Fair Is Fair—How to Assert For and Defend Against Alternative Apportionment

Alternative apportionment presents opportunities and challenges for taxpayers

By Craig B. Fields, Mitchell A. Newmark, and Eugene J. Gibilaro

The concept of apportionment in state taxation is an exception to the rule that life can be unfair. State apportionment *must* be fair. A wooden reading of a generally applicable apportionment law may not stand if that law yields an unfair result in a particular case. Alternative apportionment exists to ensure that apportionment is always fair. From the taxpayer's perspective, alternative apportionment can present opportunities (i.e., when the taxpayer believes that the generally applicable apportionment law is operating unfairly) and challenges (i.e., when a state asserts that the generally applicable apportionment law is operating unfairly).

This article provides background information on both the U.S. constitutional and statutorybased aspects of alternative apportionment and examines fact patterns in cases where taxpayers have successfully asserted alternative apportionment or successfully defended against a state's assertion of alternative apportionment. We conclude with other considerations and practicalities with respect to asserting for and defending against alternative apportionment.[1]

Background

Constitutional Alternative Apportionment

Where does alternative apportionment come from? The U.S. Constitution requires that a state tax on a business engaged in interstate commerce must meet four requirements, one of which is that the tax must be "fairly apportioned."[2] The U.S. Supreme Court has further held that a state apportionment formula that is "not intrinsically arbitrary . . . will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases."[3] For a taxpayer to demonstrate that the statutory apportionment formula is unconstitutional, the taxpayer must prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted . . . in that State' or has 'led to a grossly distorted result.'"[4] A state cannot assert that the statutory apportionment formula is unconstitutional because it taxes too little, because the legislature can always tax less than allowed under the Constitution.

For example, in *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell,* the U.S. Supreme Court held in 1931 that North Carolina's apportionment formula was unconstitutional as applied to the taxpayer in that case. There, North Carolina's standard statutory apportionment formula was a single property factor based on real and personal property located within the state. The taxpayer was in the business of tanning, manufacturing, and selling belting and other leather products; was incorporated in New York; and owned a manufacturing plant in North Carolina. The taxpayer offered evidence that the income from its business was generated from three distinct sources and demonstrated by using separate accounting principles that approximately seventeen percent of its income was attributable to its manufacturing activities performed in North Carolina. However, the state's apportionment formula yielded an apportionment percentage ranging between approximately sixty-six and eighty-five percent during the years at issue (i.e., what the Court later described as a "more than 250 percent "difference").[5] The Court concluded that this level of distortion was out of all appropriate proportion to the business transacted by the taxpayer in North Carolina.[6]

However, a decade later, in 1942, the U.S. Supreme Court declined to strike down an application of California's standard statutory apportionment formula based on the taxpayer's separate accounting evidence that its California operations resulted in a loss during the year at issue. In *Butler Brothers v. McColgan*, the taxpayer, headquartered in Illinois, engaged in the wholesale dry goods and general merchandise business. The taxpayer operated wholesale distributing houses in seven states, including California. On the whole, the taxpayer's business generated income of approximately $1.1 million during the year at issue, of which California taxed an apportioned share. The taxpayer demonstrated by using separate accounting principles that the California distributing house operated at a loss during the year at issue. Nonetheless, the Court declined to strike down California's apportionment formula for a unitary business as applied to the taxpayer, finding that "the results of the accounting system employed by appellant do not impeach the validity or propriety of the formula which California has applied here."[7] The Court concluded that the taxpayer "has not shown the precise sources of its net income" and failed to demonstrate that "factors which are responsible for that net income are present in other States but not present in California."[8]

