State Tax Planning Can Reduce Cost of Expanding Gaming Operations Outside Nevada

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Introduction

Nevada's Constitution specifically prohibits the state from imposing an individual income tax.[1] And while not constitutionally forbidden, Nevada has never imposed an income tax on non-natural persons.[2] Thus, many Nevada-based companies and their executives are generally unfamiliar with state and local income tax laws.

As they grow and expand their businesses, Nevada companies may find themselves subject to the taxing jurisdictions of other states which do impose income taxes. The expansion of legalized gaming throughout the United States has made Nevada gaming companies especially prone to income tax laws of other states. In fact, the way in which some states calculate the amount of income tax owed by companies under their jurisdiction may cause income derived from Nevada operations to be subject to the income tax of those states.

Due to the rapid expansion of Nevada-based gaming companies into other domestic jurisdictions, this article will focus only on the state income tax laws of those jurisdictions which currently allow legalized gaming[3] (the "gaming states") — specifically, income or franchise taxation by New Jersey, Colorado, South Dakota, Indiana, Iowa, Missouri, Mississippi, Illinois, and Louisiana — though the concepts of this article will apply equally to non-gaming businesses as well.

State Authority to Tax

As a general rule, each state has the power to impose franchise and income taxes on any corporation doing business within its borders. However, the power has important federal restrictions. Knowledge and understanding of these basic restrictions is necessary for proper interpretation and application of the various state income and franchise tax laws.

A. The Commerce Clause

One of the most frequently cited challenges to a state's right to tax involves the Commerce Clause of the United States Constitution.[4] The Supreme Court has repeatedly held when interpreting the Commerce Clause that the framers of the Constitution intended to encourage and protect free trade among the several states. In fact, it has ruled that the Commerce Clause, with or without Congressional action, limits a state's right to tax. For example, in *Freeman v. Hewit*[5] the Court stated:

> [T]he Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force cre-

ated an area of trade free of interference by States. In short, the Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States. . . . This limitation on State power . . . does not merely forbid a State to single out interstate commerce for hostile action. A State is also precluded from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between the States. It is immaterial that local commerce is subjected to a similar encumbrance.[6]

The Supreme Court's interpretation of the extent to which the Commerce Clause limits states' right to impose tax has varied over the years. The current interpretation is based upon its 1977 decision in *Complete Auto Transit, Inc. v. Brady.*[7] In this case, Complete Auto Transit was engaged in the business of transporting new vehicles manufactured by General Motors Corporation within the state of Mississippi. The vehicles had been assembled outside Mississippi. Based upon those facts, the Court assumed that Complete Auto Transit was directly involved in interstate commerce. In sustaining Mississippi's gross income tax, the Court reversed a long standing rule that a state tax levied directly on interstate commerce was a per se violation of the Commerce Clause.[8]

In sum, a state tax will not violate the Commerce Clause of the U.S. Constitution if it:

(1) Is applied to an activity that has a substantial nexus with the taxing state;
(2) Is fairly apportioned;
(3) Does not discriminate against interstate commerce; and
(4) Is fairly related to service provided by the taxing state.

B. Due Process

A corporation doing business in more than one state must determine the amount of income that is subject to tax by each state.

Section 1 of the Fourteenth Amendment to the United States Constitution forbids any state from depriving "any person of life, liberty or property without due process of law." Under the Due Process Clause, the Supreme Court has held that a state may tax an out-of-state taxpayer if there is "a 'minimum connection' between the interstate activities and the taxing State, and a rational relationship between the income attributed to the State and the intrastate values of the enterprise."[9] It would thus appear that as long as the tax meets the first part of the four-pronged test of *Complete Auto Transit,* the Due Process Clause should not further limit a state's right to impose an income or franchise tax.

Nexus: Determining Which States Have Jurisdiction to Tax

A corporation doing business in more than one state must determine the amount of income that is subject to tax by each state. Of course, one of the first issues which must be addressed is the identification of those states in which the corporation's activities are significant enough to subject it to taxation. In other words, a corporation must have a sufficient connection — *i.e.,* a "nexus" — with a state before that state can tax its income. The identification of which states have jurisdiction to tax a corporation's income is complicated in that the laws defining the amount of activity necessary to create a nexus will vary.

The traditional determination of whether a corporation has this nexus within a state is the presence or absence of an employee or tangible property within the state.[10] It is not necessary that the employee be full time. In *Cincinnati Milacron Co. v. Hardesty,* nonresident sales engineers who spent 45 percent of their time within the state created a nexus.[11] It is not clear, however, if a nexus is created when an employee spends less than this amount of time within state borders. In the case of gaming companies who send employees to other states to lobby for a state gaming license or to investigate the start of a gaming business, it is uncertain at which point sufficient nexus has been established to cause the company to be subject to the state's income or franchise taxes. Of course, it could be argued that the company has not begun doing business until it obtains a valid gaming license, but that argument might be used against the company for federal income tax purposes, because start-up expenses are generally not deductible.[12]

In the case of a net income tax or franchise tax measured by net income, a state's right to tax is specifically limited by Public Law 86 – 272.[13] Specifically, if the only business activities within the state are the solicitation of orders for sales of tangible personal property, and the orders are approved and filled by shipment or delivery from a point outside the state, then no income tax or franchise tax based on net income may be imposed.

Since its enactment in 1959, the scope of the term "solicitation of orders" has spawned extensive litigation, and state courts have varied in their interpretations of its parameters. Attempting to interpose a greater degree of certainty in this important area of state taxation, the Supreme Court ruled in *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.*[14] that solicitation includes "not merely the ultimate act of inviting an order but the entire process associated with the invitation . . . ."[15] The majority formulated the following standard for limiting those activities that are considered to be part of the entire solicitation process: Whether a particular in-state activity is "entirely ancillary to requests for purchases" so that it serves no "independent business function apart from [its] connection to the solicitation of orders."[16] The Court also recognized that if one or more activities are determined *not* to be entirely ancillary to requests for purchases (so that they are not protected as solicitation activities), there is a *de minimis* exception when the activity establishes only a "nontrivial additional connection" with the taxing state.[17]

Finally, as the sole exception to the above tests, the Court noted that the maintenance of an office in a state (an activity that was not present in *Wrigley*) can never be protected as a solicitation activity even if it is used exclusively to facilitate requests for purchases.[18]

Determining State Taxable Income

Once the nexus issue has been decided, a corporation must determine the amount of taxable income or loss it generates on a state-by-state basis. In general, only two methods for making that determination are used: separate accounting or unitary accounting. Those methods are fully addressed below.

A corporation that has business activities in more than one state must determine the amount of its net income that is subject to tax by each state. The corporation must first determine which states it has sufficient nexus with to create a tax connection, and then determine how to divide its income among the states in which sufficient nexus exists. Most states require the allocation of nonbusiness income to the state in which the income was generated, and provide for the apportionment of business income based upon each state's approved formula.

