITPA

Section 18. If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(c) separate accounting;

(d) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

Comment

It is anticipated that this act will be made a part of the income tax acts of the several states. For that reason, this section does not spell out the procedure to be followed in the event of a disagreement between the taxpayer and the tax administrator. The income tax acts of each state presumably outline the procedure to be followed.

Section 18 is intended as a broad authority, within the principle of apportioning business income fairly among the states which have contact with the income, to the tax administrator to vary the apportionment formula and to vary the system of allocation where the provisions of the Act do not fairly represent the extent of the taxpayer's business activity in the state. The phrases in Section 18(d) do not foreclose the use of one method for some business activity and a different method for a different business activity. Neither does the phrase "method" limit the administrator to substituting factors in the formula. The phrase means any other method of fairly representing the extent of the taxpayer's business activity in the state.