

7/30/51
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THE APPORTIONMENT OF MULTISTATE BUSINESS INCOME

THE NCCUSL UNIFORM DIVISION OF INCOME ACT*

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The judgment of the United States Supreme Court in the Northwestern Portland Cement and Stockham Valves cases (358 U.S. 450) has convinced many tax men that it is time to take some concrete action on the matter of a uniform apportionment and allocation formula for income earned in business activities conducted in more than one state and to put an end to the hitherto interminable discussions on the subject. Whether this spirit of resolution will remain unbroken in the face of acute differences of opinion with respect to the potential effects of specific provisions of such a formula on, say, tax costs and revenue yields, remains to be seen. On the whole, and despite an understandable skepticism on the part of those who have labored long and with scant success in this area, there is some reason to believe that circumstances are more favorable to success now than at any previous time. An additional spur to action is the probability that Congress will prescribe a formula if the states do not agree on one.

Starting Point Required

As a first step in the development of a uniformly applicable formula, we need a starting point--some specific proposal which will serve as a frame of reference for further proceedings. I suggest that we would do well to take as such a starting point the Uniform Division of Income for Tax Purposes Act drafted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) and approved and recommended for enactment in all the states.

The actual drafting of this Act was undertaken only after intensive study of the subject matter and consultations with both taxpayers and tax officials.

*Substance of remarks at the Fourteenth Annual Conference of Tax Executives Institute, Inc., French Lick, Indiana, September 30, 1959.

The substance of the proposal embodied in the Act has been carefully thought out; from a technical standpoint, its several sections are well articulated and, in total effect, its provisions are logical and consistent. Nevertheless, the Act has not been favorably received. This may be due to the fact that there is a considerable amount of misunderstanding about its operation. For that reason, I propose to outline and comment on the main provisions of this draft law with the thought that, properly understood, the NCCUSL proposal would appeal to a substantial number of both taxpayers and tax officials.

Several Fundamental Points

There are several points about the NCCUSL Act which should be mentioned at the outset and kept in mind because they are fundamental to a correct understanding of the proposal. First, in order to avoid the drafting problems implicit in an attempt to deal concretely with the concept of business activity or nexus in the jurisdictional sense, the drafters have used a kind of legal shorthand by giving the word "taxable" a highly artificial meaning. Second, the NCCUSL draft proceeds on the assumption that the unitary or business income subject to apportionment (rather than direct allocation) should be as broadly defined as possible. Under this approach, income to be directly allocated must meet two tests; it must be one of the kinds of income specifically enumerated, and it must also be non-unitary or non-business income. Third, contrary to some views, the Act has not been drafted so as to insure that 100 percent of the taxpayer's income will be subjected to tax in some state. This is a fairly common misunderstanding about the Act and, no doubt, this is one reason why some tax men have not been particularly enthusiastic about the proposal.

General Assumptions

Underlying the NCCUSL Act are two general assumptions; first, that a three-factor formula using property, payrolls, and receipts is the most satisfactory and acceptable formula for manufacturing and mercantile income and, second, that a proposal for the division of multistate income should specify in detail all the elements of the formula, both as to allocation and apportionment. The first assumption appears to be well founded. If the numerous committees, commissions, and study groups which have dealt with this subject in the past did nothing else, they did create a climate of opinion favorably disposed toward a three-factor formula using property, payrolls, and receipts, and their success in that respect is evidenced by the gradual

increase in the number of states employing such a formula. Accordingly, in its adoption of the principle of the three-factor formula, the NCCUSL Act is on strong ground.

As to the second assumption, one might reasonably have some reservations. From a purely practical standpoint, it might be more productive in terms of results to concentrate all effort in a program to secure uniformity in the receipts (sales) factor of the three-factor formula. There is something to be said, I think, for the proposition that substantial uniformity in the receipts factor is what is most urgently needed and, if this were achieved, a number of minor differences in the other two factors and in the directly allocated items could be tolerated. Be this as it may, the approach adopted by the NCCUSL committee is similar to that favored by many previous committees working in this same field, and it reflects the design of the drafters to prescribe an orderly and consistent series of rules to allocate or apportion all the income realized by a business subject to the Act.