After the apportionment calculations have been completed, the corporation must determine the amount of its income subject to apportionment. Several states have adopted a unitary approach which requires a taxpayer to file a combined or consolidated return that includes the results from all of the operations of the related corporations. Some states allow for separate accounting, but permission is usually required for use of this reporting method.

A. Uniform Division of Income for Tax Purpose Act

The Uniform Division of Income for Tax Purpose Act (UDIPTA) is a model act governing the allocation and apportionment of income among states. The UDIPTA was drafted in 1957 to reduce the diversity that existed among the states in determining their respective shares of a corporation's income. Today, UDIPTA (or an act closely resembling UDIPTA) is the governing law in a majority of the states imposing a corporate income tax.

The UDIPTA divides income into: nonbusiness income, which is allocated according to the type of income and the type of property giving rise to the income; and business income, which is apportioned by means of a three-factor formula. Nonbusiness income is generally assigned to states on the basis of the location of the property or, if the property is intangible, on the basis of the taxpayer's commercial domicile.

The word apportionment refers to the assignment of a taxpayer's business income on the basis of a formula. Business income is income arising out of an activity in the regular course of a corporation's business. The most often applied formula to apportion business income among states is based on the ratio of the taxpayer's activity within the taxing state to total activity. The factors usually used in the apportionment formula are sales, property and payroll, with an equal weighing of each of the three factors.

The Supreme Court has repeatedly held constitutional a state's use of an apportionment formula to determine its share of a taxpayer's taxable income. This right was clearly stated in the Court's 1983 decision in *Container Corporation of America v. Franchise Tax Board.*[19] In favoring formula apportionment over separate accounting, the Court held that apportioning the total income of a business between the taxing jurisdiction and the rest of the world on the basis of a formula would take into account objective measures of the corporation's activities within and without the jurisdiction.[20]

The Multistate Tax Compact (MTC), formulated in 1966 by the National Association of Attorneys General and the National Legislative Council, created the Multistate Tax Commission and established for member states a joint audit program for multistate taxpayers. The MTC adopted UDIPTA as an optional method of apportionment in member states.

Under UDIPTA, business income is defined as income arising from transactions and activities in the regular course of the taxpayer's trade or business, and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations. Nonbusiness income is all other income and is assigned to a particular state. Business income is apportioned by means of a three-factor formula.

The UDIPTA provides for the allocation of four types of nonbusiness income: (1) rents and royalties from real and tangible personal property, (2) capital gains and losses from sales of real and personal property, (3) interest and dividends, and (4) patent and copyright royalties.

Nonbusiness income from real estate is allocated to the state in which the property is located; this includes real property rents, royalties, and capital gains. Nonbusiness rents and royalties from tangible personal property are allocated to the state in which the property is utilized. Capital gains and losses on tangible personal property are allocated to the state in which the property had a situs at the time of sale, unless the taxpayer is not taxed in that state, in which case the income is allocated to the taxpayer's commercial domicile. Nonbusiness capital gains and losses, and interest or dividends from intangible personal property, are allocated to the state of the taxpayer's commercial domicile. Nonbusiness income from royalties on patents and copyrights is allocated to the state where the rights are utilized, but if the taxpayer is not taxed in that state, the income is allocated to the taxpayer's commercial domicile.

The UDIPTA calls for the apportionment of business income via a three-factor formula, consisting of sales, payroll, and property. Each taxing state's fractional share of each factor is determined by using the in-state activity as the numerator and the total activity as the denominator.

Sales under UDIPTA are defined as all gross receipts except nonbusiness receipts that are allocated in full to a particular state. Gross receipts for this purpose mean gross sales, less returns and allowances, and will include all interest income derived from accounts receivables, service charges, and carrying charges. Federal and state excise taxes, including sales taxes, are included in the sales factor if these taxes have been passed on to the buyer or included as part of the selling price of the product. (Please see the Appendix at the end of this article for a detailed description of the sales factor in states adopting UDIPTA and the effect of the MTC regulations.)

Under UDIPTA, the payroll factor is the total amount paid in the taxing state during the tax period by the taxpayer for compensation, divided by total compensation paid everywhere. Under the MTC regulations, compensation paid for activities connected with the production of nonbusiness income is excluded from the factor. Compensation is defined as wages, salaries, commissions, and any other form of remuneration paid to employees for personal services. Only amounts paid directly to the employee are included in the payroll factor, including the value of board, rent, housing, lodging and other benefits or services furnished to employees that constitute income to the recipient under the Internal Revenue Code. Independent contractor compensation is not included in the payroll factor.

The UDIPTA defines the denominator of the property factor as all the taxpayer's real and tangible personal property owned or rented and used during the tax period. Thus, to be included in the property factor, the property must be tangible and it must be used. The regulations issued by the MTC require that the property generate apportionable income in order to be part of the apportionment formula. Property that is idle but available for use may be included.

Owned property is valued under UDIPTA at its original cost, and rented property is valued at eight times the net annual rental rate. The value of property to be included in either the numerator or the denominator of the property factor is measured by taking the average value. This is arrived at by averaging the property values at the beginning and at the end of the year. Monthly values may be averaged if necessary to get a more accurate result.

B. The Unitary Method

The unitary approach is a method that allows a state to estimate the percentage of an affiliated group's nationwide or worldwide unitary income earned in the state, based upon the state's statutory apportionment formula. To include the activities of the corporation's subsidiaries in the apportionment formula, the state must subjectively determine that the subsidiaries' activities are an integral part of the corporation's unitary business, and as a result, are subject to apportionment.

The general theory is that a unitary business operates as a unit and cannot be segregated into independently operating divisions or branches without distortion of the group as a whole. The business operations are considered integrated, and each division is dependent upon, or contributes to, the operation of the entire business. It is not necessary that each division operate within a state in order to contribute to the activities of the group in that state. The unitary theory ignores the separate legal existence of the entities, and focuses on the business realities. As such, the separate entities are treated as a single business for state income tax purposes, and the apportionment formula is applied to the combined income of the unitary business.

Over the years the courts have developed definitions of a unitary business that includes the "three unities" test, the "contribution or dependency" test, and the "factors of profitability" test. The three unities test requires the presence of unity of ownership, unity of operation, and unity of use. If 50 percent or more of the corporation's stock is owned directly or indirectly by another corporation within the group, the unity of ownership test is met. Unity of operation is evidenced by the performance of certain functions by one of the corporations on behalf of the entire group, such as central purchasing, advertising, accounting, and management functions. Finally, unity of use is associated with executive forces and general systems of operations and is evidenced by major policy decisions that are determined by centralized management, intercompany product flow, and services that are provided by an affiliate to other affiliates.

The contribution or dependency test focuses on whether the operation of the in-state business is dependent on, or contributes to, the corporation's out-of-state business.

