IN THE
ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

INNOPHOS HOLDINGS INC.,	)	
Petitioner,	)	
	)	
v.	)	**No. 14-TT-214**
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	**James M. Conway**
Respondent.	)	**Chief Administrative Law Judge**
	)	

PETITIONER'S MOTION FOR PARTIAL SUMMARY JUDGMENT
ON COUNTS I, II, AND IV OF THE PETITION OF THE TAXPAYER

Petitioner, Innophos Holdings, Inc., by and through its attorneys, Reed Smith LLP, moves this Tribunal for the entry of summary judgment in its favor and against the Respondent, the Illinois Department of Revenue (the "Department") on Counts I, II and IV of its Petition, pursuant to Section 2-1005 of the Illinois Code of Civil Procedure. 735 ILCS 5/2-1005.

Standard for Summary Judgment

The interpretation and applicability of legislation – in this case of Illinois Public Act ("P.A.") 098-*0478* – present questions of law resolvable through summary judgment. *See*, *Barnett v. Zion Park District*, 171 Ill. 2d 385 (1996). The existence of factual questions that are unrelated to the essential elements of the cause of action does not preclude a court from granting summary judgment. *Staley Continental, Inc. v. Venterra Sales & Management Co*, 228 Ill. App. 3d 174 (1st Dist. 1992). If no genuine issue of material fact exists, the trial court must grant judgement as a matter of law. *First State Insurance Co. v. Montgomery Ward & Co.*, 267 Ill. App. 3d 851 (1st Dist. 1994). "An issue of fact is not material, even if disputed, unless it has legal and probative force as to the controlling issue." *First of America Bank, Rockford, N.A., v.*

Netsch, 166 Ill. 2d 165 (1995); *see also*, *Pietruszynski v. McClier Corporation, Architects & Engineers*, 338 Ill. App. 3d 58 (1st Dist. 2003).

Facts

The facts which are not in dispute by the parties are:

a. In tax years ending December 31, 2009 and December 31, 2010, Petitioner made sales of its goods throughout the United States and to purchasers outside the United States. For 2009 and 2010 the receipts from all such sales were reflected in the denominator of the Illinois apportionment formula of the Petitioner's Illinois income tax return for each year.

b. Some of the goods Petitioner sold in 2009 and 2010 were sold to Illinois purchasers. For 2009 and 2010 the receipts from all such sales were reflected in the numerator of the Illinois apportionment formula of the Petitioner's Illinois income tax return for each year.

c. Some of the goods Petitioner sold in 2009 and 2010, reflected in the denominator of the Illinois apportionment formula of the Petitioner's Illinois income tax return for each year, were shipped from Illinois to purchasers in states in which Petitioner was subject to a tax on or measured by income.

d. Some of the goods Petitioner sold in 2009 and 2010 were shipped from Illinois to states in which Petitioner was not subject to a tax on or measured by income either because the state in which the purchaser was located did not impose such a tax, or because the activities of the Petitioner in the state in which the purchaser was located did not exceed the scope of activities protected by Federal Public Law 86-272. Illinois Income Tax Act ("IITA") section 304(a)(3)(B)(ii) required receipts from such sales to be included in the Illinois numerator of the sales factor apportionment formula, *unless* Petitioner filed a return and paid tax on such sales in the state of the purchaser. In timely filing its 2009 and 2010 Illinois income tax returns, Petitioner did not include its receipts from the sale of goods to such states in the numerator of the Illinois apportionment formula.

e. At some point prior to January 1, 2014, the Department commenced an audit of Petitioner's 2009 and 2010 Illinois income tax returns.

f. On January 1, 2014, P.A. 098-0478 became effective, by its terms, retroactively to tax years ending on or after December 31, 2008.

g. The terms of section 100.3390 of the Department's regulations remain unchanged from what they were prior to the time Petitioner's 2009 and 2010 Illinois returns were filed, despite the enactment of P.A. 098-0478. *See*, 86 Ill. Admin. Code § 100.3390.

h. At some point in 2014, the Department issued a Notice of Deficiency to Petitioner assessing additional liability arising from the Department's inclusion in the Illinois sales factor numerator, sales made by Petitioner to purchasers in other states in which Petitioner was not subject to a tax on or measured by income.

Statutes at Issue

IITA section 304(a)(3)(B) provides as follows:

> (3) Sales factor.
>
> (A) The sales factor is a fraction, the *numerator of which is the total sales of the person in this State* during the taxable year, and the denominator of which is the total sales of the person everywhere during the taxable year.
>
> (B) Sales of tangible personal property are in this State if:
>
> . . . ; or
>
> (ii) The property is *shipped from an office, store, warehouse, factory or other place of storage in this State* and either the purchaser is the United States government *or the person is not taxable in the state of the purchaser*; provided, however, that premises owned or leased by a person who has independently contracted with the seller for the printing of newspapers, periodicals or books shall not be deemed to be an office, store, warehouse, factory or other place of storage for purposes of this Section. Sales of tangible personal property are not in this State if the seller and purchaser would be members of the same unitary business group but for the fact that either the seller or purchaser is a person with 80% or more of total business activity outside of the United States and the property is purchased for resale.

35 ILCS 5/304(a)(3) (emphasis added). At issue here is the first sentence of section 304(a)(3)(B)(ii), which has read the same since the enactment of the IITA in 1969.

IITA section 304(f), as amended by P.A. 098-0478 provides as follows:

> (f) Alternative allocation. If the allocation and apportionment provisions of subsections (a) through (e) and of subsection (h) *do not,* <u>for taxable years ending before December 31, 2008,</u> fairly represent the extent of a person's business activity in this State, **or**, <u>for taxable years ending on or after December 31, 2008, fairly represent the market for the person's goods, services, or other sources of business income,</u> the person may petition for, or the Director may, without a petition, permit or require, in respect of all or any part of the person's business activity, if reasonable:
>
> (1) Separate accounting;
> (2) The exclusion of any one or more factors;
> (3) The inclusion of one or more additional factors which will fairly represent the person's business activities <u>or market</u> in this State; or
> (4) The employment of any other method to effectuate an equitable allocation and apportionment of the person's business income.

35 ILCS 5/304(f), as amended in 2013 by P.A. 98-0478. At the time that Petitioner filed its 2009 and 2010 Illinois income tax returns none of the underlined passages in section 304(f) above were in the law; on January 1, 2014 such passages retroactively became the law in effect for such years, as provided by P.A. 98-0478.

