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State Tax Planning — What's Left?

by Charles F. Barnwell Jr.

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Disclaimer: The author makes no representation or recommendation regarding planning strategies described in this article, and further makes no representation regarding their ethics, legality, or effectiveness.

Despite the title of this article, multistate companies continue to have significant opportunities to reduce their state taxes. Although many of the traditional tax planning strategies no longer result in meaningful savings, new opportunities arise as state tax laws change and the business environment evolves. The old game of planning, analogous to the simplicity of checkers, has evolved into a complex chess game. But neither side — state or taxpayer — can yet declare checkmate.

To understand the continuing opportunity, consider the unalterable reality. State tax planners continue to have the "multifactor": 50 unique and competing state tax regimes, coupled with "multi" levies, including income, franchise, sales and use, unemployment, gross receipts — just to name the more common. The multifactor enables the state tax planner to play one state against another, for example, using separate filing versus combined filing states, or filing in a state without an income tax versus a state with one. "Multi" spans the dimensions of entity selection to include subchapter S and C corporations, limited liability companies, regarded and disregarded, and partnerships. There are multiple apportionment regimes, often within a single state, applied to increasingly diverse business transactions and environments. Competition among states includes retaliatory measures and competing economic development programs that give tax planners a way to negotiate the lowest tax outcome.

It is axiomatic that companies evolve in a less than optimal manner, from a state tax standpoint. Companies grow in number of jurisdictions and in organizational complexity. The objective of sound state tax planning is to create the optimal structure — that is, the lowest legal state tax liability for the business enterprise — without adversely affecting operations. Therefore, though the state planner's chess pieces never change, the opportunities and moves evolve.

To understand what's new about state tax planning, it is necessary to review the past state of play; many of the chess pieces are still in use, while some offer little, if any, return. The history of state tax planning has been one of parry and counterparry. As the planner develops strategies, the states react, creating obstacles to those strategies until the next strategy evolves. After a discussion of the history of state tax planning, the author will explore the current environment, the ways taxpayers are adapting to greater state tax challenges, and the likely next chapter in the saga.

Looking Back — Three Generations of Planning

Simpler times called for simpler measures. The first generation, an era lasting through the mid-1980s, may be described as one of blocking and tackling. State tax planners learned to create nowhere income using Public Law 86-272 and using origination shipment in states without throwback. Planners also used allocation, or nonbusiness income, more frequently. Over time those strategies lost their teeth as states began chipping at the edges of "solicitation" to narrow the applicability of P.L. 86-272. States also fought the good fight toward full apportionment either through the courts or with legislation (see Florida's due process requirement for nonbusiness income[1]) until it became common to hear the state tax planner advise his client that, as a practical matter, there is no such thing as nonbusiness income. Ironically, with the increasing weight on the sales factor, which will be discussed further, the opportunity to use nowhere income has in some ways withstood the test of time and even grown. However, as states adopt the unitary method and switch (back) to *Finnigan*,[2, 3] the nowhere income strategy is a double-edged sword. Moreover, in *Wrigley*, the U.S. Supreme Court gave greater clarity to what taxpayers may and may not do under P.L. 86-272.[4]

Second Generation — Era of the One-Offs

State tax policy has an ironic twist: States purport to strive for uniformity while at the same time devise competing tax regimes. Without shrewd planning, that mixed message from the states can lead to an overapportionment of income. It is unfair for states to push for "full apportionment" on such a playing field when overapportionment can often occur.[5] Taxpayers seldom have a reasonable opportunity to avoid overapportionment, but states are constantly auditing and stamping out underapportionment.

> ***The opportunity to use nowhere income has in some ways withstood the test of time and even grown.***

Consider the evolution of sales factor weighting[6] — a circumstance often leading to overapportionment. It would seem that uniformity is a myth because state tax autonomy inherently leads to conflicting rules, an overt contradiction to the theory of uniformity. The multistate taxpayer's only recourse is to play the game and continue to strive for nowhere income. In that way, at a minimum, the diligent avoid overapportionment and may even, occasionally, win a chess piece or two.

As a natural reaction to that less than level landscape, taxpayers began developing "one-off" state tax planning strategies in the second generation of planning. That evolution began occurring in the late 1980s. The classic strategy involved the isolation of various intangibles in intangible holding companies. Delaware became the jurisdiction of choice given section 1902(b)(8), a Delaware statute that gave planners a powerful mechanism to shift income out of separate-filing states to Delaware holding companies with no tax.