The contribution or dependency test focuses on whether the operation of the in-state business is dependent on, or contributes to, the corporation's out-of-state business. Typical transactions that point to dependency include substantial borrowing on out-of-state operations to finance in-state operations, transfers of top-level executives from out-of-state operations, and transfers of manufacturing equipment and materials from out-of-state.

The factors of profitability test includes functional integration, centralization of management, and economies of scale. Functional integration includes product flow among affiliates and centralized functions such as advertising, accounting, purchasing, manufacturing, and financing. Interlocking board of directors, interchange of personnel at upper management levels, and required parent company approval on major policy decisions are benchmarks of centralized management. It should be noted that for vertically integrated businesses, the dependency or contribution test and the factors of profitability test generally are easily satisfied.

In general, a state attempts to find a connection between a corporation and its out-of-state profitable related entities to justify using the unitary concept. If such a connection is determined to exist, the corporation is required to apply the state's apportionment formula to all its income to determine the amount of income that is subject to tax in that state, even when the in-state business has generated a loss.

Taxation in the Gaming States

A. Colorado

The Colorado corporate income tax[21] is imposed on all domestic corporations and foreign corporations doing business in Colorado. However, corporations exempt from federal tax are also exempt from the Colorado tax. The tax is measured by net income — for tax years beginning after June 30, 1993, there is a flat 5 percent tax. Colorado will exempt a small business corporation that has a valid federal S corporation election from the Colorado income tax.

Corporations conducting business in more than one state must allocate and apportion total modified federal taxable income to determine the amount attributable to Colorado. Colorado has adopted UDIPTA through the adoption of the MTC and the uniform regulations promulgated by the Multistate Tax Commission. In addition, Colorado has also adopted alternative apportionment provisions differing significantly from the MTC's UDIPTA rules. Taxpayers chose annually which of the two apportionment methods to use.

Colorado may permit or require a member of a unitary group of affiliated corporations to file a combined report in which its income is determined by the apportionment of the entire group's business income.

The MTC as adopted by Colorado permits some corporations to file a short form gross receipt return. To qualify for this election, a corporation's business activity in Colorado must be limited to sales — no Colorado property can be owned or rented, and gross sales in Colorado cannot exceed $100,000. If the election is made, the corporation pays a tax of 0.5 percent of its annual gross receipts from sales in or into Colorado instead of the regular corporate income tax.

Members of an affiliated group are permitted to file a consolidated Colorado return if all members of the group consent to be included in the return. Colorado has no provisions specifically covering situations where a federal consolidated return has been filed but the affiliated group chooses not to file a Colorado consolidated return, or vice versa. Presumably, a group of corporations in this situation should attach a schedule to the Colorado return showing what federal taxable income would have been had the corporation or group reported on the same basis (consolidated or separate) as in Colorado, and that figure should be used as the starting point in computing Colorado taxable income.

Apportioning Colorado taxpayers may choose between applying the UDIPTA provisions or Colorado's own provisions. The election is made annually and may not be changed after the due date of the return or the date the return is filed, whichever is later.

Colorado has also adopted the MTC allocation and apportionment regulations, which are applicable to corporations apportioning income under the MTC. The regulations were adopted by Colorado in 1976 — verbatim and substantially in their entirety — except that all examples were deleted.

1. Business v. Nonbusiness Income — UDIPTA Election

The Colorado definition of business income applicable to taxpayers electing to allocate and apportion income under MTC, is the same as in UDIPTA and the MTC regulations.

2. Apportionment — UDIPTA Election

Colorado has adopted the MTC, as well as the model MTC regulations, which are applicable to taxpayers electing to allocate and apportion income under the MTC.

3. Sales Factor — UDIPTA Election

Colorado has adopted the MTC, as well as the model MTC regulations, which are applicable to taxpayers electing to allocate and apportion income under the MTC.

4. Payroll Factor — UDIPTA Election

Colorado has adopted the MTC, as well as the model MTC regulations, which are applicable to taxpayers electing to allocate and apportion income under the MTC.

5. Property Factor — UDIPTA Election

Colorado has adopted the MTC, as well as the model MTC regulations, which are applicable to taxpayers electing to allocate and apportion income under the MTC.

Taxpayers qualified to apportion income may elect annually to do so. Under Colorado law, income is apportioned using a two-factor formula consisting of a revenue factor and a property factor. The taxpayer's entire net income is divided into two equal parts, and one-half is multiplied by the revenue factor, the other half by the property factor; the two resulting figures are added together to arrive at Colorado taxable income. If this method is selected there is no distinction between business and nonbusiness income.

B. Illinois

The Illinois income tax[22] is imposed on corporations for the privilege of earning or receiving income from Illinois sources. An additional Personal Property Replacement Income Tax is imposed on corporations subject to the regular income tax. Both taxes are measured by Illinois net income. The regular tax is payable annually at a rate of a 4.8 percent. Corporations, other than S corporations, are subject to the additional replacement income tax at a rate of 2.5 percent of net income. An S corporation will pay the replacement income tax at a rate of 1.5 percent and is exempt from the regular tax. Organizations exempt from federal taxation are exempt from the Illinois income tax, but may be subject to the tax on unrelated business income.

Multistate corporations allocate and apportion base income to determine the amount attributable to Illinois. Illinois has adopted provisions substantially similar to UDIPTA and the uniform regulations issued by the MTC, except that Illinois uses a double-weighted sales factor. Illinois requires unitary reporting by corporate affiliates.

Illinois has adopted several provisions that have no UDIPTA counterpart. Only a few have applicability to a gaming operation, namely, that combined reporting of income is required by two or more corporations engaged in a unitary business, and that interest and dividends and other items not specifically allocated or apportioned under the general allocation and apportionment provisions are allocated to the state of commercial domicile of the corporation.

The Illinois allocation and apportionment provisions are applicable to taxpayers who are taxable in another state. However Illinois has not adopted the MTC rule that permits allocation of nonbusiness income regardless of whether a corporation is taxable in another state.

1. Business v. Nonbusiness Income

The Illinois definition of business income and the provisions for allocating nonbusiness income are substantially the same as UDIPTA and the MTC regulations, with the exceptions for interest and dividends mentioned earlier.

2. Apportionment Formula

Illinois uses a double weighted sales factor.

3. Sales Factor

Illinois has adopted the UDIPTA provisions and MTC regulations as to the sales factor, except that the Illinois sales factor is double-weighted.

4. Payroll Factor

Illinois has adopted the UDIPTA provisions and MTC regulations on the payroll factor.

5. Property Factor

Illinois has adopted without change UDIPTA provisions and MTC regulations on the property factor.

