

Proceedings in Committee of the Whole  
Uniform Division of Income for Tax Purposes Act  
Tuesday Morning, July 9, 1957

Mr. Joe C. Barrett, of Arkansas, presiding;  
Mr. George V. Powell, Washington, presenting the Act.

CHAIRMAN BARRETT: The Chairman of the Drafting Committee, Mr. George V. Powell, of Seattle, Washington, will have charge of the presentation of this Act in Committee of the Whole.

MR. POWELL: Thank you, Mr. Chairman.

You will recall that this Act was considered by the Conference at its meeting in Dallas.

Briefly, the background of this Act is that it was recommended by the Council of State Governments, that is, that an act on this subject be prepared, and also by a committee of the American Bar Association.

The purpose of the Act is to provide a means whereby the income tax laws of the various states can be apportioned so that the impact of the tax is such that no corporation pays tax on more than 100 per cent of its income. As the situation now is, some corporations are taxed in various states and there are different formulae for apportionment with the result that the taxes are imposed on what amounts

to more than 100 per cent of a corporation's income. It is to avoid that, that this Act is designed.

I think it would simplify it if we for the moment passed over the Definitions Section and started with Section 2.

There is one thing about this Act that we must keep in mind in going through it. First, it is not designed for adoption in all of the 48 states. It is designed for adoption only in those states which have taxes upon net income or which are in some fashion measured by net income. Furthermore, it must be considered as a part of the income tax laws of the state. It is not framed in that manner because of the variety of laws in the several states, but in some way it must be integrated with the income tax laws of the various states. It in no way imposes a tax or relieves a corporation from a tax. It does not amend the income tax law. All it does is apportion the tax among the states. It governs the impact of the tax laws but not whether or not a corporation is taxable.

SECTION 2: Any taxpayer having income from business activity which is taxable both within and without this state [other than activity as a financial organization or public utility or the rendering of purely personal services by an individual] shall allocate

and apportion his net income as provided in this Act.

The Section has agreed to delete the brackets in lines 3 and 5 and insert in lieu thereof commas, so that there will be no brackets, and the language starting "other than activity" down through "individual" will be a part of the text.

CHAIRMAN BARRETT: Is there any comment on Section 2? Hearing none, we will proceed to Section 3.

MR. POWELL:

SECTION 3. For purposes of allocation and apportionment of income under this Act, a taxpayer is taxable in another state if (1) in that state he is subject to a net income tax, a franchise tax measured by net income, a franchise tax for the privilege of doing business, or a corporate stock tax, or (2) that state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not.

CHAIRMAN BARRETT: Are there any comments on Section 3? You are moving very well, Mr. Powell.

MR. COLBY: When you say "a franchise tax for the privilege of doing business" even though a state had a franchise tax for the purpose of doing business, this Act

would not be applicable if there were no net income, is that correct?

MR. POWELL: No, that is not correct. It is not a question of whether this Act is applicable or not. The words here are "a taxpayer is taxable." That is another concept which we have in this Act which we must keep in mind. This Act will be adopted only in a state which had a net income tax, but for purposes of this Act we assume that a net income tax is possible in all of the 48 states, and that a taxpayer is taxable, we consider, in each of the 48 states whether or not there be a tax. The language here "a franchise tax for the privilege of doing business" or "a corporate stock tax" is largely in here for purposes of clarification of the concept.

Clause (2) which says "that a state has jurisdiction to subject the taxpayer to a net income tax regardless of whether, in fact, the state does or does not," is really the operative part of the Section. The other is just to clarify the meaning, I would think.

CHAIRMAN BARRETT: Are there further comments on Section 3?

MR. HAVIGHURST: I would like to go back briefly to Section 2 and suggest that perhaps the wording might be

reconsidered.

In a sense Section 18 does provide for allocation of apportionment for national organizations and public utilities, and therefore "as provided in this Act" does not seem to me to be quite correct because Section 18 is part of the Act also. I would like to make that as a suggestion.

MR. POWELL: I am not sure that Section 18 will permit the allocation or apportionment of income of financial organizations and public utilities because I think Section 18 says it does not apply to those.