Coverage of the Act

The Act applies to income from business activities generally, except activity as a financial organization or public utility. Financial organization is defined to include a bank, trust company, savings bank, investment company, and any type of insurance company and might also include an industrial bank, a safe deposit company, a savings and loan institution. The property, payroll, and receipts formula is not ideal for allocating or apportioning of income of such organizations and, in addition, the business activities of organizations of this kind are often conducted exclusively within one state.

Public utility is not actually defined in the Act. Each state would define the term to include all taxpayers subject to regulation by a state agency or commission. The elements of such a definition, outlined parenthetically, in the NCCUSL Act are "ownership or operation for public use of 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." A question has been raised whether this language would exclude oil companies from the application of the Act. While the Act does refer to the "production...of oil (and) oil products", the terms must be read in the light of the over-all qualification of "ownership or

operation for public use." Undoubtedly, what the drafters had in mind here was the inclusion of common carrier pipelines transporting oil and oil products. Nevertheless, since a question has been raised about the ambiguity of the language here, it might well be clarified in the definition of "public utility" enacted by an adopting state.

Another question which might be raised here is whether the NCCUSL Act would apply to non-business income of a financial organization or non-operating income of a public utility. While this point is not expressly provided for, the inference is that the Act would apply to such income because the exclusion relates to "income from business activity...other than activity as a financial organization or public utility."

Application of the Act

The two key provisions governing the application of the Act are in Sections 2 and 3. Section 2 provides that the allocation and apportionment sections of the Act apply to any taxpayer "having income from business activity which is taxable both within and without the state." Section 3 provides that a taxpayer is taxable in another state if he is in fact subject to an income, franchise, or capital stock tax in that state, or if that state has jurisdiction to subject the taxpayer to an income tax. That the legislature in one or more of the states in which the taxpayer conducts business activities has not exercised its prerogative to impose an income tax is immaterial. Whenever the word "taxable" is used in the Act, it must be understood in this sense. It is basic to the correct interpretation of this Act to keep in mind at all times that a taxpayer may be "taxable" in another state, within the meaning of this Act, without actually paying an income tax in that state.

Thus, Section 2 says in effect that the Act applies to a taxpayer if his business activities are sufficient, in a jurisdictional sense, to subject him to an actual income, franchise, or capital stock tax liability in more than one state, or to sustain the imposition of an income tax in more than one state, even though in fact one or more of those states do not subject him to an income tax.

This unusual concept of "taxability" has been formulated in order to avoid the difficulties involved in specifying in detail those minimum business activities which would constitute a sufficient nexus, in the jurisdictional sense, to sustain the application of an income tax. Another reason for omitting a detailed

specification is that the courts ultimately decide the jurisdictional question anyway, and tests which may have their approval today may be unsatisfactory tomorrow. However, the use of this kind of legal shorthand is not without its own difficulties because it is evident that this arbitrary definition of "taxable" has given rise to some confusion and misunderstanding in the general interpretation of the Act.

In practice there really is no way to avoid the formulation and specification of those minimum business activities which satisfy the due process requirement. The tax administrator in applying the Act and the taxpayer in complying with it both must have clear notions as to the quality and quantity of these activities. There is simply no other way in which either party can give meaning to the words "that state has jurisdiction to subject the taxpayer to a net income tax." Such a determination is called for at several points in the statute, for example: (1) in order to decide whether the taxpayer's income is subject to allocation and apportionment in the first place; and (2) in order to decide what goes into the numerator of the receipt (sales) factor of the apportionment formula.