C. Indiana

The Indiana adjusted gross income tax[23] is imposed on corporate income which has been derived from sources within Indiana. There are also two additional income taxes imposed on sources within Indiana: the supplemental corporate net income tax, and the gross income tax. Corporations pay the greater of the gross or adjusted gross income tax, plus the supplemental net income tax. The adjusted gross income tax is payable annually at a rate of 3.4 percent. The gross income tax is imposed on the taxpayer's total gross receipts and is imposed at two different rates: one for general business transactions, and the other for specified nonbusiness transactions and those transactions involving utility services. The supplemental corporate net income tax is derived from adjusted gross income. The greater of the adjusted gross income tax or the gross income tax is subtracted from adjusted gross income and the remainder is taxed at a rate of 4.5 percent.

Multistate taxpayers allocate and apportion modified federal taxable income to determine the amount attributable to Indiana. Indiana has adopted rules that follow the general patterns of UDIPTA and MTC regulations, except that greater weighing may be given to the sales factor beginning in 1993, if certain conditions are met.

The most significant difference between the text of UDIPTA and the Indiana regulations is that the UDIPTA qualification test of taxability in another state is used only in the Indiana allocation rules and the sales factor throwback rule, not as a prerequisite to apportion income. In addition, while Indiana currently uses the standard three-factor apportionment formula that is provided in UDIPTA, if there are two consecutive quarters of income growth in Indiana and an additional quarter, the state apportionment formula will be modified to place greater weight on the sales factor.

The Indiana allocation and apportionment provisions are applicable to taxpayers who are taxable in another state. However Indiana has not adopted the MTC rule which treats nonunitary corporate divisions as a separate business for purposes of allocation and apportionment.

1. Business v. Nonbusiness Income

The Indiana definition of business income and the provisions for allocating nonbusiness income are substantially the same as UDIPTA except that an Indiana regulation eliminates the presumption that income is business income unless clearly classifiable as nonbusiness income.

2. Apportionment Formula

Indiana is currently using the formula provided in UDIPTA. Except, as previously noted, after two consecutive quarters of income growth in Indiana and an additional quarter, the apportionment formula will be modified to place greater weight on the sales factor.

3. Sales Factor

Indiana has adopted the UDIPTA provisions and the MTC regulations on the sales factor with the following exceptions: the MTC rules relating to the inclusion or exclusion of receipts from occasional sales and includes federal and state excise taxes has been omitted; sales between affiliated group members are excluded from the numerator and denominator of the Indiana sales factor; the Indiana sales factor does not include sales made outside the United States; Indiana has not adopted the UDIPTA taxability test of apportionment and uses instead as a throwback rule; and, Indiana uses the UDIPTA § 17 income producing activity test for assigning sales other than sales of tangible property, but it has added provisions without using the MTC counterpart relating to situs of property in regard to income-producing activity.

4. Payroll Factor

Indiana has adopted the UDIPTA provisions and MTC regulations on the payroll factor with several exceptions. The Indiana regulations omit the MTC definition of "employee". Indiana has added a special provision with no MTC counterpart assigning wages paid to employees engaged in transporting employees engaging in the transportation of persons or materials, as a regular part of the taxpayer's business activity on the basis of miles traveled in Indiana, and the denominator of the Indiana payroll factor does not include compensation paid outside the United States.

5. Property Factor

Indiana has adopted the UDIPTA provisions and MTC regulations on the property factor with several exceptions. Under Indiana regulations, movable property that may be used in the regular course of business in more than one state is valued according to miles or to time in the state, as applicable, and the property factor denominator does not include real or tangible property owned or rented in an area outside the United States. The MTC rule that incidental day-to-day expenses are not considered rentals for motels and automobiles is omitted by Indiana. Also, Indiana did not adopt the MTC special rules pertaining to the treatment of subrentals and nominal rental rates in the property factor.

D. Iowa

The Iowa corporate income tax[24] is imposed on corporations organized under the laws of the state and on every foreign corporation doing business in or deriving income from sources within Iowa. The tax, measured by net income and payable annually, is set at graduated rates for the first $250,000, and at a fixed rate of 12 percent thereafter. An alternative minimum tax is also imposed.

Iowa has adopted the Internal Revenue Code in effect as of January 1, 1992, as the starting point for the computation of Iowa net income. The computation of the Iowa tax begins with federal taxable income before net operating loss and after dividends deduction. Various modification adjustments are made to arrive at Iowa "net income." This amount is then allocated and apportioned. A net operating loss, if applicable, is subtracted from allocated and apportioned income to arrive at Iowa "taxable income."

Iowa has not adopted UDIPTA, the MTC, or the uniform regulations promulgated by the Multistate Tax Commission. Its allocation and apportionment provisions are unusual in that a one-factor (gross receipts) formula, called the "business activity ratio," is used to apportion business income. A taxpayer does not have to be "taxable in another state" to establish the right to allocate or apportion, but must be "carrying on a trade or business partly within and partly without the state."

Iowa does not permit or require the filing of combined reports by unitary corporate affiliates. Affiliated corporations, as defined for federal purposes, may elect to file a consolidate state return under certain conditions.

1. Business v. Nonbusiness Income

Iowa has adopted the UDIPTA definition of "business income" and "nonbusiness" income. However, Iowa differs from UDIPTA as to the allocation rules for nonbusiness rents and royalties with respect to tangible personal property, patents and copyrights.

2. Apportionment Formula

Iowa uses a one-factor sales formula called the "business activity ratio." Under Iowa law, a taxpayer can file a statement with the Director of Revenue proposing an alternative method of taxation if the statutory formula attributes to Iowa income that is not in reasonable proportion to the business transacted within the state. A "business activity ratio" return must be filed before such action is permitted, and the burden of proving that the statutory method of apportionment produces an unrealistic result falls upon the taxpayer.

Separate accounting is one possible alternative method of allocation and apportionment; however, the fact that it produces a result substantially different from the statutory method does not establish that the single-factor sales formula is inappropriate.

3. Sales Factor — Business Activity Ratio

Iowa uses a single-factor formula consisting of a "business activity ratio," which is essentially equivalent to the UDIPTA sales factor.

4. Payroll Factor

Not applicable.

5. Property Factor

Not applicable.

E. Louisiana

The Louisiana corporation income tax[25] is applicable to all nonexempt corporations deriving Louisiana taxable income, except insurance companies. The income tax is applied to net income derived from Louisiana sources and is payable at progressive rates from 4 percent of the first $25,000 to 8 percent of net income in excess of $200,000.

Louisiana incorporates by reference the Internal Revenue Code as currently in effect, as well as all applicable U.S. Treasury regulations. Louisiana taxable income is determined by applying statutory modifications to federal taxable income. Louisiana law does not generally provide for the filing of a consolidated or combined return.

Corporations operating in more than one tax jurisdiction allocate and apportion Louisiana taxable net income or loss to determine the amount attributable to Louisiana. Louisiana has not adopted the MTC or the UDITPA. Instead, Louisiana law provides a two-factor formula for loan businesses and service enterprises, a three-factor formula for manufacturers, merchandisers and certain public utilities, and special formulae for certain transportation companies. Federal income tax attributable to Louisiana sources and state loss carryovers are subtracted from allocated and apportioned income to arrive at Louisiana net taxable income.