ARGUMENT

Introduction

IITA section 304(f), by design, and by its terms, only has a role when applied with reference to another provision of Article III of the IITA regarding apportionment. Consequently, when section 304(**f**) is amended, every provision of Article III is affected. Other than the amendment which changed its original designation from 304(e) to 304(f), there had been no amendment to that section until P.A. 098-0478. The amendment made to section 304(f) removed the sole purpose for Article III up to that date, the fair measurement of business activity of a taxpayer with income from multistate sources, and substituted it with the new purpose of fairly measuring the market for a taxpayer's goods. Hence, the entirety of Article III pivoted with that amendment.

While there is no dearth of case law regarding whether a law is or may have retroactive application, here the General Assembly expressly stated in the amendatory law that the amendments apply to prior tax years, specifically those ending on or after December 31, 2008. The Court has said that "If the General Assembly has clearly expressed an intention that a statute be given retroactive effect, we must honor that intention unless the constitution prohibits us from doing so." *Allegis Realty Investors v. john Lotus Novak*, 223 Ill. 2d 318, 332 (2006). Thus, for example, in rejecting a challenge to certain tax levies "prior to the amendment becoming law" that was to validate such prior levies and to prospectively exclude such levies from rate

limitations, the Court said that "Because we determined that the General Assembly had clearly intended to reach those earlier tax levies, and because we concluded that retroactive application would not offend the constitution, we gave effect to the legislature's intent and upheld the statutory requirement." *Commonwealth Edison Co. v. Will County Collector*, 196 Ill. 2d 27, 42 (2001). By its terms, P.A. 98-0478 is intended to apply to tax years ending on or after December 31, 2008 and is hence applicable to Petitioner's 2009 and 2010 Illinois income tax returns.

When a statute pivots prospectively, taxpayers have an opportunity to change direction in whichever way is most helpful to them and they are not prohibited by the change in the law. When a statute pivots retroactively, taxpayers have no such choice. However, neither does the Department have the choice to cite a taxpayer for going the wrong way before the law changed when, because of the retroactive pivot of the law, the taxpayer is now seen to have been moving with the flow of traffic. This is such a case.

I. COUNT I: Because Public Act 098-0478 is applicable to tax years ending on or after December 31, 2008, the sales factor numerator in Petitioner's 2009 and 2010 Illinois income tax sales apportionment formulas is correct as filed, as each fairly reflects the Illinois market for Petitioner's goods.

The "2013 Spring Legislative Agenda" publicly disseminated by the Department included the following description of the Department's own proposal to amend the IITA:

> **D. Correct Alternative Apportionment Standard**
> Sub-sections a, b, c & d of IITA Section 304 were previously amended to address this, but it failed to change sub-section f. IITA Section 304(f) allows alternative apportionment when the statutory formula does not fairly reflect the taxpayer's business activities in Illinois. *This does not mesh well with the current sales factor provisions, which apportion income according to customer location rather than* ***where the taxpayer is engaged in business activities***. We should amend this provision to allow alternative apportionment when the statutory formula does not fairly reflect the market for the taxpayer's goods or services in Illinois.

Exhibit A, Illinois Department of Revenue, 2013 Spring Legislative Agenda, Synopsis of Proposal: Omnibus Income Tax proposal LRB # 098 04083, page 2 (emphasis added). What the

Synopsis did not disclose, however, was that the change, when it became law in Public Act 098-0478 effective January 1, 2014, would be retroactive to tax years ending on or after December 31, 2008. Long before P.A. 098-0478, section 304(a)(3)(B)(ii) of the IITA already did "not mesh well" with the IITA.

Section 304(a)(3)(B) is original to the 1969 enactment of the IITA. At that time, and until 1987, the apportionment formula consisted of the average of three factors: property, payroll and sales, adopting and thus reflecting the design of the Uniform Division of Income for Tax Purposes Act ("UDITPA") drafted in 1957 by the National Conference of Commissioners on Uniform State Law, and incorporated into article IV of the Multistate Tax Compact. Illinois joined the Multistate Tax Compact in 1967, and adopted the IITA in August of 1969. *See, generally, Hartmarx Corporation and Subsidiaries v. Bower,* 309 Ill. App. 3d 959 (1999). The first regulations issued by the Department for the IITA provided specifically for the property and sales factor, as follows:

> (d) Uniform treatment. A person using a [property/sales] factor under the Illinois Income Tax Act shall compute the numerator and the denominator of such factor in a manner consistent with such person's computation of the numerator and denominator thereof in other states employing the same factor, especially states which have adopted the Multistate Tax Compact. Thus, if all states were to adopt the Multistate Tax Compact, all [property/sales] included in the denominator of the [property/sales] factor would also be included in the numerator of the factor of some state.

Illinois Department of Revenue Regulations, July 1, 1971, Article 3, Sections 304-2(d), 304-4(g). **Exhibit B**. The payroll factor had a similar provision regarding compensation paid in Illinois but not relying on the Multistate Tax Compact and instead assuming that if all other states had the Illinois rule then compensation would be "paid in" only one state. *Id.,* Section 304-3(b)(3).

In *GTE Automatic Electric, Inc., v. Allphin,* 68 Ill. 2d 326 (1977), the Court explained that, at the time, "[t]he purpose of the uniform act [UDITPA] and article 3 of the Illinois act is to

assure that 100%, and no more or no less, of the business income of a corporation doing multistate business is taxed by the State having jurisdiction to tax it." *Id.* at 335. Indeed, the Court quoted the principal author of UDITPA as stating that "states levying net income taxes or taxes measured by net income have an amazing variety of formulas for allocating income" and "that because of the differences in the formulas, it is possible for interstate businesses to be taxed on more than 100% of their net income, or in some cases, substantially less, depending, of course on the particular states in which the business is subjected to such taxes." *Id.* Thus, the author concluded, "The uniform act, if adopted in every state having a net income tax or a tax measured by net income, would assure that 100 % of income, and no more or no less, would be taxed." *Id.*

The tax years at issue in *GTE Automatic*, were 1969, 1970 and 1971. *Id.* at 330. Although the *GTE Automatic* decision was issued in 1977, by 1975 Illinois had withdrawn from the Multistate Tax Compact. Illinois was therefore no longer bound to the pursuit of uniformity that all other MTC signatory States strived for. Uniformity aside, "Illinois' three-factor formula, combining the property, payroll and sales factors, [was] designed to adjust for any variances in any given factor so that ***the factors together represent 'business activity.'"*** *The New Yorker Magazine, Inc. v. The Department of Revenue,* 187 Ill. App. 3d 931, 941 (1989), restating, with citation to *GTE Automatic*, that "the purpose of Illinois' three-factor apportionment formula is to assure not only that a corporations' business income not be overtaxed *but also to avoid any gap* in taxing all business income." (emphasis added).