In response, state auditors began using concepts analogous to IRC section 482, economic nexus, and combination to negate the savings from intangible holding companies. Two seminal cases, *Geoffrey*[7] and *Aaron Rents*,[8] in the mid-1990s tell the tale of sordid lessons learned by both sides in that phase of the struggle between states and businesses.

Taxpayers began experimenting with variations of the theme, planning around section 482 challenges with transfer pricing specialists. Taxpayers' attorneys developed good business purposes outside tax savings for isolating intangibles. As the doctrine of economic nexus grew, so did the bitterness of the debate.

In this second generation of planning, companies also used internal leveraging, placing debt held by holding companies located in tax haven jurisdictions such as Delaware and Nevada into operating companies with nexus-creating activities. Another one-off strategy, similar to the intangible holding company and internal leveraging, was use of the management company.[9] In its most vanilla wrapper, the strategy worked well for companies with their seat of management located in a unitary state. The strategy involved drawing a corporate circle around the management activity, and the use of management fees to concentrate income in the unitary-based management company. In those cases, the management company would often become the "host" or "income concentration point" to secure additional savings. To calculate the net effect of those savings, a taxpayer could develop a simple savings formula as follows:

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[1] *See, e.g.*, Fla. Stat. section 220.03(r). Florida's idea is to allow for allocation only when apportionment of the income item violates the due process clause of the U.S. Constitution.

[2] California Gov. Arnold Schwarzenegger (R) signed a budget bill on February 20, 2009, that reinstates the rule of *Finnigan*.

[3] *Appeal of Finnigan Corp.*, 88-SBE-022-A, California State Board of Equalization.

[4] *Wisconsin Department of Revenue v. William Wrigley Jr. Co.* 505 US 214, 112 S Ct 2447, 120 L Ed 2d 174.

[5] Overapportionment occurs when the taxpayer's overall factors add up to more than 100 percent when summed.

[6] *See* Charles F. Barnwell Jr., "The Sales Factor: Top Five Issues Taxpayers Need to Consider," *Journal of MultiState Taxation and Incentives*, February 2008.

[7] *Geoffrey, Inc. v. S. Carolina Tax Commission*, 437 SE2d 13, 313 SC 15.

[8] *Aaron Rents, Inc. v. Marcus E. Collins*, Civil Action File D-96025, Georgia Superior Court Fulton County, June 27, 1994.

[9] For a novel and controversial attempt at blending intangibles and management, see *WorldCom, Inc. et al., Debtors*, U.S. Bankruptcy Court S.D.N.Y., third and final report by Dick Thornburgh, bankruptcy court examiner (Chapter 11 case number 02-13533(AJG) (Jan. 26, 2004)), in which planners attempted to create an asset based on "insight of management").

Sum, for each separate filing state, the product of:
Intercompany "base shift" (that is, intercompany royalties, management fees and interest)
X Separate-filing state apportionment factor
X Separate-filing state rate
= State tax savings

Another similar strategy, designed to minimize tax on foreign dividends, involved (or involves) the creation of a host entity, located in a unitary state or tax haven state, for the ownership of controlled foreign corporations. In that manner the taxpayer could channel foreign dividends away from separate-filing states.

Third Generation

Third-generation state tax planning generally involved comprehensive process-driven state tax minimization planning projects led by teams mainly from large accounting firms and characterized by:

- use of combined return (or consolidated return states such as Florida (elected) and Virginia) state apportionment footprints for income concentration; and
- base shifting away from separate-filing states, as well as East/West splits — a strategy using the unitary-state-dominated western United States as the "income concentration point."

The above structures were used in concert with base shifting of management fees; intangible asset income such as royalties, and internal leveraging; or the use of internal debt (back to back or internally created).

Ever greater numbers of large companies undertook such planning, and many companies achieved significant reductions in their overall state income tax burdens. In this third generation, planners developed new strategies, some suited to particular industries and others suited to just about any company with a decent multistate apportionment footprint. The latter included:

- 80/20 companies;
- captive real estate investment trusts;
- regulated investment companies;
- subchapter T cooperatives;
- payroll leasing companies;
- the use of "Finnigan sales companies" or "Joyce companies";
- purchasing companies or buy/sell arrangements; and
- state tax planning using foreign attributes with entity-class hybridization.