Subsequent to *Butler Brothers*, the U.S. Supreme Court held that Missouri's standard statutory apportionment formula yielded "a grossly distorted result" and that the state was required to "make the accommodations necessary to assure that its taxing power is confined to its constitutional limits."[9] In *Norfolk & Western Railway Co. v. Missouri State Tax Commission*, Missouri's standard statutory formula required that railroad rolling stock be apportioned to the state for property tax purposes based on the proportion of the taxpayer's railroad track miles in Missouri relative to the taxpayer's railroad track miles everywhere. During the year at issue, the taxpayer, a primarily coal-carrying railroad, leased all of the property of another railroad company that engaged in a substantial amount of business in Missouri. Under the statutory formula, eight percent, or approximately $20 million, of the taxpayer's rolling stock was apportioned to Missouri. However, the taxpayer offered evidence that the actual percentage of its rolling stock located in Missouri on the assessment date was three percent, or approximately $7.6 million, a distortion of approximately 165 percent. The taxpayer also demonstrated that: (1) its coal operations required a substantial amount of specialized equipment that rarely ever entered Missouri; and (2) the company had leased the vast majority of its rolling stock regularly present in Missouri and that Missouri had assessed such property in the year before the lease at approximately $9 million. The Court stated that, when a taxpayer comes forward with strong evidence tending to prove the formula yields a grossly distorted result, the state cannot merely assert that the discrepancy resulting from application of the statutory formula is due to "nonparticularized increase in intangible value."[10] That is, the state cannot simply dismiss or ignore the distortion.

Butler Brothers makes clear that a mere showing of a different result using separate accounting principles will likely not suffice for the taxpayer to meet its burden. However, *Hans Rees' Sons, Inc.* and *Norfolk & Western Railway Co.* provide examples of the requisite level of distortion, the kind of evidence that is necessary to meet the burden of proving that the statutory apportionment formula produces an unconstitutional result and the burden of disproving unfairness in a particular case.

Statutory Alternative Apportionment

The U.S. Supreme Court has observed that states' apportionment formulas occasionally over-reflect or under-reflect income attributable to the taxing state: "Yet despite this imprecision, the Court has refused to impose strict constitutional restraints on a State's selection of a particular formula."[11] Therefore, statutory alternative apportionment provisions have been enacted, in part, to provide "a salutary 'safety valve' to avoid unfair results that may not rise to the level of unconstitutional distortion."[12] Of course, one does not need a statute to remedy unconstitutionally unfair apportionment inasmuch as constitutional violations are always wrong.

State statutory provisions permit a state's tax administrator to vary the statutory apportionment formula if that formula does not fairly represent the extent of a taxpayer's business activity within the state. The model alternative apportionment provision in the Uniform Division of Income for Tax Purposes Act (UDITPA) states:

> If the allocation and apportionment provisions of this Act 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.[13]

Many states have adapted the UDITPA alternative apportionment formulation to their own tax codes either by adopting identical language or with minor modifications.[14] Moreover, other states that have not adopted the UDITPA scheme have nonetheless adopted their own alternative apportionment provisions.[15]

Unlike in the constitutional context, statutory alternative apportionment can be asserted by both the taxpayer and the state. Therefore, the taxpayer must be aware that the state may also seek to deviate from the standard statutory formula by using the statutory authority, to the taxpayer's detriment.

The U.S. Supreme Court has further held that a state apportionment formula that is 'not intrinsically arbitrary . . . will be sustained until proof is offered of an unreasonable and arbitrary application in particular cases.'

Asserting Alternative Apportionment

The following are examples of fact patterns under which taxpayers have successfully persuaded state courts to grant their requests for alternative apportionment.

Excluding Factors Not Connected to Generating the Income

A state's standard apportionment formula may include a factor that makes little or no contribution to the generation of the taxpayer's income. Some states have enacted provisions to ensure the exclusion of immaterial factors from the apportionment formula. For example, Massachusetts requires the exclusion of any factor "if the denominator of the factor is less than ten per cent of one third of the taxable net income or if it is otherwise determined to be insignificant in producing income."[16] However, in the absence of such a provision, taxpayers can argue that including a factor arising from an immaterial activity distorts its apportionment formula and results in an apportionment that does not fairly represent its in-state activities.