The Louisiana corporation franchise tax[26] is applicable, in the absence of specific exemption, to all domestic corporations and to all foreign corporations qualified to do or actually doing business in Louisiana, exercising or continuing a corporate charter in Louisiana, or owning or using any part of corporate capital, plant or other property in Louisiana in a corporate capacity. The franchise tax rate is $1.50 per $1,000 of the tax base up to $300,000 and $3.00 per $1,000 in excess of $300,000. The tax base is the greater of: (1) the amount of the corporation's capital stock, surplus, undivided profits, and borrowed capital, employed in Louisiana; or (2) the total assessed value of real and personal property in the state, but in no case less than $10 per year. Allocation of taxable capital to Louisiana is computed on the basis of the arithmetical average of the ratios of property and sales.

1. Business v. Nonbusiness Income

Louisiana has no provision distinguishing business from nonbusiness income.

2. Apportionment Formula

Louisiana allocation and apportionment differs significantly from UDIPTA. Louisiana does not distinguish allocable from apportionable income on the basis of whether it is business or nonbusiness income (except gain or loss from sales or exchanges of property). Rather, the distinction between allocable and apportionable income is made on the basis of the type of income involved. Louisiana law provides a two-factor formula for loan businesses and service enterprises, a three-factor formula for manufacturers, merchandisers and certain public utilities, and special formulae for certain transportation companies.

With the exception of gain or loss from sale or exchange of property, Louisiana law does not distinguish allocable from apportionable income on the basis of the functional relation of the income to the business. Rather, items of gross income are segregated by type into allocable income and apportionable income, based upon the type of income involved.

Rents and royalties from real or tangible personal property, gain or loss from sales or exchanges of property not made in the regular course of business, interest income, dividends from corporate stock, royalties or like revenue from the use of intangible rights, and income from construction or repair services are allocable to the applicable state. All other items of gross income are apportionable.

3. Apportionment Formulas

Louisiana law provides various statutory formulae for the apportionment of income not directly allocated and also provides a procedure for apportionment by separate accounting. The apportionment formula applied depends on the type of business from which the taxpayer primarily derives income. When the numerator and denominator are zero in any one or more factors in the apportionment formula, the factor is dropped from the apportionment formulas and the arithmetical average is determined from the total remaining factors.

For enterprises such as gaming where a taxpayer's income is primarily derived from a service business in which the use of property is not a substantial income-producing factor, a two-factor formula is used based upon the proportion of wages paid and gross income derived within Louisiana. Taxpayers who generate their income from manufacturing, merchandising and other non-service efforts use an apportionment formula different from the two-factor formula applicable to gaming.

4. Gross Income Factor

The gross income factor is determined by computing the ratio of the gross apportionable income of the taxpayer from Louisiana sources to total gross apportionable income from all sources.

Gross apportionable income from Louisiana sources is defined to include the revenue from services performed in Louisiana and any other gross income derived entirely from Louisiana sources, as well as income partially derived from Louisiana sources to the extent that services were performed in Louisiana.

5. Payroll Factor

The payroll factor is determined by computing the ratio of the amount paid by the taxpayer for salaries, wages, and other compensation for personal services rendered in connection with the production of net apportionable income in Louisiana, to the total amount paid everywhere for such services.

6. Property Factor

Not applicable.

F. Mississippi

Corporation income[27] and franchise[28] taxes are imposed on all corporations domesticated or qualified to do business in Mississippi, and on all corporations engaged in business or having sources of income in Mississippi. An income tax is imposed upon the entire net income of a resident corporation and the entire net income from property owned or sold and business, trade or occupation carried on in Mississippi by nonresident corporations. The existing tax rates are as follows: 3 percent on the first $5,000 of taxable income, 4 percent on the next $5,000 of taxable income, and 5 percent on all taxable income in excess of $10,000. Any license fee based on the gross revenue of gaming licenses paid in any tax year will be allowed as a credit against the income tax liability for that tax year. The gaming license fee uses a higher percentage on its assessment for gaming corporations with annual gross revenue greater than $600,000; consequently, the income tax liability for gaming corporations will generally be eliminated.

Domestic and foreign corporations that are engaged in business in Mississippi must pay franchise taxes. The franchise tax rate is $2.50 per $1,000, or fraction thereof, of value of capital used, invested, or employed in Mississippi. The minimum tax is $25. In determining the value of capital employed in Mississippi, the taxpayer shall apply to total capital the ratio which the real and tangible personal property owned in Mississippi and the gross receipts from business carried on in Mississippi bear to the total real and tangible personal property owned and gross receipts wherever located and from wherever received. Capital is defined as the combination of issued and outstanding capital stock, paid-in capital, surplus and retained earnings.

Corporations deriving income from business activity both within and outside Mississippi and taxable both within and outside Mississippi, must allocate and apportion Mississippi taxable net income or loss to determine the amount attributable to Mississippi. Mississippi has not adopted the MTC or the UDITPA. Mississippi law provides for the following: (1) any corporation that maintains or could maintain separate accounts is to determine Mississippi net business income through separate accounting unless that method is found as not reflective of actual income attributable to Mississippi; (2) corporations using separate accounting apportion net business income from sales of capital assets, interest dividends, rents and royalties on the basis of the sales ratio; and (3) nonbusiness income is allocated pursuant to statutory provisions resembling UDIPTA. If separate or direct accounting is not employed, one of the various statutory apportionment formulae is used, depending upon the type of business in which the taxpayer is principally involved.

While the nonbusiness income of foreign corporations is allocated within and outside Mississippi on the basis of statutory provisions, domestic corporations taxable in another state on their business income wherever derived allocate their entire nonbusiness income to Mississippi.

1. Business v. Nonbusiness Income

The Mississippi definition of business income is the same as under UDIPTA, and clarifies that all income that arises from the conduct of trade or business operations of a taxpayer is business income. All transactions and activities of the taxpayer that are dependent upon or contribute to the operation of the taxpayer's economic enterprise as a whole constitute the taxpayer's trade or business. All other income is nonbusiness. Items of net income designated as nonbusiness income are allocated directly to the states in the same manner as under the provisions of UDIPTA, except for capital gains and losses from the sale of intangible personal property which are allocated based upon commercial domicile or business situs.

2. Apportionment Formula

If the Commissioner finds that direct or separate accounting of Mississippi net business income does not reflect the true income attributable to property owned or business done in Mississippi, or if by reason of the unitary multistate activities of the corporation direct or separate accounting for Mississippi net business income is impossible, net business income is apportioned to Mississippi on the basis of apportionment formulae prescribed by regulation. Mississippi law provides various regulatory formulae, applicable to different types of businesses, for the apportionment of business income and also provides for various alternative methods of apportionment should the regulatory formulae prove to be unfair.