The cumulative effect of those third-generation strategies led to a wave of state counterparries. First, states began enacting addback rules[10] — laws in separate-filing states requiring operating companies to add back intercompany expenses, primarily related to interest and intangibles, paid to related companies. Other states adopted the unitary method,[11] while still other states — Texas, Michigan, and Ohio — enacted something similar to a gross receipts tax. There are now fewer than 20 separate-filing states (see Exhibit A, next page), and of those, only 9 have no addback.[12] The combination of addback statutes and the drift toward the unitary method has, as a practical matter, put the base shift planners out of business. Moreover, in some states the reaction has been to enact increased penalties and sniff out such projects. In the context of base shifting, the real answer to the question "What's left?" is nothing — or at best, very little.

The New Generation — What Really Is Left?

To answer that question, the author must get a bit philosophical. Those looking for new planning ideas must decide whether the glass is half full or half empty, and for those that have witnessed all the chaos over those earlier generations of planning, they may wonder what the glass had in it in the first place.

> ***There probably are no more elegant plays that save taxes in multiple states with one change to structure.***

That said, there probably are no more elegant plays that save taxes in multiple states with one change to structure, such as the classic Delaware holding company. And, as noted, the states have thoroughly eliminated base shifting. Thus, planners are developing a new generation of planning. But the fundamentals — the multifactor, and the fact that complex corporate families evolve in a less than optimal way from a state tax perspective — will perhaps never change. The principle remains: Is

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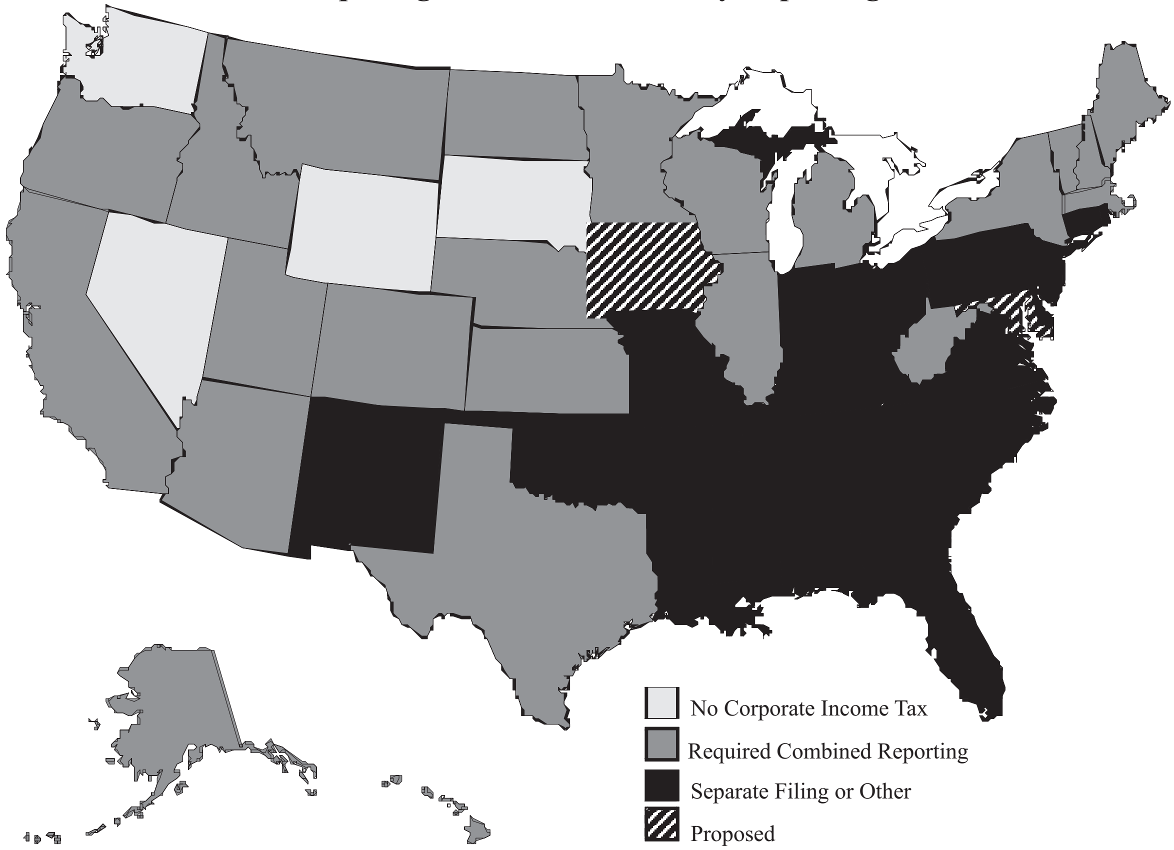
[10]Charles F. Barnwell Jr., "Addback: It's Payback Time," *State Tax Notes*, Nov. 17, 2008, p. 437, *Doc 2008-21539*, or *2008 STT 223-1*.