Unitary Approach

Section 1(a) defines business income and section 1(e) defines non-business income, and these two definitions taken together with section 4 make it clear that all the unitary or business income is to be apportioned; and that rents, royalties, capital gains, interest and dividends are to be directly allocated only to the extent that they constitute non-business income. This approach has some appeal from a conceptual standpoint inasmuch as it tends to narrow the area to which the separate allocation rules apply. To the extent that these kinds of income can be included in the unitary category, the taxpayer's compliance problems are apparently simplified, especially in those states where the net income reported to the United States is the starting point for the determination of taxable income for state tax purposes. This advantage may be largely theoretical, however, because a considerable amount of the income involved in the specific items enumerated may, in fact, be incidental or non-business income in which case it would have to be separately identified and directly allocated anyway. Moreover, a good many states favor the direct allocation of the kinds of income specifically enumerated because all or most of these may be said to have a situs within one state and nowhere else. This being so, it might be preferable from the standpoint of acceptability to bring the Uniform Act into conformity with the practice now followed in many states whereby the specifically named items are in every case directly allocated. The

practical effect of such a change in the provisions of the NCCUSL Act would be to treat these specified types of income uniformly under all circumstances whereas under the provisions of the Act, as they now stand, such specific items of income might be apportioned (as part of the unitary income) in the case of company A, and allocated (as non-unitary income) in the case of company B, and possibly given a mixed treatment in the case of company C.

Commercial Domicile

Section 1 defines "commercial domicile" as the principal place from which the trade or business of the taxpayer is directed or managed. The commercial domicile of a corporation is important in this draft as a seemingly alternative state for the direct allocation of non-business income. The use of the commercial domicile has been criticized both as to content and purpose. It has been suggested, for example, that the trend toward diversification of industry and the decentralization of management responsibility make it difficult to pick out one state as the commercial domicile of a large organization. It has also been suggested that the only reason for the inclusion of the term was the desire to have one state to which otherwise untaxed non-business income might be allocated on a residual basis.

It seems to be quite clear that the drafters of the NCCUSL Act thought it necessary to include some definition of a business headquarters because of the fact that many corporations do not carry on any of their principal business activities in the state of incorporation. Without question, they have had some difficulty in defining business headquarters to the satisfaction of all concerned. Nevertheless, the commercial domicile as presently defined seems to be preferable to the concept of the "principal income state" used in the first draft of the NCCUSL Act; namely, the state to which the three-factor formula apportioned the greatest amount of income. On balance, it appears that present definition of commercial domicile should be accepted, at least until someone comes up with a better one.

As to the other point, that the concept of the commercial domicile is used in order to insure that the income will be allocated to some state where it will be taxed, I think this is not a correct interpretation of the Act. For example, section 5 provides that (non-business) rents and royalties from tangible personal property are allocable to the state where the property is used, but, if the taxpayer is not taxable in that state, such rents and royalties are allocable in their entirety to the commercial domicile. This does not mean that, if such income is not actually taxed in the place

of utilization, it is then re-allocated to the state of the commercial domicile. We have to remember the arbitrary meaning of the word "taxable" as it is used in the Act. What this section really means is that, if the taxpayer has no jurisdictional connection with the state of utilization, i.e., that he is not engaged in business activities in that state in the due process sense, then the income should be allocated to the general business headquarters. However, if the taxpayer is conducting business activities in the state of utilization, so that this income could be subjected to taxation if the state had an income tax, the income is allocated to that state because it is "taxable" there within the meaning of the statute even though in fact it is not taxed. It has already been noted that this arbitrary definition of "taxable" is the cause of some misunderstanding about the operation of the NCCUSL Act and section 5 is one of several examples of this point.

As a practical matter, income from tangible personal property would always be allocated to the state where it is earned because it is difficult to conceive of a situation where the state in which the income was earned would not have jurisdiction to tax--whether it did so or not being immaterial. Furthermore, any attempted re-allocation of income from personal property with a definite situs in one state would run into constitutional difficulties where the income tax in the state of re-allocation is a direct income tax, and this would probably be true also under an excise or privilege tax measured by net income as most of these statutes now stand.