The *New Yorker Magazine* decision involved the 1986 tax year, although it was decided in 1989. However, by 1987, Illinois had abandoned the three-factor formula of UDITPA which had served as the foundation for the *GTE Automatic* and *New Yorker Magazine* decisions. Instead, Illinois now had an apportionment formula consisting of four factors: property, payroll,

sales, and sales. Having abandoned the pledge to pursue uniformity and to police against gaps and overlaps by leaving the MTC, and having abandoned the framework to achieve uniformity and the rationale for having a policing role by adopting a non-UDITPA formula, Illinois was laboring under a delusion when it argued, as it continued to do in several cases, that the Illinois statutory apportionment formula was still designed to assure that income is not overtaxed but also to avoid any gap in taxing all business income. To continue that argument after abandoning the non-UDITPA four-factor formula in favor of a *single* factor sales apportionment formula on and after December 31, 2000 – as the Department will have to do to oppose this motion – will go beyond delusion and into active psychosis.[1]

In *Hartmarx Corporation v. Bower*, 309 Ill. 959 (1999), the taxpayer challenged the inclusion of sales, made outside Illinois, in the Illinois sales factor numerator pursuant to section 304(a)(3)(B)(ii) partly on the basis that "there is no evidence that the income from the sales at issue is attributable to anything but the sales activities of [the taxpayer] outside Illinois." *Id.* at 968. The appellate court's response was that:

> This argument overlooks that apportionment focuses on "business activity," a concept capable of encompassing more than "sales activity" as narrowly defined by Hartmarx. Hartmarx may believe that shipping is not a part of "sales activity," but its customers would likely disagree with that definition. Moreover, the Tax Act defines sales of tangible personal property as "in this State" if the property is shipped from an office, store, warehouse, factory or other place of storage in this State and the person is not taxable in the State of the purchaser."

Id. at 968. Consider that passage in light of the fact that P.A. 098-0478 made the following retroactive amendment to Section 304(f) of the IITA:

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[1] "But as of January 2012, only ten jurisdictions exclusively require the equal-weighted three-factor formula. Seven of these ten are Compact members. Although states are moving away from equal-weighting, they are moving away in the same direction – toward more heavily weighting the sales factor. Thirty-seven states now at least double weight the sales factor. And fourteen of the thirty-seven use the sales factor only. Five of these fourteen are Compact members. Attachment E shows factor weightings by state." Multistate Tax Commission, *Multistate Tax Compact Article IV, Recommended Amendments*, May 3, 2012, Page 10. **Exhibit C.**

> (f) Alternative allocation. If the allocation and apportionment provisions of subsections (a) through (e) and of subsection (h) *do not,* for taxable years ending before December 31, 2008, *fairly represent the extent of a person's business activity* in this State, **or**, for taxable years ending on or after December 31, 2008, *fairly represent the market for the person's goods*, services, or other sources of business income, the person may petition for, or the Director may, without a petition, permit or require, in respect of all or any part of the person's business activity, if reasonable:
>
> (1) Separate accounting;
> (2) The exclusion of any one or more factors;
> (3) The inclusion of one or more additional factors which will fairly represent the person's business activities or market in this State; or
> (4) The employment of any other method to effectuate an equitable allocation and apportionment of the person's business income.

35 ILCS 5/304(f), as amended by P.A. 98-0478, underlined in original, italics added. P.A. 98-0478 excised "business activity" – the basis for upholding throwback of sales in *Hartmarx* – retroactively to December 31, 2008. As the Department itself noted in its 2013 Legislative Agenda, "*This does not mesh well with the current sales factor provisions, which apportion income according to customer location* rather than where the taxpayer is engaged in business activities." **Exhibit A**, Illinois Department of Revenue, 2013 Spring Legislative Agenda, Synopsis of Proposal: Omnibus Income Tax proposal LRB # 098 04083, page 2 (emphasis added).

Section 304(a)(3)(B)(ii) was upheld in *Hartmarx* on the basis that shipment of sales from Illinois represented "business activity." By amending section 304(f) to *retroactively* disregard business activity and instead focus on the market the IITA now comports to the view the taxpayer advocated in *Hartmarx,* and reflected by Petitioner's 2009 and 2010 original Illinois returns. Petitioner's original 2009 and 2010 returns as filed, without applying IITA section 304(a)(3)(B)(ii), do "fairly represent the market for [Petitioner's] goods", without the need for section 304(f) to be activated. Applying section 304(a)(3)(B)(ii) to add non-Illinois market sales

to the Illinois numerator "does not mesh well with the current sales factor provisions," since doing so is based on "business activity" in Illinois and not "according to customer location."

Hartmarx expressed the view that "the throwback rule is designed to ensure that the taxpayer does not receive a windfall," but in reality the entire premise for the Illinois role as an apportionment-cop, so to speak, rests on a flawed tautology. At no time have all states imposing an income tax had the same apportionment formula. Absent that, it was impossible in 1969 as in any later year to conclude that not being subject to tax in a given state somehow would result in a "windfall" for a taxpayer. The assumption that uniformity was or would become the norm lacks even more basis in fact today than it lacked in 1969.[2]

Even within Illinois, from 1969 through December 31, 2008, taxpayers deriving income from sales of services or from intangibles, financial organizations, transportation companies, and insurance companies, which had a specific IITA apportionment formulas, were subjected to no equivalent "throwback" provision.

Consider also that when Illinois transitioned to a single sales factor formula in 2000, many of those taxpayers who apportioned income from services wound up with a zero Illinois apportionment factor because Illinois apportioned 100% of the income to the State where more than 50% of the direct costs of performance of the income producing activity were located. Consider too that the taxpayer whose "windfall" was prevented by throwback under IITA section 304(a)(3)(B)(ii) before 2000, would, assuming the same facts in 2001, pay even more to Illinois because of its payroll and property in all states was disregarded – was that a windfall to Illinois?