In *Stonebridge Life Insurance Co. v. Department of Revenue*, the Oregon Tax Court held that Oregon's standard three-factor apportionment formula for insurance companies (i.e., insurance sales, payroll, and real estate/interest income) was unconstitutional as applied to the taxpayer.[17] The taxpayer was engaged in the business of providing life, accident, and health insurance coverage. For the year at issue, less than one percent of the taxpayer's premiums were received from Oregon policies (i.e., approximately $6 million of $661 million), and the taxpayer had no Oregon payroll (i.e., $0 out of approximately $39 million). However, the taxpayer received approximately $250,000 from Oregon real and tangible property in connection with two loans secured by Oregon property and received approximately $1.5 million from all real and tangible personal property (i.e., an Oregon percentage of approximately sixteen percent). The three factors were averaged and resulted in an Oregon apportionment percentage of approximately 5.7 percent due entirely to the equal weighting of the real estate/interest income percentage, which was relatively small and not an integral part of the taxpayer's insurance business.

The taxpayer demonstrated that if it had not earned approximately $250,000 of income from Oregon real and tangible property during the year, its Oregon apportionment percentage would have been 0.3013 percent. By earning an additional $250,000 in income from an Oregon source, the taxpayer's Oregon taxable income increased from what would have been approximately $680,000 to approximately $12.1 million, a distortion of 1,883 percent. The tax court found significant that the taxpayer's gross income from real and tangible property constituted less than 0.3 percent of the taxpayer's aggregate income from both insurance sales and real and tangible property. Therefore, it ruled that Oregon's statutory apportionment formula yielded a result "'out of all appropriate proportion to the business transacted' by taxpayer in Oregon. Simply put, taxpayer's low insurance sales and [payroll] factors did not balance out taxpayer's circumstantially high real estate income and interest factor."[18]

Successfully Including Factors Connected to Generating the Income

A commonsense approach to ensuring "fair apportionment" is that if a state requires that a particular item of income be included in the taxpayer's apportionable tax base, then the factors associated with generating that income should be included in the taxpayer's apportionment formula. Moreover, one U.S. Supreme Court justice has explained why inclusion of the factors associated with generating apportionable income is required by the U.S. Constitution.[19] Therefore, to the extent that the state's standard apportionment formula or the regulations promulgated thereunder do not permit representation in the apportionment factor denominators of those factor values that generated the income, the taxpayer can argue that such exclusion is unconstitutional and, at a minimum, does not fairly represent its in-state activities.

In *Tambrands, Inc. v. State Tax Assessor*, the taxpayer engaged in a unitary business with foreign affiliates that paid approximately $7.5 million in dividends to the taxpayer during the year at issue.[20] While those dividends were included by the state tax assessor in the business income of the taxpayer, the state tax assessor excluded the property, payroll, and sales of the foreign affiliates from the taxpayer's apportionment formula. The taxpayer asserted alternative apportionment and argued that, because the dividends from the foreign affiliates were included in the apportionable tax base, the apportionment formula should include at least a portion of the property, payroll, and sales of the foreign affiliates. The Supreme Judicial Court of Maine found that the result of the state tax assessor's failure to include the property, payroll, and sales of the foreign affiliates in the taxpayer's apportionment formula was that "more of the business activity of the unitary business is attributed to Maine than is the actual case."[21] Therefore, as a matter of constitutional law, the taxpayer had "met its 'distinct burden of showing by 'clear and cogent evidence'' that Maine's apportionment formula results in extra-territorial values being taxed."[22]

Successfully Demonstrating the Methodology for Computing a Particular Factor

While a state's standard statutory apportionment formula may include factors that are critical to how the taxpayer generates its income, the methodology by which the factor is computed may itself be distortive by including values that are not integral to generating income or excluding values that are integral to generating income. In these cases, the taxpayer can argue that a particular factor should include or exclude certain types of value to fairly represent the extent of the taxpayer's business activity in the state.