MR. HAVIGHURST: Maybe it would be better to defer this until we come to Section 18.

MR. POWELL: I think perhaps it would.

MR. HOWARD: Do I understand in lines 7 and 8, Section 3, that that refers to whether or not the state does or does not apply a tax, an income tax? Is that what that language means?

MR. POWELL: Yes.

MR. HOWARD: I don't think that is clear.

MR. POWELL: What it means is whether in fact the state does or does not subject the taxpayer to a net income tax.

MR. MCKENZIE: Mr. Chairman, in line 7 of Section 3,

I don't see what the language "regardless of whether, in fact, the state does or does not" add to the meaning of the Section. I think "that state has jurisdiction to subject the taxpayer to a net income tax" sufficiently covers it. Although the state has the power, the state does not necessarily have to exercise it to have this apply.

MR. POWELL: You are 100 per cent right, Mr. McKenzie, but, as you will see when you get through this thing, we have had a great deal of trouble with the word "taxable" in here and the concept of due process and whether or not a state does in fact have a net income tax law gets sort of tangled up in here. This is purely for purposes of clarification. It is redundant, but we feel it is desirable to make more clear what we are trying to say.

CHAIRMAN BARRETT: If there are no other comments, proceed to Section 4.

MR. POWELL:

SECTION 4. Rents and royalties from real or tangible personal property, capital gains, interest, dividends, or patent or copyright royalties, to the extent that they constitute non-business income, shall be allocated as provided in sections 5 through 9 of this Act.

CHAIRMAN BARRETT: Are there any comments on Section 4? Where is Mr. Jenner about his cross-references?

MR. MCKENZIE: He has gone to lunch.

MR. POWELL: The Committee has noted that the figure 9 in line 5 should be 8. It should be sections 5 through 8.

CHAIRMAN BARRETT: If there are no further comments on 4, proceed to Section 5.

MR. POWELL:

SECTION 5. (a) Net rents and royalties from real or immovable tangible personal property located in this state are allocable to this state.

(b) Net rent and royalties from movable tangible personal property are allocable to this state:

(1) if and to the extent that the property is utilized in this state, or

(2) in their entirety if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized.

(c) The extent of utilization of movable tangible personal property in a state is determined by multiplying the rents and royalties by a fraction, the numerator

of which is the number of days of physical location of the property in the state during the rental or royalty period in the taxable year and the denominator of which is the number of days of physical location of the property everywhere during all rental or royalty periods in the taxable year. If the physical location of the property during the rental or royalty period is unknown or unascertainable by the taxpayer, movable tangible personal property is utilized in the state in which the property was located at the time the rental or royalty payer obtained possession.

CHAIRMAN BARRETT: Are there any comments on Section 5?

MR. MERRILL [Oklahoma]: I am a little puzzled about putting together part of Section 3 and that part of Section 5 (b), sub-Section (2), as to net royalties from movable tangible personal property that are allocable in this state in their entirety, if the taxpayer's commercial domicile is in this state and the taxpayer is not organized under the laws of or taxable in the state in which the property is utilized. When you go to Section 3, you say that the taxpayer is taxed if the state has jurisdiction to subject the taxpayer to a net income tax regardless of whether or not the state has

a jurisdiction to tax. My understanding with respect to jurisdiction to tax the proceeds from the use of personal property within the state is that the state in which that property is used has jurisdiction to tax the proceeds from the use of that property. It would seem to me that subsection (2) of (b) in 5 is cancelled out by (2) in Section 3.

MR. POWELL: If you are right on your first premise, that is so, but we were concerned that there may be questions, situations, where the owner of the personal property lives in a state other than the state in which the property is being used. It is being rented to someone else who is using it there, and that may be the only contact between that state and the owner of the property, and there might be some difficulty about the jurisdiction of the state in which the property is located to impose a tax on the owner of the property who resides in another state and has no other contact therewith. It may be for just a transitory period that the property is in the using state, and there might be a due process question as to whether that using state could successfully impose a tax on the owner of the property. That is the situation we are trying to cover here.