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[2] *See, e.g.,* Testimony of Joseph Henchman (Tax Counsel & Director of State Projects, of the Tax Foundation) Before the U.S. House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law – Hearing on the Impact of Congressional Legislation on State and Local Government Rules, April 15, 2010, *"The Role of Congress in State Tax Legislation: Ensuring that State Taxation Does Not Do Harm to the National Economy"*, stating "On apportionment, states have drifted away from a once-uniform rule, with successive rounds of states' grabbing revenue from other states (see table) through modified formulas, throwback rules, and combined reporting." The table referenced shows that, as of 2010, out of 47 jurisdictions (including D.C.) imposing a tax on or measured by net income, only 12 still had an evenly weighted three-factor formula. **Exhibit D.**

The demonstrably erroneous belief that throwback cures an illusory windfall cannot support its application in light of the retroactive effect of P.A. 097-0478, particularly when the IITA at no time sought to prevent or cure windfalls for all taxpayers under the IITA.

The in-state business activity of shipping in connection with non-Illinois sales does not fairly represent the market for Petitioner's goods in Illinois, and adding as Illinois sales those non-Illinois sales as to which there is Illinois shipping activity does not "mesh well" with the new apportionment touchstone: market. If section 304(a)(3)(B)(ii) remains to be automatically applied by every taxpayer on their original return, then it will *in **every** instance* work contrary to the new purpose of Article III of the IITA by inflating the Illinois market by the addition of non-Illinois sales to the sales factor numerator. A harmonious reconciliation of IITA section 304(a)(3)(B)(ii) with section 304(f) requires that section 304(a)(3)(B)(ii) not be automatically applicable to sales made into states where the taxpayer is not subject to tax. Two statutes, or two parts of one statute, concerning the same subject must be considered together in order to produce a harmonious whole. *People v. Rinehart*, 2012 IL 11179, ¶ 26.[3].Consistently with the new market focus of Article III of the IITA, section 304(a)(3)(B)(ii), for tax years ending on or after December 31, 2008, will "mesh well" if it is only activated by resort to section 304(f).

Petitioner's original 2009 and 2010 returns fairly reflect Petitioner's Illinois market for its goods. Given the retroactive impact of 304(f) as amended by P.A. 98-0478, in making an

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[3] "If a statute's language is unclear or ambiguous, if it is susceptible of more than one reasonable reading, we must resort to other sources to aid our inquiry. *See People ex rel. Department of Professional Regulation v. Manos*, 202 Ill. 2d 563, 571 (2002). Such sources include the maxim of in *pari materia,* under which two statutes, or two parts of one statute, [*768] [**453] concerning the same subject must be considered together in order to produce a "harmonious whole." *Sulser v. Country Mutual Insurance Co.*, 147 Ill. 2d 548, 555 (1992). Words and phrases should be construed, not in isolation, but in light of other relevant provisions. *People v. Beachem*, 229 Ill. 2d 237, 243 (2008). "[W]e consider the statute in its entirety, keeping in mind the subject it addresses and the legislature's apparent objective in enacting it." *People v. Cardamone*, 232 Ill. 2d 504, 512 (2009*); People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 280 (2003) ("in determining the intent of the General Assembly, we may properly consider not only the language of the statute, but also the purpose and necessity for the law, the evils sought to be remedied, and goals to be achieved")."

adjustment to those returns after January 1, 2014, the Department violated and made an arbitrary and erroneous use of Section 304(f) of the IITA when, instead, it should have accepted the Petitioner's returns as filed.

II. COUNT II: Because of the retroactive effect of P.A. 098-0478, the Department's adjustment made after the effective date of P.A. 098-0478 to add non-Illinois sales to Petitioner's Illinois sales numerator must be supported by clear and cogent proof that: (i) excluding non-Illinois sales from the Illinois numerator does not fairly reflect the Illinois market for Petitioner's goods; and that, (ii) adding back such non-Illinois sales to the Illinois numerator does clearly reflect that market.

Section 100.3390 of the Department's IITA regulations provides that:

> The party (the Director or the taxpayer) seeking to utilize an alternative apportionment method has the burden of going forward with the evidence and proving by clear and cogent evidence that the statutory formula results in the taxation of extraterritorial values and operates unreasonably and arbitrarily in attributing to Illinois a percentage of income which is out of all proportion to the business transacted in this State.

86 Ill. Admin. Code § 100.3390(c). The regulation was not amended after the enactment of P.A. 98-0478. The retroactivity of P.A. 098-0478 makes it impossible for the Department to issue a business activity-based adjustment under IITA section 304(a)(3)(B)(ii) and deny that it is engaged in an exercise of its alternative apportionment powers under section 304(f). As this case proves, every time the Department makes such an adjustment the Department will be taxing extraterritorial values.

When the Department introduces its Notice of Deficiency ("NOD") into evidence at trial, it will establish a *prima facie* case that the statutory formula, including the adjustment under § 304(a)(3)(B)(ii), results in taxation of extraterritorial values because the adjustment takes sales known by the Department to be Petitioner's non-Illinois destination (market) sales and treats them, contrary to fact, as Illinois sales in the numerator of the Illinois apportionment formula. Introducing the NOD into evidence will also establish that the statutory formula operates unreasonable and arbitrarily in attributing such income to Illinois out of all proportion to

Petitioner's Illinois market because, more so than in 1969, 1987 and 2000, it is known : (i) that a minority of states use three-factor formulas, (ii) that Illinois through its IITA apportionment amendments is as guilty as any other State in *creating* gaps and overlaps in apportionment that the IITA was supposed to police against, and that, therefore, (iii) it is entirely arbitrary to add non-Illinois sales to the Illinois numerator on the unreasonable belief that doing so prevents a windfall or somehow assures, that "100%, and no more or no less" of business income is taxed.[4] Introducing the NOD into evidence will in every case involving 304(a)(3)(B)(ii) for a tax year ending on or after December 31, 2008, establish half of what is required for a Section 304(f) adjustment.