The same considerations would not apply to income from intangibles. Allocation of income from intangibles to the commercial domicile involves no more than a recognition of the principle that intangibles are attributed to the domicile of the owner. However, if situs is to be the governing factor for the allocation of income from tangible property, consistency suggests that principle might also be used to the extent feasible to govern the allocation of income from intangibles. The business situs rule is recognized with respect to the imposition of property taxes on intangibles, and it could with little difficulty be adopted for income tax purposes. Even though these qualifications are accepted, there is still a good case for the retention of the commercial domicile concept for the limited purpose of the direct allocation of interest and dividends from intangibles which do not have a business situs apart from that of their owner.

The Apportionment Formula

Property Factor. The NCCUSL property factor takes into account real and tangible personal property owned or

rented and used. The basis for property owned by the taxpayer is original cost; for rented property, eight times the net annual rental rate.

The inclusion of rented property is by no means novel. It is not uncommon for property used in production, both plant and machinery, to be rented or utilized under a sale-and-lease-back arrangement; if the use of such property is not recognized in the property factor, the distribution of income will be distorted. Therefore, although the inclusion of rented property has been criticized and although its inclusion is not without some difficulty in application, it is likely that this element will find wider acceptance in the property factor of whatever formulas are found among the states.

The recommendation that original cost be used as the basis of value for owned property is a departure from the general practice. This feature, too, has been criticized by taxpayers. However, with the exception of some by no means unanswerable questions relating to the cost basis of properties acquired in reorganizations, the main objection to this basis is that it is less convenient to use than book value. This is true but should the choice of basis be made solely on the criterion of convenience? One must also bear in mind that the use of book values for both old and new investments in productive facilities may distort the relative importance of the contributions of the old and the new properties to the stream of income. Differences in price levels, inflationary factors, and the percent-depreciated status of old and new properties may very well produce dollar figure relationships which do not give adequate recognition to the income contribution of the old property.

The use of original cost will not eliminate this distortion completely, but it will tend to reduce it. Moreover, the use of original cost in the property factor may offset to some extent the loss in apportioned income which some people think the typical manufacturing state (if there is such a state!) will lose by the adoption of a destination receipts factor. But, even aside from this possibility, the recommendation by the NCCUSL committee that original cost be used as the basis for the valuation of owned property is sound and would constitute an improvement over the present practice.

Payroll Factor. The NCCUSL Act's payroll factor is tied to the place of performance of service and follows the provisions of the Model Unemployment Compensation Act with respect to place of service, base of operations, etc. It is the intention of the drafters that the taxpayer generally will be able to use the same basic date for payroll factor and unemployment compensation tax purposes.

Criticism of this factor has been negligible. The few changes suggested have been either clarifying or clerical and, since no questions of substance have been raised, it may be assumed that there is no serious objection to the use of the kind of payroll factor defined in sections 13 and 14 of the NCCUSL Act.

Receipts (Sales) Factor. The NCCUSL Act's sales factor has two components. One component is receipts from sales of tangible personal property; the other is residual in nature and includes all business income other than receipts from sales of tangible personal property. Receipts from sales of tangible personal property is taken into the numerator of the sales fraction primarily on a destination basis test. Other business receipts are taken into the numerator on a place of performance basis with a further provision that, if the income producing activity is conducted both within and without the state, it is to be attributed to the place where the greater proportion of the activity, measured by costs of performance, is carried on.

The sales factor is by far the most controversial part of the NCCUSL proposal because it adopts the destination basis test for receipts from sales of tangible personal property, and also because it provides at the same time for attribution of such receipts to the state of origin under certain circumstances. This so-called alternative basis for attributing receipts to the state of origin has been vigorously criticized by taxpayers on the ground that it represents an attempt to get the total receipts from sales of tangible personal property into the combined numerators of the sales factors of taxing states.

This interpretation is incorrect and the misunderstanding here goes back to section 3 and the arbitrary definition of potentially "taxable" which is used throughout the statute. Actually, the origin basis of attribution is limited to situations where the United States is the purchaser or where the taxpayer delivers or ships property to a purchaser who is located in a state where the taxpayer's business activities are either nil or insufficient to support the assertion of income tax jurisdiction. If the taxpayer is conducting business activities in State A, sufficient to support the imposition of an income tax, the receipts from sales of tangible personal property delivered or shipped to a purchaser in State A are attributed to that state; and, if State A does not impose an income tax, those receipts will not appear in the numerator of the sales fraction of any other state.