Because gaming enterprises are entitled to a credit against their income tax for the Mississippi gaming license fees and consequently would in general owe no income taxes, a more detailed explanation of Mississippi apportionment is not provided here.

G. Missouri

The Missouri corporation income tax[29] is imposed on all domestic corporations and on foreign corporations that are licensed to do, or are doing business in Missouri. The tax rate for tax years beginning after August 31, 1993, is 6.25 percent and the tax base is net income.

Corporations deriving income from business both within and outside Missouri must allocate and apportion Missouri taxable income to determine the amount attributable to and taxable in Missouri. Missouri has substantially adopted the MTC. Missouri law also provides that certain taxpayers may, in lieu of the MTC three-factor formula, elect to use a statutory single-factor apportionment formula with no differentiation between business and nonbusiness income. The factor is based upon sales or business transactions.

The three-factor MTC apportionment provisions are applicable to Missouri taxpayers who are taxable in another state and who also elect to allocate and apportion income. The election to use the Missouri single-factor apportionment formula or the separate accounting method is applicable to every taxpayer organized, authorized, or existing under Missouri law, licensed to do business in Missouri, or doing business in Missouri.

Missouri also allows for the filing of a combined report by members of an affiliated group of corporations if the group elects to file a consolidated Missouri return. Missouri law provides that an affiliated group of corporations filing a consolidated federal return may elect to file a consolidated Missouri return if at least 50 percent of the group's income is derived from Missouri sources. Taxpayers may choose to report on a separate accounting basis. If they so choose, they are required to petition the director of revenue for approval sixty days before the end of the taxable year.

1. Business v. Nonbusiness Income

The Missouri definition of business income is the same as contained in the MTC regulations. If the three-factor formula is elected, nonbusiness income is allocated within and without the state according to the same rules as under the MTC. Nonbusiness income is allocated outside Missouri in the same manner under the single-factor apportionment formula.

2. Apportionment Formula

Corporations receiving multistate income may elect to apportion their income through the use of the traditional three-factor formula, through the statutory one-factor formula, through separate accounting, or if none of the aforementioned methods fairly represent income, through the use of an alternative method as enumerated under Missouri law.

3. Sales Factor

Taxpayers electing to use the three-factor formula compute the sales factor in the same manner as under the MTC with the MTC regulations.

4. Payroll Factor

Missouri has adopted the MTC provisions regarding the payroll factor, and the Director of Revenue has promulgated a rule that incorporates the MTC regulations and is to be used as an interpretive guideline for those taxpayers electing to use the three-factor apportionment formula.

5. Property Factor

Missouri has adopted the MTC provisions regarding the property factor, and the Director of Revenue has promulgated a rule that incorporates the MTC regulations and is to be used an interpretive guideline for those taxpayers electing to use the three-factor apportionment formula.

6. Single-Factor Apportionment Formula

The single-factor apportionment formula is a fraction, the numerator of which is sales (or business) transacted wholly in the state plus one-half of the sales transacted partly within and partly without the state; the denominator is total sales everywhere.

H. New Jersey

The New Jersey corporation business tax[30] is a franchise tax measured by net income. New Jersey imposes its corporation income tax on corporations deriving income from New Jersey sources but that are not doing business in the state so as to be subject to the corporation business tax. The income tax is imposed directly upon net income from sources within the state. The New Jersey corporation business tax rate is 9 percent of the taxpayer's entire net income apportioned to the state. The minimum tax is $25 for a domestic corporation and $50 for a foreign corporation. The corporate income tax is 7.25 percent of the entire net income apportioned to the state. New Jersey also charges a business and income tax surtax of approximately 0.4 percent — the proceeds of which are used to cleanup hazardous waste.

The corporation business tax is a franchise tax imposed on corporations, not specifically exempted, for the privilege of having or exercising a corporate franchise in New Jersey, or for doing business, employing or owning capital or property, or maintaining an office in New Jersey. Domestic corporations become subject to the tax by the mere possession of a corporate franchise. Foreign corporations become subject by: holding a general certificate of authority to do business issued by the Secretary of State; by holding a certificate, license, or other authorization issued by any state department or agency other than the Secretary of State, authorizing the company to engage in corporate activity within the state; by doing business in the state; by employing or owning capital in the state; by employing or owning property in the state; or by maintaining an office in the state. Doing business includes all activities that occupy the time or labor of men for profit. Every corporation organized for profit and carrying out any of the purposes of its organization within the state is deemed to be doing business for the purposes of the tax.

The corporation income tax is designed to tax New Jersey source income of corporations that are not subject to the business tax. The tax is imposed on every domestic and foreign corporation, not exempted, deriving income from sources within New Jersey.

Multijurisdictional corporations apportion adjusted entire net income to determine the amount attributable to New Jersey. New Jersey has adopted statutory and regulatory rules following the general pattern of the MTC regulations and UDIPTA, but there are significant differences between New Jersey law and the uniform law. Most importantly, New Jersey considers all income apportionable.

New Jersey does not allow the filing of consolidated returns and has no provisions requiring or allowing combined reports.

1. Business v. Nonbusiness Income

New Jersey does not differentiate between business and nonbusiness income; all income is subject to apportionment.

2. Apportionment Formula

New Jersey has adopted a three-factor apportionment formula similar to the one provided in UDIPTA and the MTC regulations. The formula is termed the business allocation factor and it is a fraction — the numerator of which is the property factor plus the payroll factor plus the sales factor. The denominator is three, less the number, if any, of factors for which there is no denominator value. A factor is excluded only if both its numerator and its denominator are zero. The Director may adjust or the taxpayer may request an adjustment to the business allocation factor if it does not appear to properly reflect the activity, business receipts, capital, entire net worth, or entire net income of the taxpayer reasonably attributable to the state.

3. Sales Factor (Receipts Fraction)

New Jersey has not adopted UDIPTA nor the MTC regulations on the sales factor, which in New Jersey is termed the receipts fraction. However, the New Jersey rules are similar to UDIPTA. The numerator of the factor is receipts allocable to New Jersey, and the denominator is receipts within and without New Jersey. Receipts include all income included in the tax base. Income excluded from the tax base is excluded from the factor, and income included in the tax base in included in the factor.

4. Payroll Factor

New Jersey has not adopted UDIPTA nor the MTC regulations on the payroll factor, and the New Jersey rules differ in several respects from UDIPTA. The numerator of the New Jersey payroll factor is the total wages, salaries, and other personal service compensation within New Jersey. The denominator is the total of such compensation within and outside New Jersey.