Section 304(f) and IITA regulation section 100.3390 also require that the party making the section 304(f) adjustment also establish that the adjustment will "fairly represent the market for the person's goods" in Illinois. The application of IITA Section 304(a)(3)(B)(ii) *commences* with an Illinois numerator that already comprises all Illinois market sale, and *then adds* non-Illinois sales to the numerator. Adding non-Illinois sales to the Illinois numerator does not "fairly represent the market for the person's goods" in Illinois. Using a provision intended to measure "business activity" in a formula intended to measure the "market" does not, in the Department's own words, "mesh *well with the current sales factor provisions, which apportion income according to customer location rather than where the taxpayer is engaged in business activities*." **Exhibit A**, Illinois Department of Revenue, 2013 Spring Legislative Agenda, Synopsis of Proposal: Omnibus Income Tax proposal LRB # 098 04083, page 2 (emphasis added). The Department has to put forth facts which show why adding non-Illinois sales to the Illinois numerator better reflects the Illinois market – its NOD alone will not establish that.

[4] *See* fn. 1 and fn. 2.

In the topsy-turvy world created by the retroactive effect of P.A. 98-0478, after the Departments introduces the NOD into the record and rests its case, Petitioner's motion for a directed finding in its favor should be granted on the basis that the adjustment fails to establish that adding non-Illinois sales to the Illinois numerator fairly reflects the Illinois market for Petitioner's goods. Even if the motion is denied, Petitioner's introduction of its original 2009 and 2010 tax returns should meet Petitioner's burden of overcoming the NOD by establishing that the method Petitioner proposes – not applying IITA section 304(a)(3)(B)(ii) – more fairly reflects the Petitioner's Illinois market for its goods because it only reports actual Illinois market sales in the numerator.

III. COUNT IV: <u>In the alternative</u>, because of the retroactive effect of P.A. 98-0478, contrary to the requirements and protections of Due Process, Petitioner was deprived of the opportunity to avoid the Department's adjustment by petitioning, before filing its original 2009 and 2010 returns or by filing a claim prior to January 1, 2014, for alternative apportionment relief from the distortive effect of IITA section 304(a)(B)(3) which assures that Petitioner's sales factor apportionment formula cannot fairly reflect the "market for [Petitioner's] goods" in Illinois.

Procedural due process delineates the procedures that must be followed before depriving a person of life, liberty, or property. *Fischetti v. Village of Schaumburg*, 2012 IL App (1st) 111008, ¶ 15. At the time of filing the original 2009 and 2010 Illinois returns, Petitioner was subject to the Department's regulation section 100.3390 and its requirement that Petitioner seek approval from the Department for any alternative apportionment it may propose no less than 120 days prior to the due date of the return. 86 Ill. Admin. Code § 100.3390(e)(1). Regulation section 100.3390 also provides that a taxpayer may petition for alternative apportionment "as part of a protest to a notice of deficiency issued as a result of the audit of the taxpayer's return . . . provided that "the audit adjustments being protested result in the need for the petition for

alternative apportionment" but not if "such petition could have been submitted" prior to the filing of the original return or in an amended return. 86 Ill. Admin. Code § 100.3390(e)(3).

It is well settled that the law does not require a useless act. *See, e.g., People v. Schoeneck,* 42 Ill. App. 3d 711, 714 (3rd Dist. 1976), where the court stated:

> "If, as in the instant case, the defendant is ineligible for treatment and probation because of a pending felony charge, we find no basis for interpreting the statute as requiring an examination. To so interpret the statute would require a useless act insofar as the statutory scheme of treatment and rehabilitation is concerned. Even if defendant was found to be a drug addict and even if treatment was recommended, nevertheless, the eligibility section of the statute would bar any such disposition of defendant's case. We fail to see how such an examination would be of any benefit to the defendant and the court."

Similarly here, because of *Hartmarx,* Petitioner was ineligible to file a petition either before filing its returns or in a claim for refund on the basis that the adjustment required by section 304(a)(3)(B)(ii) distorted its "business activity." That changed while Petitioner was under audit by the Department, on January 1, 2014, when P.A. 098-0478 gave retroactive effect to the amendments to IITA section 304(f). Therefore, under the terms of regulation section 100.3390, because Petitioner could not have requested relief under Section 304(f) as amended by P.A. 098-0478 prior to filing its 2009 and 2010 returns, Petitioner is eligible to request alternative apportionment relief, in the form of the Department's acceptance of its returns as originally filed for 2009 and 2010.

It is entirely appropriate for the Tax Tribunal to exercise authority under section 304(f) and to thereby declare that Petitioner's original 2009 and 2010 returns provide a fair reflection of the Illinois market if section 304(a)(3)(B)(ii) is not applied, and therefore that, pursuant to section 304(f), section 304(a)(3)(B)(ii) should not apply to Petitioner for the 2009 and 2010 tax years. *See, e.g., Miami Corporation v. Department of Revenue*, 212 Ill. App. 3d 702 (1991), where the trial court applied Section 304(f) to allow separate accounting and the appellate court

affirmed specifically rejecting a remand to the Department to determine the amount of the adjustment because the amount was easily determined from materials submitted by the taxpayer and the Department had introduced no other materials. There, like here, the amount of the adjustment requested is easily established by reference to the 2009 and 2010 tax returns as originally filed under penalties of perjury. The relief requested is that they be accepted as filed, *without* making the additions to the Illinois numerator that the Department made pursuant to IITA section 304(a)(3)(B)(ii).

Respectfully submitted,

INNOPHOS HOLDINGS, INC.

By: _____
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EXHIBIT A

Illinois Department of Revenue

2013 Spring Legislative Agenda

Illinois Department of Revenue

AGENCY LEGISLATIVE INITIATIVES

Income Tax

Synopsis of Proposal: **Omnibus Income Tax Proposal**

LRB#098 04083

A. Extend statute of limitations for members of a combined group who fail to join in the return.
B. Extend statute of limitations to 6 years for underreporting withholding by more than 25%.
C. Require common control to exist for companies to be members of a unitary group.
D. Correct Alternative Apportionment Standard (304(f)) to account for changes to single sales factor apportionment.
E. Eliminate both the IL-1023-C Composite Return and the IL-1000 Pass-Through Entity Payment Income Tax Return. Instead, include the non-resident pass-through entity withholding amounts on the original IL-1120-ST, IL-1065 or IL-1041 returns.
F. Apportion to Illinois the gain on a non-resident sale of an interest in an Illinois partnership and subchapter S corporation interests.