Excluding Value in a Factor Not Integral to Generating the Income

In *British Land (Maryland), Inc. v. Tax Appeals Tribunal*, the taxpayer was a real estate investment company that purchased a property in Baltimore and held the property for nine years before purchasing an office building in New York City.[23] Shortly after the taxpayer entered the New York City real estate market, the taxpayer sold its interest in the Baltimore property and recognized a capital gain of approximately $13 million. Inasmuch as the New York City property was valued at approximately three times the value of the Baltimore property, the New York property factor in the year of the sale significantly contributed to the statutory New York formula yielding a sixty-four percent apportionment of the gain from the sale of the Baltimore property to New York.

The taxpayer offered separate accounting evidence showing a 2,200 percent distortion in the percentage of the gain from the sale of the Baltimore property apportioned to New York under the statutory formula. However, the New York Court of Appeals stated that the taxpayer's separate accounting evidence alone was insufficient to prove unconstitutional apportionment. Nonetheless, the Court of Appeals concluded that application of the standard apportionment formula was unconstitutional in this case, because the gain principally arose from four factors that all occurred and had their economic impact prior to the taxpayer's acquisition of the New York City property: (1) an improved economic climate in downtown Baltimore; (2) sound management by the Baltimore real estate management firm retained to operate the property; (3) renovations to the building; and (4) acquisition of the fee interest in the property. Therefore, "[u]nder these circumstances, the extremely marked differences in value inevitably had a distorting effect."[24]

A taxpayer may also consider asserting alternative apportionment to counter unfavorable audit workpapers. However, there may be state-specific procedural rules barring the taxpayer from asserting statutory alternative apportionment as late as during an audit of the return.

Including Value in a Factor Integral to Generating the Income

In *Miami Corp. v. [Illinois] Department of Revenue*, the taxpayer derived income from investments in real estate, stocks, and other securities.[25] One of the taxpayer's investments was in Louisiana real estate on which oil and gas deposits were discovered. The taxpayer's oil and gas reserves in Louisiana generated more than eighty percent of the taxpayer's income during the years at issue. However, inasmuch as the Illinois property factor included only real and tangible property, the value of the taxpayer's intangible property (i.e., the reserves) was excluded from the property factor altogether. The plaintiff demonstrated unconstitutional distortion by showing that, under the standard statutory methodology for computing the property factor, the value of the taxpayer's capitalized lease for its Chicago office was worth more than the 250,000 acres of Louisiana land containing the oil and gas reserves. Based on this evidence, the Appellate Court of Illinois held that "the trial court did not err in finding that plaintiff had met its burden by producing clear and cogent evidence that the income attributed to Illinois is out of appropriate proportion to the business transacted in Illinois."[26]

In *Lancaster Colony Corp. v. Limbach*, the Ohio Supreme Court held that the taxpayer was entitled to alternative apportionment under the state's alternative apportionment statutory provision.[27] All of the taxpayer's marketing was performed by independent contractors. However, the Ohio payroll factor included only compensation paid to an employee, and the value of the amounts paid by the taxpayer to the independent contractors was excluded from the payroll factor. The taxpayer asserted alternative apportionment, and the Ohio Supreme Court agreed, despite finding that the inclusion of payments to the independent contracts in the payroll factor was only "a modest correction" because "[d]rastic distortions are not the only unfair results that may be remedied; any unfair representation of a taxpayer's business activity may be corrected."[28]

Finally, in *In re. Infosys Technologies Ltd.*, an administrative law judge (and on appeal, the Tax Appeals Tribunal) agreed with the taxpayer that the statutory method of computing the payroll factor (based on compensation) was distortive because the taxpayer, a software company, had many relatively low-compensated employees located in India, whereas it had only a few highly compensated employees located in New York.[29] Pursuant to New York's statutory alternative apportionment provision, the taxpayer asserted and was permitted to use an alternative method for computing its payroll factor. The judge found that "a more realistic and appropriate [payroll factor] would be the percentage of New York [located] billable employees versus total billable Infosys employees (on-site and offshore)."[30]

Defending Against Alternative Apportionment

The following are examples of fact patterns under which taxpayers have successfully persuaded state courts to overrule a state's tax administrator's assertion of alternative apportionment.