[11]For example, Wisconsin, a separate-filing state "hold out," finally caved and adopted combined reporting. On February 19, 2009, Gov. Jim Doyle (D) signed the economic recovery bill, SB 62. As part of a comprehensive economic plan, this legislation created a variety of income tax and sales tax changes.

[12]Separate filing states (i.e., states not requiring mandatory combination) without an addback intangibles expenses paid to related parties include Delaware, Florida, Louisiana, Missouri, New Mexico, Oklahoma, Pennsylvania, South Carolina, and West Virginia. Tennessee is a separate filing state (except for certain companies such as in the financial services industry) without an addback of intangibles expenses paid to related parties but requires addback if a taxpayer fails to disclose related-party intangible expenses.

Exhibit A.
Requiring Combined or Unitary Reporting



there a legal structure that optimizes the multistate profile (that is, a structure that legally and ethically minimizes state tax liabilities) without adversely affecting operations? And while the basic idea is the same, the approach and tools are different.

The emerging new and different tax planning techniques are more complex than strategies of earlier generations and have the following characteristics:

- planning ideas and concepts are often more industry-specific;
- planning is sensitive to the accounting requirements of Financial Accounting Standards Board Interpretation No. 48 (now codified as FASB ASC 740), "Accounting for Uncertainty in Income Taxes," and its implications;
- apportionment factor planning has transcended base shifting as a critical fulcrum;
- the states continue to offer different, larger, and more competitive incentives;
- "portability" has replaced the "apportionment footprint";
- the world is becoming smaller and there are state tax planning ideas in the context of international operations;
- cyberspace has profound implications for where transactions take place and to what jurisdictions the taxpayer should attribute apportionment factors; and
- the best offense may be a good defense for many companies that continue to operate base-shifting-type planning in a world in which such planning has been rendered ineffective at best — and can actually now lead to real exposure.

Planning Ideas: More Industry-Specific

The Multistate Tax Commission has enacted model apportionment regulations for eight industries: airlines, construction contractors, financial institutions, railroads, telecommunications and similar services, trucking companies, television and radio broadcasting, and publishing. Although this article does not delve into the details of those industry-specific regulations, the state tax planner can benefit from a thorough understanding of those rules if the client's business belongs to one of those industries.

If those specialized rules result in a reduced tax burden, perhaps the "planning" means simply to use them when possible. While many states have not enacted the specific MTC rules, the tax planner may be in a good position to petition the state to use those rules under MTC Reg. IV.18 (Uniform Division of Income for Tax Purposes Act section 18).

Alternatively, if those industry apportionment rules lead to an increase in tax, the planner should consider the nature of the client's income, and the possibility of bifurcating operations so that specialized apportionment rules apply only to operations within the specialized industry. Often, the taxpayer has diverse sources of income within these industry groupings. For example, telephone companies may have income from selling phone equipment. Or home builders may have income from the sale of real property held for construction projects. If that other income is earned by the entity that does construction services, would it make sense to transfer the gains from the sale of real property to an entity to avoid the contractor apportionment rules on that income?

FIN 48 — Sensitive Planning

FIN 48 has had a profound effect on state tax planning. The interpretation[13] requires public companies (and some private companies[14]) to hold reserves for tax uncertainty. In quantifying the reserves for uncertainty, the financial auditor must assume that the state tax auditor has all the facts and law at his disposal. That assumption forces the state tax planner to plan as though an omniscient auditor is sitting beside the planner and will challenge every position that is less than highly certain. Given the ambiguity inherent in state tax planning, as evidenced by the discussion above regarding the evolving generations of parries and counterparries, FIN 48 creates a new model: Unless the planning yields a highly certain result, there can be no financial statement recognition for the uncertain planning.