Proposal Description:

A. Extend Statute of Limitations for members of a combined group (unitary C-Corps) who fail to join in the return.

Currently, if a combined group files a return that excludes a member, the statute of limitations for assessing the member's income expires when the group's limitations period (currently 3 years) expires. IDOR proposes an unlimited statute of limitations if the member has separate-company nexus with Illinois, but fails to file an Illinois return or join in the combined return. Currently, there is no statute of limitations for regular non-filers. This proposal seeks to bring treatment of members of a combined group who do not file a return in line with the department's treatment of all other non-filers.

B. Extend statute of limitations to 6 years for underreporting of withholding.

IITA Section 905(b)(1) provides a 6-year statute of limitations for issuing a notice of deficiency whenever the taxpayer has understated base income by more than 25%. A similar provision should be made for withholding.

C. Require common control to exist for companies to be members of a unitary group.

IITA Section 1501(a)(27) requires "common ownership" to exist for companies to be members of a unitary business group, and for corporations defines common ownership to be ownership of more than 50% of the outstanding voting stock of the corporation. The ownership requirement

is really about control, and the 50% test causes some unitary businesses to be treated as non-unitary. The statute should be amended to refer to control, not ownership, although it could create a presumption of control when there is ownership of more than a specified percentage of stock.

D. Correct Alternative Apportionment Standard

Sub-sections a, b, c & d of IITA Section 304 were previously amended to address this, but it failed to change sub-section f. IITA Section 304(f) allows alternative apportionment when the statutory formula does not fairly reflect the taxpayer's business activities in Illinois. This does not mesh well with the current sales factor provisions, which apportion income according to customer location rather than where the taxpayer is engaged in business activities. We should amend this provision to allow alternative apportionment when the statutory formula does not fairly reflect the market for the taxpayer's goods or services in Illinois.

E. Eliminate both the IL-1023-C Composite Return and the IL-1000 Pass-Through Entity Payment Income Tax Return. Instead, include the non-resident pass-through entity withholding amounts on the original IL-1120-ST, IL-1065 or IL-1041 returns.

Auditing partnerships, S-corporations and trusts and their shares flowing through to their non-resident owners/partners/beneficiaries has been problematic for the Audit Bureau. Not all of the Information from Schedule B (IL-1120ST, IL-1065) and Schedule D (IL-1041) on the owners, partners, and beneficiaries is data captured and/or mapped, so tracking of the owners, partners, and beneficiaries has been a manual process. With the creation of the IL-1000 return, it has become even more difficult to track non-resident filing. They can be included on an IL-1023-C Schedule BC, an IL-1000, or an IL-1040NR. IL-1065 returns, IL-1041 returns, IL-1120 and IL-1120-ST returns could also be filed based on the entity type of the owner, partner, or beneficiary. This is confusing and cumbersome for the taxpayer and the Department alike.

We have conducted audits on a sampling of IL-1000 returns to see the extent of the problems. Every audit we conducted has had issues.

Making this change to having the non-resident pass-through withholding payment a part of the original IL-1120-ST, IL-1065 or IL1041 returns will eliminate the processing of two return types: IL-1023-C and IL-1000. This would be a cost savings to the Department, and a time savings to the taxpayers. It utilizes forms that we currently have and taxpayers currently complete, simplifying the process. This would reduce the number of errors that we are seeing. It allows Audit to look in one place for the non-resident filings, and has the advantage to the taxpayers of allowing non-residents to utilize their credits. The K-1-P/K-1-T is sent to the taxpayer already, and it would give them a document (similar to how a W-2 is used) that spells out how much payment was made on their behalf.

Taxpayers will be in favor of this proposal because it will reduce the number of forms and time required to file and pay tax on non-resident partners, owners, and beneficiaries. In addition, it will simplify the process and allow for the non-residents to utilize the credits to which they are entitled.

IDOR will also benefit from this proposal since it will eliminate the processing and maintenance of two return types, consolidating the filing onto forms we currently have – with limited modifications. The streamlined process will allow better audit tracking of non-resident partners, owners, and beneficiaries. This could result in both cost savings and additional tax collections.

Legislation is necessary due to IDOR's specific use of the IL-1023-C and the IL-1000 being provided for by statute.

F. Apportionment of gain on sale of partnership and subchapter S corporation interests.
Under current law, the gain realized by a nonresident on the sale of a partnership interest or Subchapter S corporation stock is not apportioned to Illinois. As the sale of an intangible by someone who is not engaged in the business of buying and selling, it is sourced to Illinois only if the taxpayer's income producing activity is predominantly in Illinois, which is virtually never the case. IITA Sections 305 and 308 should be amended to source the gain to Illinois in the same proportion as the business income of the partnership or Subchapter S-Corporation is sourced in the hands of the selling partner or shareholder.

EXHIBIT B

State of Illinois
DEPARTMENT OF REVENUE
Illinois Income Tax Act

CERTIFICATION

I certify that the attached and foregoing are true, complete and correct copies of Pages 2-1 through 7-38 of the Regulations promulgated by the Illinois Department of Revenue under the "Illinois Income Tax Act," filed as required by an Act entitled "An Act concerning administrative rules," approved June 14, 1951, as amended.

Dated this First day of July, A.D. 1971.

DEPARTMENT OF REVENUE

George E. Mahin
Director of Revenue

FILED
INDEX DIVISION

JUL 14 1971

John W. Lewis
Secretary of State

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Example. A, a resident of New York, is not in the business of being an inventor, but owns a patent on a single invention, which he licenses to a manufacturer of automatic garage door openers. Royalties are a percentage of the manufacturer's sales. The manufacturer has plants situated in Missouri, Illinois and Indiana. Under §300-2(c) (2) (B), the royalty income is presumed to be nonbusiness income. If A's royalties can be allocated to Missouri, Illinois and Indiana on the basis of sales from the manufacturer's plants in each of those states, those royalties attributable to sales from the Illinois plant are allocated to Illinois. If, however, the manufacturer's accounting procedures do not reflect sales from the specific plants, but royalties are paid on the basis of total sales not broken down by plant, then, since A is not a resident of Illinois, the patent is not utilized in Illinois and none of the royalties are allocated to Illinois.

(e) Taxability in another state. For the test of taxability in another state, see §300-5.

(f) Interest and dividends. For allocation of interest and dividends, see §301-1(b) (2).