Failure of Proof

Courts have been nearly uniform in placing the burden of proof on the state when it is the state's tax administrator asserting alternative apportionment.[31] Taxpayers have successfully defended against state assertions of alternative apportionment in cases where the only evidence offered by the state is that its alternative method would result in a larger tax liability or that "tax considerations" with respect to the taxpayer's transactions resulted in the standard statutory formula yielding a more favorable result for the taxpayer. Taxpayers should use to their advantage the burden on the state when they seek to apply alternative apportionment.

In *CarMax Auto Superstores West Coast, Inc. v. South Carolina Department of Revenue*, the taxpayer owned and operated used car superstores on the West Coast (i.e., not in South Carolina), where it sold used automobiles at retail.[32] For the first two of the years at issue, the taxpayer owned intellectual property that it licensed to a related party (CarMax East) that engaged in used automobile retailing on the East Coast, including in South Carolina. For the subsequent four of the years at issue, the taxpayer owned an interest in a limited liability company that was treated as a partnership and that licensed the intellectual property and provided financing services to CarMax East.

Using the standard statutory gross receipts apportionment method, the taxpayer included in the numerator of the gross receipts factor its receipts from financing and intangibles in South Carolina and included in the denominator its receipts from financing, intangibles, and retailing everywhere. The department asserted alternative apportionment and sought to remove the taxpayer's receipts from retailing from the gross receipts factor. The South Carolina Supreme Court found that the only evidence offered by the department to support its assertion was that the taxpayer's corporate structure was purportedly "linked with tax minimization strategies" and "evidence regarding the sourcing of income, and the fact that [the taxpayer's] apportionment ratio yielded a significantly lower tax than that of CarMax East."[33] The court concluded that "[e]ven if these findings accurately characterize [the taxpayer's] motives, they do not provide a sound evidentiary basis to support" the department's assertion of alternative apportionment.[34]

Illegal Rulemaking

The framers of UDITPA "contemplated that states would enact 'separate legislation' embodying specialized formulas appropriate to particular industries," such as public utilities, transportation, and other industries.[35] However, in states where such legislation has not been adopted, tax administrators have frequently required specialized formulas asserting their purported authority under the state's statutory alternative apportionment provision.

Nonetheless, in the absence of a properly enacted regulation setting forth alternative apportionment rules for particular industries, taxpayers have successfully defended against assertions of alternative apportionment when the tax administrator seeks to implement its policy through case-by-case adjudication. Two examples come from the high courts of New Jersey and Maryland.[36] In both cases, the taxpayers were operators of television stations and the issue was the proper method of apportioning receipts from the sale of airtime to advertisers ("advertising receipts"). For the years at issue, the tax administrators asserted alternative apportionment and required the taxpayers to source their advertising receipts using the "audience share" method by which advertising receipts were sourced to the states using the ratio of the station's in-state audience to its total audience.

While neither high court doubted the authority of the tax administrators to require an alternative method of apportionment for the broadcast television industry or the reasonableness of the audience share method, both courts overruled the state's assertion of alternative apportionment. The New Jersey Supreme Court explained that "[t]he actual determination to use such an allocation method, however, requires implementing regulations and recourse to rulemaking procedures," and in the absence of the director complying with the requirements of the New Jersey Administrative Procedures Act, "the adoption of the audience share factor . . . was invalid."[37] The Maryland Court of Appeals likewise held that "[t]he effect of the Comptroller's audit was to announce a substantially new generally applicable policy with respect to apportionment of the network advertising income of national broadcasting corporations" and that "the new policy had to be promulgated pursuant to the rulemaking procedures of the APA."[38]

