Draft Amendment to MTC Regulation IV.17
Regarding Treatment of Activities Performed "On Behalf Of" the Taxpayer

As Approved for By-law 7 survey by Executive Committee, November 2006

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••• Reg. IV.17. Sales Factor: Sales Other Than Sales of Tangible Personal Property in This State

(1) In general. Article IV.17. provides for the inclusion in the numerator of the sales factor of gross receipts from transactions other than sales of tangible personal property (including transactions with the United States Government); under this section, gross receipts are attributed to this state if the income producing activity which gave rise to the receipts is performed wholly within this state. Also, gross receipts are attributed to this state if, with respect to a particular item of income, the income producing activity is performed within and without this state but the greater proportion of the income producing activity is performed in this state, based on costs of performance.

(2) Income producing activity: defined. The term "income producing activity" applies to each separate item of income and means the transactions and activity ~~directly~~ engaged in by the taxpayer in the regular course of its trade or business for the ultimate purpose of producing that item of income ~~obtaining gains or profit~~. Such activity ~~does not~~ includes transactions and activities performed on behalf of a taxpayer, such as those conducted on its behalf by an independent contractor. Accordingly, income producing activity includes but is not limited to the following:

(A) The rendering of personal services by employees or by an agent or independent contractor acting on behalf of the taxpayer or the utilization of tangible and intangible property by the taxpayer or by an agent or independent contractor acting on behalf of the taxpayer in performing a service.

(B) The sale, rental, leasing, licensing or other use of real property.

(C) The rental, leasing, licensing or other use of tangible personal property.

(D) The sale, licensing or other use of intangible personal property.

The mere holding of intangible personal property is not, of itself, an income producing activity.

(3) Cost of performance: defined. The term "costs of performance" means direct costs determined in a manner consistent with generally accepted accounting principles and in accordance with accepted conditions or practices in the trade or business of the taxpayer to perform the income producing activity which gives rise to the particular item of income. Included in the taxpayer's cost of performance are taxpayer's payments to an agent or independent contractor for the performance of personal services and utilization of tangible and intangible property which give rise to the particular item of income.

(4) Application.

(A) In general. Receipts (other than from sales of tangible personal property) in respect to a particular income producing activity are in this state if:

(a) the income producing activity is performed wholly within 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.

(B) Special rules. The following are special rules for determining when receipts from the income producing activities described below are in this state:

(a) Gross receipts from the sale, lease, rental or licensing of real property are in this state if the real property is located in this state.

(b) Gross receipts from the rental, lease, or licensing of tangible personal property are in this state if the property is located in this state. The rental, lease, licensing or other use of tangible personal property in this state is a separate income producing activity from the rental, lease, licensing or other use of the same property while located in another state; consequently, if property is within and without this state during the rental, lease or licensing period, gross receipts attributable to this state shall be measured by the ratio which the time the property was physically present or was used in this state bears to the total time or use of the property everywhere during that period.

Example: Taxpayer is the owner of 10 railroad cars. During the year, the total of the days during which each railroad car was present in this state was 50 days. The receipts attributable to the use of each of the railroad cars in this state are a separate item of income and shall be determined as follows:

$$\frac{(10 \times 50) = 500}{3650} \times \text{Total Receipts} = \text{Receipts Attributable to this State}$$

(c) Gross receipts for the performance of personal services are attributable to this state to the extent that such services are performed in this state. If services

relating to a single item of income are performed partly within and partly without this state, the gross receipts from the performance of such services shall be attributable to this state only if the greater proportion of the services was performed in the state, based on costs of performance. Usually, where services are performed partly within and partly without this state, the services performed in each state will constitute a separate income producing activity; in such cases, the gross receipts from the performance of services attributable to this state shall be measured by the ratio which the time spent in performing the services in this state bears to the total time spent in performing the services everywhere. Time spent in performing services includes the amount of time expended in the performance of a contract or other obligation which gives rise to such gross receipts. Personal service not directly connected with the performance of the contract or other obligation, as for example time expended in negotiating the contract, is excluded from the computations.

Example (i): Taxpayer, a road show, gave theatrical performances at various locations in State X and in this state during the tax period. All gross receipts from performances given in this state are attributed to this state.

Example (ii): The taxpayer, a public opinion survey corporation, conducted a poll by means of its employees in State X and in this state for the sum of $9,000. The project required 600 man-hours to obtain the basic data and prepare the survey report. Two hundred of the 600 man-hours were expended in this state. The receipts attributable to this state are $3,000.

$$\frac{200}{600} \times \$9{,}000 = \$3{,}000$$

(C) Services on Behalf of Taxpayer. An income producing activity performed on behalf of a taxpayer by an agent or independent contractor is attributed to this state if such income producing activity is in this state.

(a) Such income producing activity is in this state:

(i) when the taxpayer can reasonably determine at the time of filing that the income producing activity is actually performed in this state by the agent or independent contractor, but if the activity occurs in more than one state, the location where the income producing activity is actually performed shall be deemed to be not reasonably determinable at the time of filing under (4)(C)(a)(i);

(ii) if the taxpayer cannot reasonably determine at the time of filing where the income producing activity is actually performed, when the contract between the taxpayer and the agent or independent contractor indicates it is to be performed in this state and the portion of the taxpayer's

payment to the agent or contractor associated with such performance is determinable under the contract;

(iii) if it cannot be determined where the income producing activity is actually performed and the agent or independent contractor's contract with the taxpayer does not indicate where it is to be performed, when the contract between the taxpayer and the taxpayer's customer indicates it is to be performed in this state and the portion of the taxpayer's payment to the agent or contractor associated with such performance is determinable under the contract; or

(iv) if it cannot be determined where the income producing activity is actually performed and neither contract indicates where it is to be performed or the portion of the payment associated with such performance, when the domicile of the taxpayer's customer is in this state. If the taxpayer's customer is not an individual, "domicile" means commercial domicile.

(b) If the location of the income producing activity by an agent or independent contractor, or the portion of the payment associated with such performance, cannot be determined under (4)(C)(a)(i) through (4)(C)(a)(iii), or the taxpayer's customer's domicile cannot be determined under (4)(C)(a)(iv), or, although determinable, such income producing activity is in a state in which the taxpayer is not taxable, such income producing activity shall be disregard