§304-1. BUSINESS INCOME OF PERSONS OTHER THAN RESIDENTS. (a) General apportionment rule. The business income of a person other than a resident is allocated to Illinois if such person's business income is derived solely from Illinois. Every person other than a resident who derives business income from Illinois and one or more other states must apportion such business income between

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Illinois and such other state or states in accordance with the provisions of section 304. Special apportionment rules are provided for the business income of insurance companies, financial organizations, and persons furnishing transportation services, and for alternative methods of allocation where the specific statutory provisions do not fairly represent the extent of a person's business activity in Illinois. See section 304(b), (c), (d) and (e). As a general rule, all other business income is apportioned by multiplying the income by a fraction, the numerator of which is the sum of the property factor (if any), the payroll factor (if any), and the sales factor (if any), and the denominator of which is 3 reduced by the number of factors which have a denominator of zero. A person deriving business income from 2 or more businesses should apportion all business income by use of a single fraction, rather than applying different fractions to the income of each business, unless one business is subject to a special apportionment rule.

(b) Example. §304-1 may be illustrated by the following example:

> Example. A corporation derives business income from Illinois and Iowa. Its property factor is 3/8, or .375000; its payroll factor is 1/3 or .333333; and its sale factor is 1/4 or .250000. The sum of the three factors is .958333. Divided by 3, the fraction to be applied to A's business income to determine the amount apportionable to Illinois is .319444.

§304-2. PROPERTY FACTOR. (a) In general. (1) Property included. The property factor used in apportioning business income is a fraction, the numerator of which is the average value

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of a person's real and tangible personal property owned or rented and used in the trade or business in Illinois during the taxable year, and the denominator of which is the average value of all the person's real and tangible personal property owned or rented and used in the trade or business during the taxable year. For purposes of the property factor, the average value of property is normally determined by averaging the values at the beginning and ending of the taxable year. However, where reasonably required to reflect properly the average value of a person's property, the Director may require or allow monthly values during the taxable year to be averaged. The term "real and tangible personal property*** used in the trade or business" includes land, buildings, machinery, equipment, inventories, stocks of goods, livestock, poultry and growing crops, as well as all other real and tangible personal property used in the production of business income but does not include coin or currency.

(2) Property in transit. Property in transit between business locations of its owner is situated at its destination for purposes of the property factor. Property in transit between a seller and a buyer and which is included by either in such person's property factor is situated at its destination for purposes of such factor.

(3) Mobile and movable property. The value of mobile equipment such as automobiles, trucks, engines, railroad cars and the like, as well as of movable tangible personal property, which is located within and without Illinois during the taxable year shall be included in the denominator of the property factor and a percentage of such value shall also be included in the numerator of the factor, such percentage being the same as

the percentage of the taxable year during which such property was within Illinois. However, an automobile permanently assigned to an employee shall, for purposes of the property factor, be situated in the state in which the employee's compensation is "paid" under the payroll factor, or, at the election of the owner of the property, in the state where the vehicle is licensed.

(b) Property used in trade or business. (1) In general. The test of whether a particular item of property is to be included in the property factor is whether, during the taxable year, it is actually used, is available for use, or is capable of being used in the production of business income. Property used in the production of nonbusiness income is excluded. See §300-2 for the definition of business and nonbusiness income. Property used in the production of both business and nonbusiness income is included only to the extent the property is used in the production of business income. The method of determining that portion of the value of such property to be included will depend upon the facts of each case. Property under construction (except inventoriable goods in process) is not included in the property factor until such time as it is actually used in the production of business income. On the other hand, property held as reserve or standby facilities, or property held as a reserve source of raw material, is included in the property factor. Similarly, property that has been removed from use in the production of business income remains in the property factor until its permanent withdrawal is established by an identifiable event, such as its sale, exchange, abandonment, or conversion to use in the production of nonbusiness income.

(2) Example. §304-2(b) may be illustrated by the following example:

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Example. A corporation owns and operates coal mines in Illinois and Pennsylvania. During the year 1970, it acquires a mineral interest in certain land in Illinois as additional coal reserves, but it does not open a mine during that year. During 1969, A retires a large strip mining shovel previously used in Illinois and, on October 30, 1970, sells it for scrap. A realizes a gain on its sale. The replacement shovel at A's Illinois strip mine is not operable at year-end 1970, due to a delay in delivery of certain parts, and the mine is temporarily closed down. The newly acquired coal reserves are included in both numerator and denominator of A's property factor of year-end 1970, as is the shut-down mine. However, the retired shovel is eliminated from the property factor when it is sold on October 30, 1970. Further, the new shovel is not included in the property factor at year-end because it is not then ready for use.

(c) Valuation of property. (1) Owned property. A person's owned property is valued at its original cost. As a general rule, the original cost of property is the basis of the property for determining gain from its sale or other disposition under the Internal Revenue Code, such basis being determined as of the time of acquisition by the person. Capital additions or improvements are included at cost, and no adjustment is made for depreciation or depletion. If the original cost of property is unascertainable, the property is included in the property factor at its fair market value as of the time of acquisition by the person. Inventoriable goods are valued in accordance with the valuation method used by the person for federal income tax purposes. In the case of property acquired by a person in a reorganization

or other transaction in which the basis of the property under the Internal Revenue Code in the hands of the acquiring person is determined by reference to its basis in the hands of the transferor, the original cost of the property in the hands of the acquiring person is its original cost in the hands of the transferor.

(2) Rented property. (A) Net annual rental rate. Rented property is valued at 8 times the net annual rental rate, i.e., the total annual rental rate paid by the person less the total annual rental rate received by the person from nonbusiness subrentals. The term "annual rental rate" means the amount paid as rental for the property for a 12-month period, but where the property is rented for less than a full 12-month period, the term means the amount paid as rental for the actual rental period. If property is used at no charge or is rented for a nominal rental, the property is included in the property factor on the basis of a reasonable rental. The property factor reflects the relative values of property used in the production of business income in Illinois and elsewhere. Therefore, where subrental income is business income, the annual rental rate received from such subrental is not subtracted from the annual rental rate paid for the property. See §300-2(c)(3) for a discussion of business and nonbusiness rental income. Further, where the subtraction of the annual rental rate received from nonbusiness subrentals from the annual rental rate paid for property would produce a negative or clearly inadequate value for the property, another method of determining value shall be used, but in no case shall the net annual rental rate be less than an amount which bears the same ratio to the total annual rental rate paid by the person as the property used by the person in the production of business income

bears to all the rented property.