MR. MERRILL [Oklahoma]: If that situation arises, I suppose it is all right to have that in.

MR. POWELL: We were not quite willing to assume it would not arise.

MR. MERRILL [Oklahoma]: My understanding is that it would not arise.

MR. POWELL: Probably you are right, but you are also aware that the law is a little uncertain on that subject, and that is one of the reasons for this Act. We were not willing to assume that the law was sufficiently settled so the question would never arise.

CHAIRMAN BARRETT: Mr. Powell, the question will arise and has arisen in Pacific Fruit Express against Chaney, an Arkansas case, which poses the very question that that clause is in there for. Are there further comments on Section 5? If not, proceed with Section 6.

MR. POWELL:

SECTION 6. (a) Capital gains and losses from sales of real and immovable tangible personal property located in this state are allocable to this state.

(b) Capital gains and losses from sales of movable tangible personal property are allocable to this state if

(1) the property had a situs in this state at the time of the sale, or

(2) the taxpayer's commercial domicile is in this state and the taxpayer is not taxable in the state in which the property had a situs.

(c) Capital gains and losses from sales of intangible personal property are allocable to this state if the taxpayer's commercial domicile is in this state.

MR. MCKENZIE: I don't quite understand what is meant by "immovable tangible personal property." I am trying to conceive of what tangible personal property is immovable.

MR. POWELL: There we get away from the law of fixtures, as to whether it is or is not a part of the real property. We did not want to get into that question. You can say "whether it is real property or movable tangible personal property." I think the purpose of the Committee was to avoid any controversy about that.

MR. MCKENZIE: It seems to me that even though a chattel might be affixed to real estate and be characterized as a fixture, it still would be movable.

MR. POWELL: I think what the Committee has in mind, and maybe we did use a poor choice of words but I don't know of any alternative, is personal property of the kind that is customarily moved, such as trucks and that sort of thing.

MR. MCKENZIE: If it is your intention to cover

fixtures, why don't you say so?

MR. POWELL: Do you have any thoughts on that?

MR. PIERCE: As you know, in a number of states there is some doubt as to a property law in respect to tangible personal property on the question of when it becomes a part of the real property and when it does not. The wording is to cover those things that have a permanent situs in one state. To remove them means the destruction of the property, you might say, in the particular location. Yet it may be classified under the local law as "personalty" rather than "realty," and the broad language is used here to cover the differences in the several states that are possible.

It is true that most tangible property will be movable, but it is only to differentiate this case where you do have it in some states, where the law is not sure, that cover a situation in this twilight zone where it will be a fixed situs type of property, so that state, we feel, should have the right to tax the capital gains from the sale of that property. That is the major purpose of it.

Most personal property will, of course, be movable. For example, your ordinary inventory, your machinery, and everything else, your tools, equipment, will all be movable tangible personal property, but there are some types of

structures that are connected with the realty in the fixture class that are in the twilight zone in several states as to where they are to be classified. We thought if it is immovable in that concept, that state should be the state which should have the benefit of being able to tax that income.

CHAIRMAN BARRETT: Does that explanation satisfy you, Mr. McKenzie?

MR. MCKENZIE: Mr. Pierce I think has pointed out the difficulty when says they are movable in this concept. There is no definition of that concept in this Act. That is why I think it is better to use fixtures which is more definitive than immovable which, in its general concept, means just that, not something that can be moved.

MR. POWELL: We are taking under consideration the possibility of deleting the words "and immovable" in line 2 and the word "movable" in line 4, thinking that the problem is solved by the question of situs. We speak of location and situs, and that perhaps is sufficient whether or not it be movable or immovable.

CHAIRMAN BARRETT: Then the Committee will take that under advisement. Are there further comments on Section 6? If not, the President advises me that we should entertain a motion from the Chairman of the Section at this time.

MR. THORMODSGARD: Mr. President, I move that the Committee of the Whole rise and report that it has had under consideration the Uniform Division of Income for Tax Purposes Act, that it has made progress, and begs leave to sit again this afternoon.