In effect, as to receipts from sales of tangible personal property, what the NCCUSL Act does is to divide total receipts from sales among all states

in which the taxpayer is conducting business; that the taxpayer does not actually pay an income tax in one or more of the states concerned does not affect this division.

If one accepts the principle of the destination test, it is difficult to make a good case, at least as to non-governmental sales, against the limited attribution to the state of origin which the uniform act provides. Since it is quite likely that goods are either manufactured or warehoused in the state of origin, the taxpayer is conducting business activities in that state which are substantial in the jurisdictional sense, and there cannot be any quarrel with the attribution on that ground. Moreover, under the present practice such a rule is implicitly recognized in the situation, for example, where a domestic corporation is not permitted to apportion its income or even to minimize its sales factor in the home state unless it is in fact doing business in the jurisdictional sense in some other state.

The main objection, however, to the NCCUSL sales factor is the use of the destination basis itself. What is the case for this type of sales factor--one which has already been adopted in a number of states? The answer to this question is fundamentally the same as the answer to the question why have a sales factor at all. In fact, some economists deny the validity of a sales factor on principle. They put the case quite simply: goods are the product of investment and labor, and accordingly only two factors are appropriate for use in an apportionment formula, namely, property to measure the contribution of investment and payrolls to measure the contribution of labor.

The analysis is satisfactory as far as it goes, but it doesn't go far enough. We are dealing here with something more than the production of wealth; we need to consider the further process of realizing income from the sale of the goods produced. In order to realize this income, it is necessary to have a market for the goods produced, and it is precisely the importance of contribution of the market which is recognized by the sales factor. This immensely practical point is generally accepted by both business men and tax officials, and the sales factor is in fact found in most apportionment formulas.

The same reasoning which would lead one to accept a sales factor supports the quantification of this factor on some basis related to the market. In the NCCUSL Act and in a number of state laws, the location of the purchaser, i.e., the destination basis, has been selected as filling that requirement most satisfactorily. Yet, this basis is sharply criticized even by some who are, nevertheless, wholeheartedly in

favor of retaining a sales factor. There is an element of inconsistency in this latter position, however, because to the extent one of the other bases (origin, principal place of negotiation, earmarking to order, etc.) used for the sales factor coincides with the place of manufacture, the use of that basis is tantamount to recognizing the contribution of the market in theory but denying it any significance in practice. The NCCUSL factor, on the other hand, recognizes the contribution of the market in a practical and logically defensible manner and provides criteria for quantification that are administratively feasible and susceptible of consistent application.

Revenue Effect

Some of the objections on the part of state tax administrators to the adoption of the destination basis sales factor must be attributed to the possibility that corporation income tax revenues might be adversely affected. This is, of course, a possibility because the adoption of the destination basis would mean the exclusion from the numerator of the sales fraction of those receipts from sales where the location of the purchaser is different from the place of storage, earmarking to order, negotiation, etc. These exclusions would be offset to some extent by the inclusion of receipts now attributed to other states, i.e., receipts from sales of goods shipped to or delivered to purchasers in that state. How each state would fare on balance if the destination basis were universally adopted is a point on which there is very little data available. However, there are indications that the change would not affect revenues in the manufacturing states to the extent which some administrators apparently fear.

Several years ago, the Council of State Governments conducted a survey^{1/} which throws a little light on this point. A number of corporations doing business in several states were requested to report the amount of income taxes actually paid to the several states in which they operated and also to recompute these taxes on the basis of a three-factor formula (property, payrolls, and sales) with the sales factor alternatively based on (1) negotiation, (2) origin, and (3) destination. This survey while based on a limited sample of taxpayers is particularly informative because respondents were requested to base the property factor on original cost where feasible and to include rented property on an eight times rental basis in the property factor.

^{1/} Report of Survey of Effects on State Revenues of Various Proposed Uniform Apportionment Formulas. Council of State Governments, Chicago, 1956.