Compensation is attributable to New Jersey if any of the following conditions are met: (1) the service is performed entirely in New Jersey; (2) the service is performed both within and outside the state, but the service performed outside the state is incidental to the individual's service within the state; (3) the service is not performed entirely in any state, but some of the service is performed in New Jersey and the base of operations or the place from which the service is directed or controlled is in the state, or the base of operations or place of direction or control is not in any state in which some part of the service is performed, but the individual's residence is in New Jersey; or (4) services are performed both within and outside the state and contributions are not required and paid with respect to such services under an unemployment compensation law of any other state.

5. Property Factor

New Jersey has not adopted UDIPTA nor the MTC regulations on the property factor and there are several differences between the New Jersey rules and UDIPTA. The numerator of the New Jersey factor is the average value of the taxpayer's real and tangible personal property within New Jersey. The denominator is the average value of such property within and outside New Jersey. As under UDIPTA, the New Jersey factor includes property owned, leased, rented, or used by the taxpayer. Properties under construction or not in service are specifically excluded. Value for this purpose is book value, less New Jersey depreciation and without deduction of any encumbrance on the property. Leased or rented property is valued at eight times its annual rental rate.

Average value is computed on a quarterly basis or, at the option of the taxpayer or the Director, on a monthly, weekly, or daily basis. A semi-annual or annual basis may be used, but, only if no distortion of average value results.

State and local taxation is increasingly more important and costly for businesses.

I. South Dakota

South Dakota imposes no tax based on income on general business corporations. However, a franchise tax measured by net income is imposed on every national banking corporation, production credit association, and saving and loan association doing business in South Dakota.[31] Because a gaming enterprise will generally not be subject to an income or franchise tax in South Dakota, this article will not cover any further details of the South Dakota income and franchise tax laws.

Planning Strategies to Minimize State Income and Franchise Taxes

During the 1980s, the federal government shifted the burden of funding many basic services to state and local governments. Accordingly, the increased fiscal responsibilities, coupled with generally stagnant or depressed economies, have caused state and local governments to increase their focus on methods of raising revenue. Almost without exception, the states have stepped up enforcement of the revenue laws already on the books. State and local tax administrators are becoming more aggressive in their interpretation of who is subject to taxes and the amount of taxes due.

As a result of the above, state and local taxation is increasingly more important and costly for businesses. This trend is expected to worsen. The Clinton Administration, for instance, has proposed that a significant portion of its health reform proposal be funded and supported by state and local governments. Consequently, planning and implementing strategies to minimize state franchise and income taxation will likely produce significant savings in the cost of doing business in those states which rely on that form of taxation.

A. Planning Early: Forming a New Corporation

As is true in most areas, the earlier state tax planning begins, the more like optimal strategies can be implemented. Incorporation itself can have significant state and local tax consequences. For instance, many new corporations are incorporated in Delaware even if their expected operations will be conducted elsewhere. Delaware is usually chosen for non-tax reasons — because its general corporate laws are relatively liberal in conducting corporate business.

Although no income tax is imposed by Delaware, the annual franchise tax imposed by the state can be significant. The annual franchise tax assessed by Delaware is the lower of a tax based on the number of authorized shares, or on the basis of "assumed par value capital." The "assumed par value capital" basis method is not available for shares issued without a par value. The annual Delaware franchise tax can range from $30 to $130,000 depending on the number of shares authorized. Thus, from a planning perspective, if non-tax considerations make incorporating in Delaware necessary, the number of authorized shares should be kept to a minimum.

The taxing rules of the state in which the corporation will actually do business should also be considered when deciding the on state in which to incorporate. In some states, the franchise tax on a domestic corporation (one incorporated in that state) is significantly different from the franchise tax on a foreign corporation (one incorporated in a different state or country).

B. Allocation and Apportionment of Income

A basic state income tax planning strategy is to allocate or apportion corporate taxable income away from high income tax rate states, to lower or non-income tax states.

As discussed above, a number of states require a corporation to report 100 percent of its income to the state unless the corporation has established the right to apportion and/or allocate its income. For example, if a corporation has all of its property and employees located in New Jersey and has gross receipts throughout the United States, it is required to report 100 percent of its income to New Jersey. A New Jersey gaming corporation may have all of its property and employees located in New Jersey and receive significant amounts of investment income. State tax savings may be generated by establishing a bona fide office in a nontaxing state to hold and manage its investment portfolio, since a significant portion of the company's receipts would not be reported to New Jersey or any other state.

C. Alternate Apportionment Factors

Most states permit a modification of the apportionment formula under certain circumstances. When the standard three-factor apportionment formula does not fairly reflect the taxpayer's activity in the state, the taxpayer is often permitted to request elimination, substitution or modification of one or more components of the regular apportionment formula. However, such modifications are usually permitted only with the permission of the state's taxing authority. Given the current pressures to generate state tax revenues, approval may be more likely when the modification would initially increase the tax due to the state, even if the long-term expectations would be for a lower tax.

D. Separate Accounting

An alternative to the modification of a state's apportionment factors may be the use of separate accounting for the corporation's in-state and out-of-state activities. Certain states (*e.g.*, Mississippi) actually favor the use of separate accounting over the use of the statutory apportionment formula. If the corporation can convince the state taxing authorities that a separate accounting more closely conforms to its financial accounting procedures and more fairly reflects the activity within the state, the taxing authority may allow a separate accounting to report state taxable income.

Generally, the following four criteria must be met to obtain approval for separate accounting:

1. The business conducted in the state must be unrelated to the business conducted outside the state;

2. Separate accounting must clearly reflect the amount of income earned within the state;
3. No significant intercompany transactions exist; and
4. Separate, independent management of in-state and out-of-state activities must be present.

E. Unitary Reporting

Although not always an option, and often a requirement, combined reporting may be used as a planning device. This method of reporting can permit a multistate company to offset income of profitable locations with the losses of unprofitable affiliates.

It should be noted that once a company files on a combined basis, it is often difficult or impossible to change to a separate basis of reporting. Thus, long term expectations of activity and income should be considered before this planning opportunity is utilized.

F. Use of Different Accounting Methods

Some states permit or require the use of different accounting methods as compared to federal tax requirements. Depreciation methods, for instance, are often permitted to differ from the federal method. In those states which limit or disallow loss carryforwards, an extended depreciation method for state purposes may permanently reduce state income tax if the depreciation deductions are deferred to offset future taxable income.

G. Formation of Real Estate Company

A potential tax planning strategy involves the formation of a separate corporation to hold real and (possibly) some personal property. The key benefit which may be realized is lowering the property factor in the three-factor apportionment formula. If property is separately owned in a subsidiary different from the operating corporation and the operating corporation leases the property rather than owns it, the apportionment factor can be favorably adjusted in many circumstances. This is because property owned is usually valued at original cost, net book value, or fair market value, while rented property is included in the property factor at eight times the net annual rent amount.

A potentially favorable non-tax benefit from this planning idea is that the company's equity in the real property may be shielded from the business liabilities of the operating company. Prior to forming a real estate subsidiary, however, consideration of long term results, potential transfer taxes, and recording fees must be made.