[The motion was carried.]

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Tuesday Afternoon, July 9, 1957

CHAIRMAN BARRETT: When we suspended before noon we had completed consideration of Section 6. Mr. Powell will now present Section 7 and the remaining portion of the Act.

MR. POWELL: With respect to Section 6 which we have completed, I would like to advise that the Committee has accepted the suggestion of Commissioner McKenzie and deleted in line 2 four words, namely, "and immovable tangible personal" and in line 4 it has deleted the word "movable," so it will read: "sales of tangible personal property."

SECTION 7. Interest and dividends are allocable to this state if the taxpayer's commercial domicile is in this state.

CHAIRMAN BARRETT: Are there any comments on Section

7? If not, we will proceed to 8.

MR. POWELL:

SECTION 8. (a) Patent and copyright royalties are allocable to this state:

(1) if and to the extent that the patent or copyright is utilized by the payer in this state, or

(2) if and to the extent that the patent or copyright is utilized by the payer in a state in which the taxpayer is not taxable and the taxpayer's commercial domicile is in this state.

(b) A patent is utilized in a state to the extent that it is employed in production, fabrication, manufacturing, or other processing in the state or to the extent that a patented product is produced in the state. If the basis of receipts from patent royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the patent is utilized in the state in which the taxpayer's commercial domicile is located.

(c) A copyright is utilized in a state to the extent that printing or other publication originates in the state. If the basis of receipts from copyright

royalties does not permit allocation to states or if the accounting procedures do not reflect states of utilization, the copyright is utilized in the state in which the taxpayer's commercial domicile is located.

CHAIRMAN BARRETT: Now may we have comments, if any, on Section 8, taking each paragraph. Let us first take (a), then (b), and (c) separately. Hearing none, Mr. Powell, you may proceed.

MR. POWELL:

SECTION 9. All business income shall be apportioned to this state by multiplying the income by the percentage derived by use of the following formula:

$$\frac{\text{Property Factor plus Payroll Factor plus Sales Factor}}{3}$$

It has been suggested by the Committee on Style, and accepted by this Committee, that the language on this Section be changed to conform to the language used in other places in the Act so it will read as follows:

SECTION 9. All business income shall be apportioned to this state by multiplying the income by a fraction, the numerator of which is the property factor plus the payroll factor plus the sales factor, and the denominator of which is 3.

The result is the same. The language is a little clearer and it seems better.

CHAIRMAN BARRETT: Is there any comment on Section 9? Hearing none, we will proceed with 10.

MR. POWELL:

SECTION 10. The property factor is a fraction, the numerator of which is the average value of the taxpayer's real and tangible personal property owned or rented and used in this state during the tax period and the denominator of which is the average value of all the taxpayer's real and tangible personal property owned or rented and used during the tax period.

CHAIRMAN BARRETT: Is there any comment on Section 10? Proceed with 11.

MR. POWELL:

SECTION 11. Property owned by the taxpayer is valued at its original cost. Property rented by the taxpayer is valued at eight times the net annual rental rate. Net annual rental rate is the annual rental rate paid by the taxpayer less any annual rental rate received by the taxpayer from sub-rentals.

CHAIRMAN BARRETT: Is there any comment on 11?

MR. BUERGER: I am not too familiar with the general

purposes of the details of this Act. I am curious about the first sentence of Section 11 which apparently does not take into consideration depreciation. Is there any particular reason behind that?

MR. POWELL: Yes. First, the purpose of this Act, as we must remember, is not to determine the amount of the tax but just the distribution of the tax among the several states. The basis of distribution is determined by these factors. Each one of the taxing statutes of the various states undoubtedly has provision for depreciation and general deduction from gross income to arrive at the taxable net. We find that there is a great disparity among corporations as to the extent to which they have old properties, new properties and the like, and it was nearly impossible to arrive at a basis which was mutually acceptable, and the original cost seemed to be more generally acceptable than any other basis. If we said "cost after depreciation" we then get into the fast write-off situations and a great many things, and original cost as reflected on the books of every corporation is something readily arrived at, and throughout here we have tried to keep the accounting required by the corporation or by the taxpayer to a minimum.