If there can be no financial statement benefit for anything but state tax planning that yields a highly certain result, why bother doing any kind of planning that carries any level of uncertainty? FIN 48 puts the state tax planner in an interesting and somewhat paradoxical position. While for accounting purposes one must assume that an omniscient state auditor is on the case with all the facts and authority known, that assumption is unrealistic in the real world. While the financial statement auditor must make that unrealistic assumption, *the state tax planner does not.* Many state tax planning strategies are inherently uncertain. That does not make them illegal. FIN 48 should not relieve the state tax planner of his responsibility to plan responsibly and to ethically plan for tax reductions when reasonable but different interpretations of the law exist. Ambiguity still exists in the state tax arena, particularly given the "multifactor" environment discussed above. It is the responsibility of the state tax planner to know the alternatives and press for taxpayer advantage when legal and ethical.

> ***Many state tax planning strategies are inherently uncertain. That does not make them illegal.***

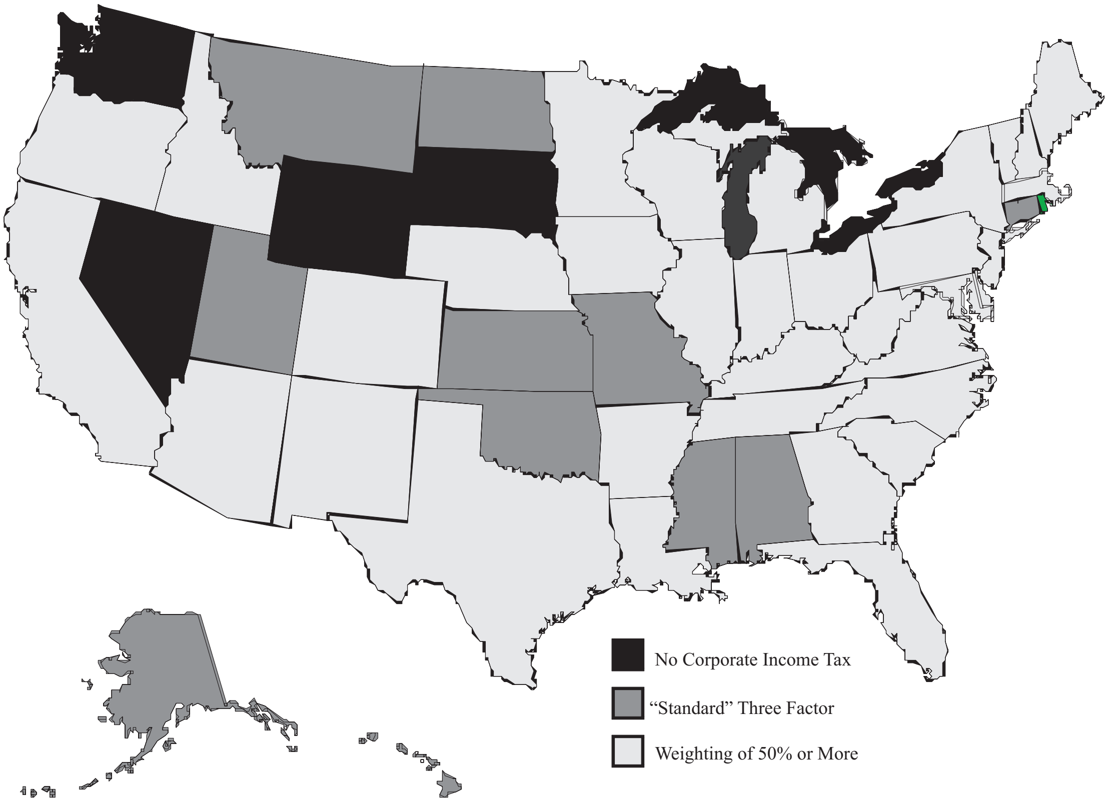
But if planning with FIN 48 uncertainty has no financial statement benefit, why do it? There are several reasons. First, assuming the taxpayer is successful, even in some jurisdictions but not others, that planning generates cash flow, even if the company has established a corresponding FIN 48 reserve for the financial statement benefit. Second, if the tax planning in question is based on filed state tax returns, the company may reverse FIN 48 reserves associated with that planning after the legal period for the state tax authority to issue an assessment has expired. (From an accounting standpoint, the reversal is accomplished by debiting the reserve and crediting tax expense.) Therefore, tax planning will generate a financial statement benefit — but only after the statute has expired.

