



Alternative Apportionment Developments

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UDITPA Section 18 Standard

- Uniform Division of Income for Tax Purposes Act (UDITPA) was approved by the National Commission on Uniform Laws as a Model Act in 1957
 - Addressed equitable allocation and apportionment of income via 3-factor formula (property, payroll, and sales).
 - Sec. 18 provided for variation when standard formula did not fairly represent the extent of the taxpayer's business activity.



UDITPA Section 18 Standard

- Principal drafter of the Act, Professor William Pierce, wrote:
 - 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, because no statutory pattern could ever resolve satisfactorily the problems for the multitude of taxpayers with individual business characteristics.



Fair Apportionment

- State apportionment formula must satisfy Due Process and Commerce Clauses.
 - Commerce Clause requires that income be fairly apportioned. *Container Corp. of Am. v. Franchise Tax Bd.*, 463 U.S. 159, 169 (1983).
 - Fair = internally/externally consistent, not discriminatory
- *But* Sec. 18 is “not confined to correcting unconstitutional distortions.”
 - *Microsoft Corp. v. Franchise Tax Bd.*, 39 Cal. 4th 750 (2006); *Twentieth Century Fox Film Corp. v. Department of Revenue*, 700 P.2d 1035, 1039–1040 (Or. 1985)



Cases

- *CarMax Auto Superstores West Coast, Inc. v. South Carolina Dep't of Revenue*, 2014 S.C. Lexis 550 (Dec. 23, 2014)
 - The S.C. Supreme Court ruled that the party seeking an alternative apportionment formula bears the burden of proof by a preponderance of the evidence that “(1) the statutory formula does not fairly represent the taxpayer’s business activity in South Carolina and (2) its alternative accounting method is reasonable.”



Cases

- *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), *rehearing denied* (Miss. Nov. 21, 2013), *cert. denied*, 134 S.Ct. 2872 (2014)
 - Georgia corporation in the business of consumer credit reporting employed three Mississippi residents and had approximately 800 customers in Mississippi.
 - Using the standard apportionment formula, taxpayer did not apportion its income to Mississippi because none of its income-producing activity occurred in the State.
 - The Department held that the standard apportionment method did not reflect the extent of the taxpayer's business in the State. Instead, the Department used market-based sourcing.
 - The Mississippi Supreme Court placed the burden of proof on the taxpayer and upheld the Department's use of market-based sourcing.



Cases

- *Vodafone Americas Holdings, Inc. v. Roberts*, Tenn. Ct. App. (June 23, 2014)
 - Upheld Commissioner's imposition of market-based sourcing as an alternative apportionment method instead of cost of performance as provided by statute
 - Vodafone's sales factor included only its sales of tangible personal property to Tennessee customers
 - Under cost of performance, Vodafone excluded all revenues from its delivery of wireless services to Tennessee customers
 - Commissioner acted within scope of discretion
 - Pending at Tennessee Supreme Court



Improper Use of Section 18

- Professor Walter Hellerstein expressed his concerns as follows:
 - “ [R]eliance on UDITPA’s Section 18 (the ‘equitable apportionment’ provision) to get to the ‘right’ conclusion is troublesome not merely because it overrides the standard statutory provisions (as does every variation from UDITPA based on equitable apportionment), but because it does so in a context that hardly seems to constitute one of the ‘unusual fact situations’ that the UDITPA draftsmen identified as justifying a deviation from the statute...”



Burden of Proof

- *MTC Report of the Hearing Officer, Oct. 25, 2013*
 - Professor Richard Pomp stated in the *Report* that:
 - “It seems obvious to many courts that the burden should be placed on the party invoking alternative apportionment because that party is asking permission to deviate from the general rules on apportionment an allocation. On the other hand, there is a presumption of correctness that accompanies a department’s assessment. If that applies in the context of alternative apportionment, the taxpayer would *always* have the burden of proof.”
 - “The Hearing Officer concludes that the view that the party invoking alternative apportionment has the burden of proof reflects general principles of American jurisprudence...”



Pending Case

- *ESPN Productions, Inc. v. Indiana Dep't of State Revenue*
 - The Department refused to apply cost of performance methodology with respect to licensing and advertising revenues
 - Instead, the Department applied an audience factor methodology, which does not appear in any statute or regulation
 - Taxpayer is challenging the use of the audience factor on various grounds, including violation of the APA.



Questions?

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