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By U.S. Mail

Charles A. Trost, Esq.
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511 Union Street, Suite 2700
Nashville, Tennessee 37219-1760

Re: UDITPA Issues to Consider for Revision

Dear Mr. Trost:

I am writing as counsel for the Motion Picture Association of America, Inc. ("MPAA")[1], the trade association representing many of the nation's leading producers and distributors of motion pictures and other programming content on film, home video, the Internet, satellite, cable, subscription and over-the-air television broadcast. The purpose of this letter is to respond to your document entitled "UDITPA Issues to Consider for Revision." Below we will discuss only issues that are of utmost importance to MPAA. Because many other UDITPA issues are relevant to MPAA and its members, to the extent the Drafting Committee takes up other issues, we would expect to participate actively in their discussion, too.

While we are cognizant of the many concerns that have been expressed about this project, and indeed share some of them, we would like to participate constructively in the upcoming meeting and as the project unfolds.

[1] The members of MPAA are as follows: Walt Disney Studios Motion Pictures, Paramount Pictures Corporation, Sony Pictures Entertainment Inc., Twentieth Century Fox Film Corporation, NBCUniversal and Warner Bros. Entertainment Inc., as well as CBS Corporation as an affiliate member.

I. UDITPA Sections 17 and 18

Since section 18 is perhaps most frequently invoked to correct perceived problems in the application of section 17, in our view, one cannot be addressed independent of the other. MPAA favors addressing both sections in a narrow fashion.

With respect to section 17, any revision of UDITPA should retain the income producing activity and cost of performance rules. As the original drafters explained, "The income-producing activity means what you are paid for; the service rendered, for instance, would be the income producing activity."[2] If the income-producing activity occurs within and without the state, costs of performance are used to determine where the activity predominantly occurs. In our view, these rules are readily administrable and provide a measure for the sales factor that makes sense.

Fundamentally, there are two ways to measure and locate sales other than sales of tangible personal property, *i.e.,* origination and destination. While MPAA recognizes that the current, origination approach is imperfect, a destination rule presents its own set of problems. The very notion of a location of sales other than sales of tangible personal property may be illusory. This is particularly true for intangibles, but not exclusively so. For example, if the destination of a service is to be measured by the location of the beneficiary, is the beneficiary the taxpayer's customer, the ultimate consumer, or some other person or entity? Equally problematic is how a lack of nexus in the destination state will be addressed. MPAA will join those strongly opposing throwback and throwout rules. As others have noted, a state's fair share of a corporation's income does not expand simply because another state declines to tax, or is unable to tax, that income.

After carefully weighing the pros and cons of each approach, the drafters chose a rule of origin, recognizing that with adequate definition, costs are readily ascertainable and their location identifiable. During the last 50 years, taxpayers and tax agencies alike have devoted extensive resources to interpreting and applying the existing rule. Having structured their affairs based on that rule, they now have settled expectations. MPAA believes that undermining such expectations with an entirely new rule would be costly and detrimental to the state tax system.

That said, a major criticism of the current rule—assignment of all sales of a particular type solely to the state with the greatest costs—could be addressed by

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[2] *See* Proceedings in Committee of the Whole Uniform Allocation and Apportionment of Income Act, at 23 (Aug. 22, 1956).

modifying the current rule rather than abandoning it entirely. Such a refinement to section 17 would greatly diminish the need for section 18, which we view as an appropriate goal. It is well-recognized that section 18 was designed to be a rare exception to the general rule. Unfortunately, it has become anything but that in practice. States widely rely on section 18 to adopt rules of broad applicability, sometimes by formally promulgating a regulation, but in some instances simply by informal announcement. Taxing authorities have become increasingly willing to invoke section 18 authority in specific cases, often appearing to modify the standard apportionment formula merely because they do not like its result.

MPAA recognizes that section 18 will always be necessary to deal with truly extraordinary situations, and we agree some special rules of broad applicability are appropriate. However, to give voice to its original intent, section 18 should be revised to impose a heavy burden on taxing authorities and taxpayers wishing to modify the standard apportionment formula and to describe that burden with specificity.

II. Nexus

We believe the Drafting Committee should exclude nexus from the scope of this project. As a constitutional concept, nexus must be determined by the courts based upon the specific facts presented by any given case or by Congress pursuant to its Commerce Clause authority. It would be especially bad policy to craft a definition that could be construed as exceeding constitutional limitations in specific cases, thereby leaving the definition open to legal challenge.

III. Procedural Issues

Currently, there are two glaring barriers to efficient and accurate determination of state tax liability: the lack of independent tribunals and the costs imposed by the pay-to-play rule. While procedural issues are not encompassed within UDITPA's original purpose of dividing income among the states, we believe that certain uniform procedural rules may be among the most meaningful contributions the Drafting Committee could make to the field of state taxation.

In particular, we would commend to the Drafting Committee consideration of a model tax court[3] and elimination of the pay-to-play rule. Along similar lines,

[3] We are aware of the model act developed by the American Bar Association but believe the issue is also appropriately advanced in this forum.

establishing uniform procedures for claims for refund, protests and appeals, including reasonable statutes of limitation, would also reflect a significant contribution of this Committee.

We thank you for the opportunity to share our thoughts and look forward to working with you.

Very truly yours,

Amy L. Silverstein