Other Items to Consider

With respect to procedure, if a taxpayer believes that the standard statutory method of apportionment does not fairly represent in-state business activities, a number of options are available. There are no state-specific procedural requirements necessary for asserting that the application of the statutory apportionment formula is unconstitutional. Conversely, states may require that certain specific procedural rules be followed to assert statutory alternative apportionment (e.g., filing a specific form or requesting to use alternative apportionment by a specified deadline), and, if those requirements are not met, the taxpayer may be precluded from asserting statutory alternative apportionment. Practically speaking, while not required, following a state's prescribed procedures for asserting alternative apportionment may be the best option for a taxpayer seeking to make a constitutional argument inasmuch as statutory alternative apportionment carries a lower burden (in many states) and can provide a fallback option if the constitutional argument does not ultimately pass muster.

Although a taxpayer could consider asserting alternative apportionment on its original return, state statutes may bar a taxpayer from taking a statutory alternative apportionment position on an original return without receiving prior state approval. In this case, the taxpayer may be limited to trying to meet the burden of proving that the standard apportionment method is unconstitutional. A taxpayer could consider formally requesting alternative apportionment to comply with any state-specific procedural rules in order to preserve its statutory alternative apportionment argument. Moreover, rather than seeking to take the position on an original return, a taxpayer could consider asserting alternative apportionment on an amended return and seek a refund.

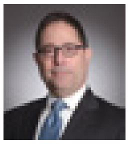
A taxpayer may also consider asserting alternative apportionment to counter unfavorable audit workpapers. However, there may be state-specific procedural rules barring the taxpayer from asserting statutory alternative apportionment as late as during an audit of the return. In this case, the taxpayer may be left with only its argument that the statutory apportionment formula is unconstitutional.

Last, when defending against the state's assertion of alternative apportionment, the taxpayer should consider the state's basis for doing so and whether it is justified. As discussed above, the fact that the tax administrator has identified an alternative method of apportionment that yields a greater tax liability than the statutory formula should never, by itself, be sufficient for the department to meet its burden to show that the statutory formula does not fairly represent in-state activities. As a fallback position, the taxpayer could consider whether there is a better alternative apportionment method available, other than the method asserted by the state. If so, the taxpayer should counter the state's asserted alternative method with its own alternative method.

Alternative apportionment presents both opportunities and challenges to taxpayers. Taxpayers know their businesses very well. When considering a state's standard statutory apportionment formula, taxpayers should always remember the golden rule that the "factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated."[39] Taxpayers always need to consider whether an apportionment formula meets that requirement and be prepared to assert for or defend against alternative apportionment. Whether through litigation or by being prepared to litigate the issue, successes abound.

Craig B. Fields and **Mitchell A. Newmark** are partners and **Eugene J. Gibilaro** is an associate in the New York City office of Morrison & Foerster LLP.


Craig B. Fields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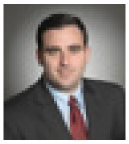
Eugene J. Gibilaro

Endnotes

1 For more information regarding alternative apportionment, *see* Craig B. Fields, Mitchell A. Newmark, & Eugene J. Gibilaro, "Unfair Apportionment: Consider the Alternatives," *Tax Executive*, May 22, 2017. *http://taxexecutive.org/unfair-apportionment-consider-the-alternatives/*

2 *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), which held that the other three requirements for a state tax passing constitutional muster are that "the tax is applied to an activity with a substantial nexus with the taxing State, . . . does not discriminate against interstate commerce, and is fairly related to the services provided by the State."

3 *Hans Rees' Sons, Inc. v. North Carolina ex rel. Maxwell*, 283 U.S. 123, 133 (1931).

4 *Moorman Mtg. Co. v. Bair*, 437 U.S. 267, 274 (1978) (citations omitted).