CHAIRMAN BARRETT: Does that answer your question,

Mr. Buerger?

MR. BUERGER: It does, Mr. Chairman.

CHAIRMAN BARRETT: Are there any other comments?

If not, may we proceed with Section 12?

MR. POWELL:

SECTION 12. The average value of property shall be determined by averaging the values at the beginning and ending of the tax period but the [tax administrator] may require the averaging of monthly values during the tax period if reasonably required to reflect properly the average value of the taxpayer's property.

CHAIRMAN BARRETT: Are there any comments? If not, proceed with 13.

MR. POWELL:

SECTION 13. The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the tax period by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the tax period.

CHAIRMAN BARRETT: Are there any comments? If not, may we proceed with 14?

MR. POWELL:

SECTION 14. Compensation is paid in this state if:

(a) the individual's service is performed entirely within the state; or

(b) the individual's service is performed both within and without the state, but the service performed without the state is incidental to the individual's service within the state; or

(c) some of the service is performed in this state and (1) the base of operations or, if there is no base of operations, the place from which the service is directed or controlled is in this state, or (2) the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this state.

I would like to point out that this is the exact language of the Model Unemployment Compensation Act which is in force in all of the states.

CHAIRMAN BARRETT: Is there any comment on Section 14?

MR. MERRILL [Oklahoma]: I think possibly my comment may be answerable in terms of the statement which was last made, but to me at least the term "base of operations" has no particular legal significance, and I did not note that

it was defined in the Definitions Section. I am wondering if there is an interpretation of "base of operations" which will satisfy the Committee as to the interpretation to be made of that.

MR. POWELL: I would like to ask Commissioner Pierce to answer that.

MR. PIERCE: This provision is taken out of the Unemployment Compensation Tax Act which is the model act adopted in all the 48 states dealing with unemployment compensation. Base of operations is not defined in that Act, and it has just had to be rushed out on the basis of general administration of the unemployment tax.

The reason we took this language verbatim is this: Every corporation will have already computed all the figures for the payment of their unemployment tax to the several states in which they do business, so that for computing this factor they just take everything that they have already reported to the individual states for paying the unemployment tax and put it in here. So we did not make any departures or attempt to make any definitions because we wanted the same computation of figures to be used when it came to this particular factor. That is why in some ways you can say the language is inartistic, too, from the standpoint of style,

but our purpose here was that we thought it was more important to follow the Unemployment Tax Act verbatim than it was to depart for stylistic purposes or to define concepts.

MR. POWELL: We anticipate that if the Act is approved this Section will be followed by a comment indicating the source of the Section. Despite the fact that it is verbatim, there are two rather minor changes in this Section which we feel for style purposes are desirable. In line 8 the word "this" should properly be changed to "the."

CHAIRMAN BARRETT: Are there further comments on Section 14? If not, you may proceed with 15.

MR. POWELL:

SECTION 15. The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the tax period, and the denominator of which is the total sales of the taxpayer everywhere during the tax period.

CHAIRMAN BARRETT: Are there any comments? If not, may we proceed with 16?

MR. POWELL:

SECTION 16. Sales of tangible personal property are in this state if:

(a) the property is delivered or shipped to a

purchaser, other than the United States government, within this state regardless of the f.o.b. point or other conditions of the sale; or

(b) the property is shipped from an office, store, warehouse, factory, or other place of storage in this state and (1) the purchaser is the United States government or (2) the taxpayer is not taxable in the state of the purchaser.

CHAIRMAN BARRETT: Are there any comments? If not, we will proceed to 17.

MR. POWELL:

SECTION 17. Sales, other than sales of tangible personal property, are in this state if:

(a) the income-producing activity is performed in this state; or

(b) the income-producing activity is performed both in and outside this state and a greater proportion of the income-producing activity is performed in this state than in any other state, based on costs of performance.

CHAIRMAN BARRETT: Are there any comments? May we proceed?