On the basis of the data submitted, these inferences were drawn:

From the findings of this survey, it appears that the states in general would not gain or lose appreciable amounts of revenue if they were to adopt uniformly any one of the proposed formulas. For a few states there might be significant increases in revenue; a few might suffer serious revenue losses.

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The survey fulfilled its major objective of providing some measure of the impact on state revenues of three possible uniform apportionment formulas. It indicates that the adoption of these formulas would not seriously affect the revenues of most states. Thus, uniformity might be accomplished with consequent advantages to both the states and corporate taxpayers without impairing the revenues now derived by the states from these taxes.

Table 6 of the Council of State Governments report shows the increase or decrease in tax payments which would have been made by the reporting corporations if income had been apportioned on the basis of a three-factor formula using a destination sales factor rather than on the apportionment basis actually in use in each state. The potential losses shown are substantial in several jurisdictions, for example: -33.4 percent in the District of Columbia; -28.8 percent in North Carolina; -17.8 percent in Oregon; -18 percent in South Carolina; -3 percent in Vermont; and -11.8 percent in Virginia. Potential decreases of between 5 and 10 percent were shown for Connecticut (-9.4 percent), Kansas (-7.6 percent), North Dakota (-9.4 percent), and Oklahoma (-6 percent).

Some of these differences are explained by the fact that the formula actually used (and on which the comparison is based) differs considerably from a three-factor formula. Consequently, the adoption of any three-factor formula would cause a significant change no matter how the sales factor was set up. For example, in the District of Columbia, income is apportioned on the basis of a single factor--sales. The North Carolina and South Carolina apportionment formulas included no sales factor at the time the survey was made. Subsequently, the income tax laws of both states were amended to remedy this omission on the ground that this action was necessary to insure equitable treatment of local manufacturers who shipped their products to regional and national markets.

It was recognized in both states that this would mean an immediate though possibly temporary loss of revenue. However, it is of interest here to note that the actual loss of revenue in North Carolina was not so large as anticipated, and this has been attributed to the fact that the loss in income apportioned outside the state by a destination sales factor was offset to a much larger degree than originally anticipated by the income apportioned to North Carolina on deliveries in and shipments into that state.

It is also quite likely that for many of the states enumerated above the potential loss caused by the use of a three-factor formula--property, payroll, and sales--is to be attributed to some difference other than the basis of the sales factor. This is suggested by the fact that all the states mentioned with the exception of Oregon, Vermont, and Connecticut would show a decrease under all modifications of the sales factor outlined. Both Oregon and Vermont show a drop in taxes paid under the first alternative (negotiation) and an increase under the second (origin). Connecticut would show an increase under both these alternatives. Therefore, in Connecticut alone of all the states mentioned above is a drop in taxes paid to be attributed solely to the adoption of the destination basis sales factor.

Summary Comment on Principal Factor Proposals

On the whole, one might tentatively appraise the impact or operating effects of the principal factor proposals in the NCCUSL formula about as follows: The inclusion of rented property in the property factor probably will be adopted eventually in all states--with or without the remainder of the NCCUSL formula. Original cost is preferable to book value as the basis of the property factor because it will reflect contributions of old and new property with less distortion than the book basis. Moreover, the use of the cost basis in this factor should tend to make the whole formula more acceptable to those states whose sales factor might possibly be adversely affected by the adoption of the destination test. No substantial objection has been raised to the payroll factor, and it is to be assumed that the NCCUSL version would have no significant effect on existing apportionments.

The adoption of a destination sales factor may cut down the importance of the sales factor in some states, particularly where the basis now used (negotiation, earmarking to sale, etc.) coincides with the place of manufacture. The loss here will be offset to a considerable extent by the inclusion of receipts from deliveries in or shipments into the state. Furthermore, the limited evidence available in the Council of State

Governments survey indicates that the amount of income apportioned to a state is greatly influenced by factor and formula differences other than the basis used for the sales factor; and that significant changes in the amount of income apportioned might be expected to occur if a one- or two-factor formula were supplanted by any three-factor formula, utilizing property, payroll, and sales. The effects of the destination basis sales factor will be further minimized by the limited retention of the origin basis on sales to the United States and on sales to foreign countries and to other states when the taxpayer is not conducting business activities in those jurisdictions.