It makes sense to do state planning — even if the planning takes a few years to "mature" into financial statement earnings. But what about state tax planning involving nonfiling? For example, a company may carefully plan its business activities to avoid nexus and the necessity of filing a return. That is typically accomplished by carefully monitoring sales activities and maintaining a tight rein on the activities of multistate sales people. In most cases, the effort focuses on planning to operate within the boundaries of P.L. 86-272. However, this type of planning presents a unique FIN 48 issue. If there is uncertainty regarding nexus, the company may have to establish a reserve in some states where it claims immunity from income tax under P.L. 86-272. That reserve is based on a nonfiling position. Unlike the foregoing discussion regarding

[13]FASB Interpretation No. 48, an interpretation of Financial Accounting Standard No. 109, "Accounting for Income Taxes."

[14]FASB Accounting Standards Update Number 2009-06, September 2009, clarifies the effective date and required disclosure for private companies.

Exhibit B.
Giving Double or Greater Weight to Sales Factor



reversals of FIN 48 reserves based on tolling statutes of limitations, in “no nexus” fact patterns the statute of limitations never tolls — because the taxpayer never files a return to trigger the statutory period. In such cases there is an unlimited year-on-year build-up of FIN 48 reserves. In theory, the FIN 48 reserve could last forever with interest, and possibly include penalty accruals mounting year over year ad inifinitum.

But even that kind of planning seems to make sense, because most states have voluntary disclosure programs. Many states publish clear lookback rules for that purpose. If a taxpayer has a no-nexus position (with uncertainty) but facts later change and nexus becomes more apparent, the taxpayer may have the opportunity to reverse FIN 48 reserves for the prevoluntary disclosure period years.

Example:

> Taxpayer for 2001 to 2007 took the position that it had immunity under P.L. 86-272. However, because some activities by salespeople were deemed to exceed solicitation based on some states’ interpretations, the company booked a reserve as if it had nexus in some destination states. Because the taxpayer never filed returns, the reserve must remain on the books, with the accrual of interest and possibly penalties. However, in a typical state with voluntary disclosure, the taxpayer may have the opportunity to limit the lookback period to three years, or 2XX7, 2XX6, and 2XX5. The state would “forgive” years 2XX1 through 2XX4. Thus, that uncertain state tax plan resulted in a permanent reduction in taxes and a reversal of some of the FIN 48 reserve established for this purpose.

Finally, uncertainty that is more likely than not under FIN 48 may result in partial recognition. Thus, while the quantitative aspects of post-FIN 48 planning may result in a smaller or deferred financial statement benefit, reasons still exist for that planning despite the bite of FIN 48.

Apportionment Factor Planning Has Transcended Base Shifting

As noted above, the benefits of base-shifting strategies emerging in the second and third generations of state tax planning have significantly eroded because of several factors, most notably:

- more states require unitary combination;
- more states have enacted gross receipt or margin tax levies; and
- states have enacted addbacks of intangible expenses paid to related parties.

While this erosion has taken place, the states have placed more and more weight on the sales factor (see Exhibit B). From a planning perspective, those trends have two significant implications. First, the benefit of shifting income from one entity to another has almost disappeared. Second, the ability to implement powerful apportionment planning with a focus on the sales factor has emerged as the new fulcrum.

Of the three standard apportionment factors — payroll, property, and sales — the sales factor is arguably the most malleable. The payroll factor, while in some respects malleable, is fundamentally based on where employees actually live and work. The same observation may be made of the property factor: Property, generally, is where it is located, and not easily changeable.[15] The sales factor, however, is the most portable of the three factors. Combining its portability with its increased weighting arms the state tax planner with a contemporary state tax planning weapon.

Consider the following planning opportunities:

- P.L. 86-272. The federal law has greater applicability today because the sales factor has so much more influence over the apportionment factor. In this regard Internet sellers and direct marketers have more valuable opportunities to take advantage of P.L. 86-272.
- *Finnigan*. There is good news and bad news as California goes back to *Finnigan*. Now, if any member of a unitary group has nexus in California, all members of the group, with or without nexus, must "numerate" California sales. The good news is that companies selling out of *Finnigan* states may, with good business purpose, provide nexus footprints for entities in other states, and thereby possibly avoid throwback in *Finnigan* states.
- Drop shipments and dock sales — where is the sale? A drop shipment occurs when the seller of goods directs his manufacturer to directly ship the goods to the seller's customer. From the seller's perspective a logical interpretation would be that the seller's sale for sales factor purposes is assigned to the state in which the seller's customer resides. But what about the manufacturer? Did the manufacturer sell to his customer (that is, the seller), or to his customer's customer? And to which state should the sale be attributed?
- Dock sales occur when the purchaser picks up the goods at the seller's dock. Where is the sale? The seller's dock or into the state where the seller takes the product? What if the seller takes the goods to his warehouse and distributes them from there? Cases go in various directions on this point.[16] And while this issue in the past had some impact, now, with heavy sales factor weighting, this issue could literally define a taxpayer's state tax position.