5 Container Corp. of Am. V. Franchise Tax Bd., 463 U.S. 159, 184 (1983)

6 *Hans Rees' Sons, Inc*., 283 U.S. at 135.

7 315 U.S. 501, 508 (1942).

8 *Id.* at 509.

9 *Norfolk & W. Ry. Co. v. Mo. State Tax Comm'n*. 390 U.S. 317, 329 (1968).

10 *Id.* at 329.

11 *Moorman Manufacturing Co.,* 437 U.S. at 273.

12 Hellerstein, Hellerstein & Swain, State Taxation § 9.20(3)(a) (3d ed. 2001 & supp. 2017-3).

13 UDITPA § 18 (1957) (Nat'l Conference of Comm'rs of Unif. State Laws, amended 1966).

14 *See, e.g.,* Cal. Rev. & Tax. Code § 25137; S.C. Code Ann. § 12-6-2320; Tenn. Code Ann. § 67-4-2014.

15 *See, e.g.,* N.J. Stat. Ann. § 54:10A-8.

16 Mass. Gen. Laws Ann. ch. 63, § 38(g).

17 18 Or. Tax 423, 441 (2006).

18 *Id.* at 441 (citation omitted).

19 *Mobil Oil Corp. v. Comm'r of Taxes*, 445 U.S. 425, 461 (1980), in which Justice John Paul Stevens dissented: "Unless the sales, payroll, and property values connected with the production of income by the payor corporations are added to the denominator of the apportionment formula, the inclusion of earnings attributable to those corporations in the apportionable tax base will inevitably cause [the taxpayer's] income to be overstated."

20 595 A.2d 1039 (Me. 1991).

21 *Id.* at 1044.

22 *Id.* at 1045 (citation omitted).

23 647 N.E.2d 1280 (N.Y. 1995).

24 *Id.* at 1286.

25 571 N.E.2d 800 (Ill. App. Ct. 1991).

26 *Id.* at 805.

27 524 N.E.2d 1389 (Ohio 1988).

28 *Id.* at 1392.

29 DTA No. 820669 (N.Y.S. Div. of Tax App., February 15, 2007), *aff'd*, (N.Y.S. Tax App. Trib., February 21, 2008).

30 *Id.*

31 But see *Equifax, Inc. v. Miss. Dep't of Revenue*, 125 So. 3d 36 (Miss. 2013), which found that the taxpayer bears the burden of proof when the department asserts alternative apportionment. However, in the wake of the *Equifax* decision, the Mississippi legislature amended its statute to expressly place the burden of proof on the party requesting or requiring alternative apportionment. *See* Miss. Code Ann. § 27-7-24.

32 767 S.E.2d 195 (S.C. 2014).

33 *Id.* at 201.

34 *Id. See also Rent-a-Ctr. W. Inc. v. S.C. Dep't of Revenue*, 792 S.E.2d 260 (S.C. Ct. App. 2016), which held that the department failed to meet its burden of proof based on similar evidence produced by the department on facts similar to those in the *CarMax* case, and *Associated Bank, N.A. v. Comm'r of Revenue*, No. 8851-R, 2017 Minn. Tax LEXIS 19 (Minn. T. C. April 18, 2017), which denied the commissioner's assertion of alternative apportionment despite the taxpayer's stipulation that it had created the entities at issue in the case for the purpose of limiting its Minnesota tax liability; the Minnesota Supreme Court heard oral arguments in the case on November 1, 2017.

35 Hellerstein, Hellerstein & Swain, *supra* note 11, at §9.20(1).

36 *Metromedia, Inc. v. Dir., Div. of Taxation*, 478 A.2d 742 (N.J. 1984); *CBS, Inc. v. Comptroller of the Treasury*, 575 A.2d 324 (Md. 1990).

37 *Metromedia, Inc.,* 478 A.2d at 755.

38 *CBS, Inc.,* 575 A.2d at 330.

39 *Container Corp.,* 463 U.S. at 169..