Conclusion

State income taxation most often mirrors federal taxation with few adjustments. Most states use federal taxable income as the starting point in deriving state taxable income and adjust for state differences. Each state's specific adjustments are beyond the scope of this article, but typical adjustments include depreciation, deduction for state taxes, net operating loss deductions and tax-exempt interest.

State income and franchise taxation can be enormously complex and very expensive for multistate business. The complexity and lack of uniformity in state laws will present significant opportunities to save state income taxes and preserve funds for operations, expansion, or return to the investor. Accordingly, a knowledgeable state income tax advisor should be consulted by Nevada-based companies when operations expand beyond Nevada's borders.

References

[1]Section 1.9 of Article 10 of the Constitution of the State of Nevada states: "No income tax shall be levied upon the wages or personal income of natural persons."

[2]Although Nevada does not impose a net income tax, it raises revenue from a variety of other taxes such as sales and use taxes, property taxes, gaming taxes, taxation of insurance premiums, mining taxes, licenses, and miscellaneous excise taxes.

[3]We have only considered Nevada-style gaming for this purpose. Accordingly, states which only permit horse or dog race betting, lotteries, and/or bingo are beyond the scope of this article.

[4]Pursuant to U.S. Constitution, art. I, § 8: "The Congress shall have the Power . . . [t]o regulate Commerce . . . among the several States . . . ."
[5]Freeman v. Hewit, 329 U.S. 249 (1946).
[6]*Id.* at 252 (citations omitted).
[7]Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).
[8]*Id.* at 289.
[9]Mobile Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425, 436 – 37 (1980).
[10]*See generally* Standard Pressed Steel v. Dep't of Revenue of Washington, 419 U.S. 560 (1975); Shaffer v. Vaner, 252 U.S. 37 (1920).
[11]Cincinnati Milacron Co. v. Hardesty, 290 S.E.2d 902, 904 (W. Va. 1982).
[12]Under Internal Revenue Code § 195, start-up expenditures (except for interest, taxes, and research and development expenditures) are not deductible for federal income tax purposes, but rather must be capitalized and amortized over at least 60 months beginning at the start of business.
[13]Pub. L. No. 86 – 272, §§ 101 – 104; 73 Stat. 555, 15 U.S.C. § 381 – 384 (1959).
[14]Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co., 112 S. Ct. 2447 (1992).
[15]*Id.* at 2455.
[16]*Id.* at 2456.
[17]*Id.* at 2458.
[18]*Id.* at 2457.
[19]Container Corporation of America v. Franchise Tax Board, 463 U.S. 159 (1983).
[20]*Id.* at 184.
[21]*See generally* COLO. REV. STAT. §§ 39 – 22 – 300.1 to –330 (1982 & 1993 Supp.).
[22]*See generally* ILL. ANN. STAT. ch. 35, §§ 5/201 et seq. (Smith-Hurd West 1993 & Supp. 1993).
[23]*See generally* IND. CODE ANN. §§ 6-2.1-1-2. et seq. (Burns 1989 & 1993 Supp.).
[24]*See generally* IOWA CODE ANN. §§ 422.32 – .41 (1990 & 1994 Supp.).
[25]*See generally* LA. REV. STAT. ANN. §§ 47:287.2 – .785 et seq. (West 1990 & 1994 Supp.).
[26]*Id.* §§ 47:601-:617.
[27]*See generally* MISS. CODE ANN. §§ 27 – 7 – 1 et seq. (1991 & 1993 Supp.).
[28]*Id.* §§ 27 – 13 – 1 to –23.
[29]*See generally* MO. ANN. STAT. §§ 143.071, .431 – .471, 147.010 – .120 (franchise tax) (Vernon 1976 & 1993 Supp.).
[30]*See generally* N.J. STAT. ANN. §§ 54:10A, :10B, :10E (1986 & 1993 Supp.).
[31]*See generally* S.D. CODIFIED LAWS ANN. §§ 10 – 43 – 1 to –77 (1989 & 1993 Supp.).
[32]Reproduced with permission from MULTISTATE CORPORATE INCOME TAX GUIDE, published and copyrighted by Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, Illinois 60646.

APPENDIX—SALES FACTOR[32]

Income Type	UDIPTA Rule	MTC Elaboration or Modification
1. Sales of tangible personal property		
a. What is in factor	All gross receipts from sales	Returns and allowances excluded sales tax, finance charges included
b. Numerator test	Receipts from sales to purchasers in state; if seller not taxable in destination state, receipts assigned to state of shipment; receipts from government sales assigned to state of shipment.	Defines "taxable in another state"; elaborates on destination and throwback test for various types of transactions.
2. Interest and dividends		
a. What is in factor	All appropriate interest and dividend included in factor. U.S. bond interest excluded by federal law.	Income that cannot be attributed to any particular income-producing activities excluded; mere holding of intangible not an income-producing activity. Also excluded are insubstantial receipts from occasional activities.
b. Numerator test	Assigned to state where income-producing activity, or greater proportion, occurs.	"Mere holding" not in income-producing activity.
3. Real property, rents, and royalties		
a. What is in factor	Gross apportionable rents and royalties.	Insubstantial receipts from incidental or occasional transactions excluded.
b. Numerator test	Assigned to state where income-producing activity occurs.	State of income-producing activity where property located.
4. Tangible personal property rentals		
a. What is in factor	Gross apportionable rental income.	Insubstantial receipts from incidental or occasional transactions excluded.
b. Numerator test	Assigned to state where income producing activity occurs.	State of location is where income-producing activity occurs; time-spent ratio used for movable property.

Income Type		UDIPTA Rule	MTC Elaboration or Modification
5.	Royalties from patents and copyrights		
	a. What is in factor	Gross apportionable royalty income.	Income not attributable to any particular income-producing activity excluded; insubstantial amounts from occasional transactions excluded.
	b. Numerator test	Assigned to state where income-producing activity occurs.	
6.	Capital gains and losses		
	a. What is in factor	Gross proceeds from sale included.	Substantial amounts of gross receipts from occasional sale of fixed asset excluded; insubstantial receipts from occasional transactions excluded; receipts from sales of intangibles excluded if receipts not attributable to any particular income-producing activity.
	b. Numerator test	Assigned to state of destination if tangible property, assigned to state where income-producing activity occurs if real property or intangible.	Real property receipts assigned to state where property located; no rule on intangibles.
7.	Income from services		
	a. What is in factor	Gross apportionable service income.	Income from occasional or incidental transactions excluded.
	b. Numerator test	Assigned to state where income-producing activity or greater proportion of activity occurs.	Provides a time-spent ratio for multistate services.
8.	Interest on accounts receivable		
	a. What is in factor	All apportionable interest.	Includes interest, service charges, carrying charges, time-price differentials earned on accounts receivable. Applies destination test.
	b. Numerator test	Unclear if destination test or income-producing activity test applicable.	