

May 7, 2010

## House Judiciary Committee Holds Hearing on State Taxation and the Role of Congress in Developing Apportionment Standards

On May 6, the House Judiciary Subcommittee on Commercial and Administrative Law (CAL), chaired by Representative Steven Cohen (D-TN), held a hearing on state income taxation to explore what role, if any, Congress should play in developing apportionment uniformity. Three witnesses were invited to testify: John A. Swain, Professor of Law, University of Arizona Rogers College of Law; James R. Eads, Jr., Executive Director, Federation of Tax Administrators (FTA); and Daniel B. De Jong, Tax Counsel, Tax Executives Institute, Inc. (TEI). A consensus was reached among the three witnesses that uniformity in apportionment methods was desirable, but they differed in their opinions on what role the Federal Government should play in developing uniform apportionment standards.

Professor Swain testified that uniformity in taxation of multistate businesses is an important goal. He stated that, given the current disparity among states' apportionment laws, Congress now has a "predicate for action" on this issue. Without uniform rules, there is a risk of both over-taxation and under-taxation of companies that conduct business in multiple states. Professor Swain noted that it is unlikely states will cooperate and adopt uniform apportionment rules voluntarily. As a result, he concluded that a prima facie case exists for federal intervention because the states' failure to coordinate their apportionment rules has resulted in (1) the risk of multiple taxation of interstate commerce and (2) greater tax compliance burdens on interstate business than would be present under uniform rules.

FTA Executive Director Eads focused on the idea that apportionment rules are best left to the states. Mr. Eads testified that state tax agencies are consistently confronted with issues related to state corporate taxation, and these agencies have the knowledge, experience, and expertise to create workable solutions to apportionment issues. He also emphasized that a rapidly changing economy necessitates state control of the apportionment rules. He expressed concern that federal involvement would prove to be burdensome and inflexible in responding to changes in the economy and in addressing how and where corporate income is generated and should be taxed. However, when Congresswoman Judy Chu (D-CA) mentioned the continued issue of over-taxation and under-taxation without uniform apportionment, Mr. Eads conceded that this problem will persist absent federal involvement.

According to TEI Tax Counsel De Jong, a consensus on a uniform apportionment standard would be difficult to accomplish but could only be done with involvement by the Federal Government. Mr. De Jong noted that changes to the current multijurisdictional apportionment rules would result in both winners and losers among multistate businesses. Mr. De Jong noted that establishing a uniform structure without federal involvement would be difficult because each state would have its own idea of what a uniform structure would look like. The challenge for the states and possibly Congress is to find a balance between the states' legitimate need for revenue and taxpayers' relief from double taxation.

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**Sutherland Observation:** It is not clear what triggered the Subcommittee’s interest in state income tax apportionment. While no bill pending is in Congress and no constituency group has publically pressed for such a bill, it is possible that the hearing was scheduled to educate members on the problems facing business and the inability of states to provide true uniformity. Given that the Multistate Tax Commission (MTC) has begun an ambitious project to revise that part of the Multistate Tax Compact that incorporates Uniform Division of Income for Tax Purposes Act (UDITPA), taxpayers should consider whether a better solution would be provided by federal legislation creating an apportionment framework.



Please contact Sutherland if you are interested in learning additional information about the effort to oppose taxation of electronically delivered products and services.

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