MR. POWELL:

SECTION 18. If the allocation and apportionment provisions of this Act do not relate to the class of business in which the taxpayer is engaged or do not fairly represent the extent of the taxpayer's business activity in this state, the taxpayer may petition for or the [tax administrator] may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

- (a) separate accounting;
- (b) the exclusion of any one or more of the factors;
- (c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this state; or
- (d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

CHAIRMAN BARRETT: Are there any comments on Section 18?

MR. HAVIGHURST: I would like to inquire what the class of business is to which the allocation and apportionment provisions do not relate.

MR. POWELL: May I say the Committee has tentatively,

subject to approval of the Conference or the Committee of the Whole, agreed to delete the language immediately following the word "Act" in line 2 down to the words "do not" in the center of line 3, so it would read "If the allocation and apportionment provisions of this Act do not fairly represent the extent of the taxpayer's activity".

MR. HAVIGHURST: That answers the point entirely.

CHAIRMAN BARRETT: In connection with this Section and the earlier one, 2? You raised your point this morning in connection with an earlier Section.

MR. HAVIGHURST: Yes, it had to do with this Section because I thought the words "do not relate to the class of business in which the taxpayer is engaged" had to do with the exceptions in Section 2, and if that was true then there was some language in Section 2 that would not be quite applicable.

CHAIRMAN BARRETT: Then the Chair understands that you are satisfied now.

MR. HAVIGHURST: I am satisfied if that language is taken out in 18.

CHAIRMAN BARRETT: Are there further comments? If not, may we proceed with 19?

MR. POWELL: The balance of the formal portions.

CHAIRMAN BARRETT: Now we will turn back to Definitions which is Section 1.

MR. POWELL:

SECTION 1. As used in this Act, unless the context otherwise requires:

(a) "Business income" means income arising from transactions and activity 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.

(b) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(c) "Compensation" means wages, salaries, commissions and any other form of remuneration paid to employees for personal services.

(d) "Financial organization" means any bank, trust company, savings bank, [industrial bank, land bank, safe deposit company,] private banker, savings and loan association, credit union, [cooperative bank], investment company, or any type of insurance company.

(e) "Non-business income" means all income other than business income.

(f) "Public utility" means [any business entity which owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications, transportation of goods or persons, or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, oil, oil products or gas.]

Note: Each state may wish to enact separate legislation to apportion and allocate the income of taxpayers subject to the control of its regulatory bodies.

I would like here to interpolate something. The definition of "public utility" here is not meant to be an accurate definition of public utility. It is intended here that the state will insert the definition of public utility which appears in its regulatory statutes or which will encompass the scope of its regulatory statutes. For instance, the language here relating to the sale of oil and oil products does not intend to exempt a company operating service stations. The intent is to cover the large companies which approach public utilities and are subject to regulation. The purpose is to indicate that this is the place where the businesses subject to regulation of one type or another are

to be excluded.

(g) "Sales" means all gross receipts of the taxpayer not allocated under sections 4 through 8 of this Act.

(h) "State" means any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any foreign country or political subdivision thereof.

MR. HAVIGHURST: Mr. Chairman, I would just like to ask whether under the existing plans the financial organization of public utilities is effectively treated in a separate category.

MR. POWELL: I believe so.

MR. HAVIGHURST: So that this Act would not affect the taxation of such business at all?

MR. POWELL: No. It is not intended to apply to them, and they are taken care of elsewhere on a mileage basis and the like.

CHAIRMAN BARRETT: Are there further comments? If there are no further comments, it would appear that we have completed the consideration of this Act, and the Chair recognizes Dean Thormodsgard.

MR. THORMODSGARD: I move that the Committee of the

Whole rise, and report that it has had under consideration the Uniform Division of Income for Tax Purposes Act, has considered it section by section, has made certain changes and amendments, and recommends that the Act as so amended be presented for vote by the states for final adoption.

CHAIRMAN BARRETT: You have heard the motion. Is there any discussion?

[There being no discussion, the motion was put to a vote and carried.]

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