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Massachusetts Apportionment Update: Current cost of performance litigation and look ahead to market sourcing and throwout in 2014

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Dial-In Number: 800 617 1412

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Agenda

- Pending cost of performance appeals
- Positioning your cost of performance appeal
- Market sourcing
- Throwout

Pending cost of performance appeals

- Three Court decisions approve “operational approach”
- Cost of performance: Rule for sourcing receipts other than from sale of TPP through 2013 tax year
- Department continues to:
 - Apply “transactional” approach (sometimes)
 - Take into account third-party costs in determining location of income-producing activity

Pending cost of performance appeals—examples

- Franchise fees
- Broker/dealer receipts (several cases)
- Consulting services
- Money transfer services
- Wholesaler credits

Recently resolved cost of performance appeals

- Advertising fees
- Purchase/sale of natural gas
- Delivery services
- Information services

Pending cost of performance appeals—Department takes operational approach

- Gift card management

- Refund opportunity-developing, licensing and maintaining software

Positioning your cost of performance appeal

- Think expansively about receipts eligible for cost of performance
- Use Department's own pending litigation positions to bolster your appeal
- Can you take different COP approaches with different business units?

New Legislation – Market Sourcing

- Effective for tax years beginning on or after 1/1/2014
- Sales, other than sales of TPP are in MA if the corporation's market for the sale is in MA.
 - Market is in MA if:
 - *Real Property*: Real property location
 - *Lease / license TPP – TPP location*
 - *Services – extent “delivered” to MA*
 - *Lease / license of intangibles – used in MA*
 - *License, lease or sale of intangible property* (payments contingent on productivity or use)
 - *Other sales of intangible property*

Market Sourcing – Issues to Watch

- Sales of web-accessed software; software hosted on a remote server—source to server?
- How are services “delivered”?
- Many sales of intangible property excluded from factor—potential constitutional issue
- Special industry regulations—still valid?

New Legislation - Throwout

- For sales other than the sale of TPP, if the taxpayer is not taxable in a state to which a sale is assigned, or if the state to which a sale is assigned cannot be determined or reasonably approximated, the sale is excluded from both the numerator and denominator of the sales factor.

Throwout – Issues to Watch

- Statutory interpretation issues:
 - What does “not taxable” mean?
 - Reasonable approximation
- Constitutional issues
- Watch Department guidance closely

Questions?



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