Finally, it is not unlikely that the adoption of the formula by a substantial number of the states would result in a higher tax yield over-all, simply because there would be less opportunity for taxable income to slip through the gaps and holes which now exist because of the differences in apportionment formulas and factors.

Recent Congressional Legislation

A final question to be considered is whether the recently enacted Public Law No. 272 (S. 2524, 86th Cong. 1st session) will affect the operation of the NCCUSL Act. In general, the new law denies states and local governments the power to tax net income derived from interstate commerce if the only business activity conducted in the state is the solicitation of orders for the sale of tangible personal property which orders are sent outside the state for approval or rejection and, if approved, are filled by shipment from a point outside the state. The law further provides that a person shall not be considered to have engaged in business activity merely by reason of sales or the solicitation of sales of tangible personal property by an independent contractor.

Inasmuch as the new federal law restricts the circumstances under which income from interstate commerce may be taxed, its provisions have to be considered in construing section 3 of the NCCUSL Act. If the taxpayer's business activities are within the area protected by Public Law No. 272, then the state does not have jurisdiction to subject the taxpayer to a net income tax and, as noted earlier, the determination on this point will decide whether the NCCUSL Act applies in the first place and whether receipts from sales are attributed to the state of origin, etc.

As a practical matter, it is the general opinion that Public Law No. 272 is essentially a legislative statement of the rule laid down by the United States Supreme Court in the Northwestern Portland Cement and Stockham Valves cases, and that it will not affect income tax jurisdiction (nor the intended operation of the NCCUSL Act)

in most states, i.e., in those states where an office or place of business has been regarded as indispensable to jurisdiction to tax. However, the new law does prohibit taxation of income where jurisdiction is asserted solely on the basis of continuous, routine solicitation of orders followed by shipments or deliveries to customers within the states (see, for example, Brown-Forman Distillers Corporation v. Collector of Revenue, 234 La. 651, 101 So.2d 70, appeal dismissed and cert. den., 359 U. S. 28; International Shoe Company v. Fontenot, 236 La. 279, 107 So.2d 640, cert. den., 359 U.S. 984) and the operation of the NCCUSL Act in those states would be affected because any determination with respect to jurisdiction and "taxability" would have to be based on the more restrictive provisions of Public Law No. 272.

Caveat

While the interpretation of Public Law No. 272 referred to above, namely, that it does not prohibit the taxation of income from interstate commerce if the taxpayer maintains an office in the taxing state, is generally accepted, the point is not completely free from doubt. The precise language protects solicitation plus the dispatch of orders to an out-of-state headquarters and the transmittal of approvals or rejections. The question then arises: does the protection of the process extend by necessary implication to a reasonable or ordinary means of carrying on this process, including a sales office maintained solely (or even primarily) for that purpose? If this question is answered in the affirmative, then the powers of the states to tax income derived from interstate commerce have been restricted considerably more than the general understanding of the law would indicate.

One is also struck by this point when the language of Public Law No. 272 is compared with that in S. 2213 (86th Cong. 1st session) which reads:

"...no State...shall have the power to impose a net income tax on income derived by a person exclusively from the conduct of interstate commerce, solely by reason of the solicitation of orders in the State by such person...if such person maintains no stock of goods, plant, office, warehouse, or other place of business within the State."

As to the tax effect of the sales office (for processing orders), P. L. No. 272 is generally interpreted as having the same meaning as S. 2213, but there is a substantial difference in the language used in these two drafts,

namely, that S. 2213 expressly preserves the office test, whereas P. L. No. 272 does not. Therefore, when we read the office test into P. L. No. 272, it is tantamount to saying that so much of the clause,

"if such person maintains no stock of goods, plant, office, warehouse or other place of business within the State"

which covers the maintenance of an office (for processing orders), might be omitted from S. 2213 without affecting the meaning of the bill.