The States Continue to Compete

A thorough discussion of incentives is beyond the scope of this article. The point, however, is that in this era of state and local fiscal strife, the competition for business investment and jobs has only grown. The irony is that one could argue the incentive business is a zero sum game for state and local governments. However, we appear to be a long way from states getting together on issues of competition.

> ***The benefit of shifting income from one entity to another has almost disappeared.***

In the meantime, state tax planners should understand not only statutory credits, but the myriad ways states offer payroll tax withholding offsets for jobs, training, outright dollar grants, and other, sometimes unpublished, incentives. Another important observation is that in today's world of incentives, some state and local jurisdictions may offer incentives merely to retain some jobs and invest in plant development.

The Context of International Operations

There are some interesting contradictions in the field of international/state taxation: UDITPA includes a foreign country in its definition of state,[17] but P.L. 86-272 applies only to interstate commerce. Also, federal income tax treaties generally extend

[15]There are notable exceptions to that premise. For example, in the financial services area, intangible property, often included in the property factor, can "exist" in any number of "locations," including commercial domicile, where a loan is negotiated, and so forth.

[16]*Department of Revenue of the State of Florida and Gerald A. Lewis, as Comptroller of the State of Florida, Appellants v. Parker Banana Co., a Florida Corporation, Appellee*, District Court of Appeal of Florida Second District, Dec. 24, 1980, 391 So 2d 762; *also see McDonnell Douglas Corp. v. FTB*, B064073, California Court of Appeal, July 7, 1994, Second Appellate District, 26 Cal App 4th 1789, 33 Cal Rptr 2d 129.

[17]UDITPA section 1(h).

only to federal income tax issues (that is, the states are technically not bound by U.S. tax treaties), but state taxable income is typically based on federal taxable income. Understanding those contradictions will enable the planner to avoid state tax traps and take advantage of planning opportunities.

For example, what are the throwback implications of sales into foreign jurisdictions? What assumptions should the planner make regarding whether his client is subject to tax, and does throwback apply in any event? The answer to those questions is a resounding maybe. The planner has several possible outcomes and should carefully examine the throwback implications, if any, in the state of shipment origination. Some states may argue that the nexus standard to use is based on P.L. 86-272. However, if P.L. 86-272 applies only to interstate commerce, does that standard make sense? What about sales into a state from a foreign jurisdiction? Does the state apply a quid pro quo rule, so that in-bound foreign sales are protected under P.L. 86-272? Some states may require that the taxpayer actually pay tax in the destination state to avoid throwback. Does payment of tax to a foreign jurisdiction satisfy that requirement? Is the tax imposed by the foreign jurisdiction an income tax? The tax planner should look for the opportunity to avoid throwback in those circumstances, or to avoid sales factor numeration in the case of sales into the United States.

> ***What are the throwback implications of sales into foreign jurisdictions?***

Because states are not bound by the U.S. tax treaty system, the tax planner has historically had a convenient shortcut: Because most states start the calculation of state taxable income with federal taxable income, as long as the foreign entity has no obligation to file Form 1120-F, there is no state taxable income. Thus, by extension, as a practical matter, states are to that extent honoring the U.S. tax treaty. However, many states do not start with federal taxable income. Also, more states are creating gross receipt levies that are not based on federal taxable income.

Cyberspace

Which jurisdiction may claim the sales factor numeration in the following examples?

- Joe downloads music from iTunes while flying from Atlanta to San Francisco using an Internet service provided by the airline;
- Sue, who lives in Maryland, is in London and downloads an e-novel from a bookseller based in New York;
- John, a resident of Louisiana, applies for a credit card loan from a bank in Texas; and
- XYZ Corp. purchases a multimillion-dollar software package. The ABC Software company provides a key, and XYZ downloads the software to a server in Nevada. Later, XYZ transfers a copy of the software to headquarters in Georgia.

Those are only a few of the myriad new issues confronting the state tax planner. Not only do the answers to those questions have a significant bearing on which state gets the sales numerator, but they also have important implications in the sales and use tax arena.

The tax planner has some dry gunpowder here, in that the facts driving apportionment are up for grabs. He also faces the prospect of multiple taxation. Consider the sale to Joe. Is the music vendor's sales factor numerator in Georgia? California? How would the vendor make that determination? In contrast, in a traditional transaction involving the sale of tangible personal property, the taxpayer would report the sale in the state to which the record or CD was shipped. How does P.L. 86-272 enter the equation? Would the state consider downloaded music tangible personal property?

In the case of XYZ Corp., is software tangible personal property? States are all over the board on that issue. Where is ABC's sale for apportionment factor purposes? Does XYZ include the software in its property factor? If so, in what state?

This is bizarre, but in today's world, a typical fact pattern presents the state tax planner with some unique planning concepts. For example, ABC has the opportunity to "deliver" software to its own server (in the new economy, "server" = "dock") for XYZ to pick up — a cyber-drop-shipment of sorts. XYZ has the opportunity to keep the master copy in its own server farm in Nevada — a state without an income tax — to create nowhere income in the property denominator.

The Best Offense

One of the most important roles state tax planners have is taking defensive positions. Because of the states' counterparries, such as combination reporting and addbacks, a tax planner's use of past structures can now lead to double taxation. That possibility is further exacerbated by FIN 48.

Example:

> Company DEF has a traditional Delaware holding company with trademarks. The operating company primarily operates in the southeast in separate-filing states with addback rules. DEF's operating company must add back royalties, negating DHC's tax benefit. Moreover, the DHC has economic nexus.

In this example, the states may not attempt on audit to tax the holding company and operating company on the same intangible income, but that is not guaranteed. And because that is not guaranteed, the financial statement auditor will insist on a FIN 48 reserve for both sides of the transaction in certain cases.

State tax planners in this decade, particularly since the introduction of FIN 48, often have to unwind the planning done in the 1990s, primarily to avoid double taxation.

Thus, state tax planners in this decade, particularly since the introduction of FIN 48, often have to unwind the planning done in the 1990s, primarily to avoid double taxation, as illustrated in the above example.

There are other planning opportunities worth briefly noting.

First, state tax planners should consider the implications of captive professional employee organizations, or PEOs (sometimes called employee leasing companies).[18] Planners need to understand the rules prohibiting State Unemployment Tax Act dumping[19] — strategies designed to obtain lower state unemployment tax rates, and take steps to ensure that planning in this area is both legal and ethical. However, from an apportionment perspective, the reality is that payroll factors generally reside in the legal entity that actually employs — that is, the entity reporting state unemployment taxes. In many cases companies can control those facts while making sure there is a good business purpose. For example, it may be beneficial to consolidate all employment in a single entity for health insurance rating purposes.

Another significant apportionment opportunity exists in the multistate sales of services. There has been extensive writing, and confusion, regarding UDITPA section 17(b), often referred to generically as "cost of performance." This section calls for the sale of intangible personal property to be sourced to the state in which the "greater proportion of the income producing activity occurs based on costs of performance." Given the service economy in the United States, that phrase leads to extraordinary confusion — and opportunity. Most notably, if a multistate service provider operates predominately in a state with market-based sourcing (for example, Georgia), the planner can create significant nowhere income. And consistent with the theme of this article regarding the ascendancy of the sales factor, the effect of that cost-of-performance strategy continues to grow as sales factor weighting increases.

Adding to the complexity . . .

While the focus of this article has been on state income taxes, good state tax planners understand the multifactor as it relates to other taxes. The thoughtful planner will, at a minimum, ensure that planning to reduce one type of tax will not increase another tax. Although that objective seems obvious, the nature of state and local taxation is such that changes in facts often do have multiple tax implications. However, just as there are traps, there are often opportunities to save multiple tax types in multiple states. Thus, the multifactor can be a powerful strategic asset for the informed and thoughtful planner. ✰

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[18]Planners have to understand the rules prohibiting "payrolling" — strategies designed to obtain lower state unemployment tax rates. A discussion of payroll/unemployment tax planning is beyond the scope of this article.

[19]*See* SUTA Dumping Prevention Act of 2004, Aug. 9, 2004.