(B) Amount paid as rental. The amount paid as rental means the actual sum of money or other consideration paid, directly or indirectly, by the person for the use of the property. It includes an amount payable as a percentage of sales or profits and also includes an amount payable in lieu of rent, such as interest, taxes, insurance, repairs or any other item which is customarily the liability of the lessor, but which is required to be paid by the terms of the lease or other arrangement with the lessor. On the other hand, an amount paid as a service charge, such as for utilities or janitor service, is not an amount paid as rental.

(C) Leasehold improvements. Leasehold improvements made by the lessee, for purposes of the property factor, are treated as property owned by the lessee regardless of the useful life of the improvements or the person in whom title is vested on termination of the lease. Therefore, the original cost of such leasehold improvements is included in the property factor of the lessee.

(3) Examples. §304-2(c) may be illustrated by the following examples.

Example (A). In 1970, A corporation merges into B corporation in a tax-free reorganization under the Internal Revenue Code. At the time of the merger, A corporation owns a factory which A built in 1965 at a cost of $1,000,000. A has been depreciating the factory at the rate of 2% per year, and its basis in A's hands at the time of the merger is $900,000. Since the property is acquired by B in a transaction in which, under the Internal Revenue Code, its basis in B's hands is the same as its basis in A's. B includes the

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property in B's property factor at A's original cost without adjustment for depreciation, i.e., $1,000,000.

Example (B). C corporation rents a factory building paying $12,000 per year in base rent, plus 1% of its gross sales. For the year 1970, its sales amount to $400,000. Its annual rental rate for the factory is $16,000 and the value of the factory is $128,000 for purposes of C's property factor.

Example (C). The facts are the same as in Example (B), except that the lease has a remaining term of 25 years when, in 1970, C makes an addition to the factory at a cost of $150,000, the addition having a useful life of 50 years. C's annual rental rate for the factory, plus addition, is $16,000, and the value of the factory is $128,000, just as in Example (B). The value of the addition is $100,000, which amount enters directly into C's property factor.

Example (D). D corporation operates a chain of men's clothing stores. It rents a 5-story office building, using the street floor as a store, and the second and third floors as its corporate headquarters. It subleases the remaining two floors to others for offices. Since the building was acquired primarily for use by D in connection with D's business the subrental income, being directly related to D's business, is business income. (See §300-2(c)(3)). Accordingly, D's annual rental rate is not reduced by the annual rental rate received by D from the subrentals.

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Example (E). The facts are the same as in Example (D), except that the building is a 20-story building, of which D subleases 17 floors to a single lessee under a net lease. This is the only rental income received by D. The subrental income is nonbusiness income, since the portion of the building not used by D in its business is simply an investment. (See §300-2(c)(3)). Accordingly, D's annual rental rate is reduced by the annual rental rate received by D from the subrental, provided that D's net annual rental rate must not be less than 15% (3 stories used by D out of 20 stories in all) of D's annual rental rate paid for the building.

Example (F). In 1970, F corporation purchases all of the stock of G corporation for $1,000,000 and within a month thereafter completely liquidates G corporation in a tax-free liquidation under section 332 of the Internal Revenue Code. The basis of the property acquired by F corporation in the liquidation is determined under section 334(b) (2) of the Internal Revenue Code, i.e., the basis of the property acquired is $1,000,000, the adjusted basis (cost) of the stock of G corporation. Accordingly, F corporation will include the real and tangible personal property acquired from G at its cost, i.e., that portion of the $1,000,000 purchase price property allocable to such property.

(d) Uniform treatment. A person using the property factor under the Illinois Income Tax Act shall compute the numerator and the denominator of such factor in a manner consistent with such person's computation of the numerator and denominator thereof in other states employing the same factor,

especially states which have adopted the Multistate Tax Compact. Thus, if all states were to adopt the Multistate Tax Compact, all property included in the denominator of the property factor would also be included in the numerator of the factor of some state.

§304-3. PAYROLL FACTOR. (a) In general. The payroll factor used in apportioning business income is a fraction, the numerator of which is the total amount paid in Illinois during the taxable year by the person for compensation, and the denominator of which is the total compensation paid everywhere during the taxable year. The total amount "paid" during the taxable year is determined on the basis of the employer's accounting method. If the employer uses the accrual method of accounting for payroll purposes, then all compensation properly accrued will be deemed to have been paid during the taxable year for which accrued. The payroll factor includes only compensation paid to employees primarily engaged in the production of business income. Compensation paid to employees primarily engaged in the production of nonbusiness income is excluded from the payroll factor. In general, however, compensation of general executive officers with company-wide authority is included in the payroll factor.

(b) Compensation paid in Illinois. (1) General rules. The numerator of the payroll factor is compensation paid in Illinois. The tests for determining whether compensation is paid in Illinois are substantially the same as those used to define "employment" in the Illinois Unemployment Compensation Act (and similar unemployment compensation acts of other states). Compensation is paid in Illinois if:

(A) the individual's service is localized in Illinois because it is performed entirely within Illinois.

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(B) the individual's service is localized within Illinois although it is performed both within and without Illinois, because the service performed without Illinois is incidental to the individual's service performed within Illinois; or

(C) the individual's service is not localized in any state but some of the service is performed within Illinois and either (i) the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within Illinois, or (ii) 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 Illinois.

(2) Compensation paid for past service. Where compensation is paid for past service, such compensation shall be disregarded in computing the numerator and denominator of the payroll factor. (NOTE: Compensation paid for the past services may be subject to withholding. See §701-2(g) for specific rules with regard to withholding.

(3) Uniform application of rules. The foregoing rules are to be applied in such manner that, if they were in effect in other states, an item of compensation would constitute compensation "paid in" only one state. Thus, if an item would, under these rules, constitute compensation paid in a state other than Illinois because the individual's service was localized in such other state under test (B), it could not also be compensation paid in Illinois. For further discussion of these tests, see §701-2(c), (d), (e) and (f), dealing with withholding.

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§304-4. SALES FACTOR. (a) In general. The sales factor used in apportioning business income is a fraction, the numerator of which is the total sales of the person in Illinois during the taxable year, and the denominator of which is the total sales of the person everywhere during the taxable year. In general, the term "sales" means gross receipts constituting business income whether such gross receipts arise from the sale of real or tangible personal property or from some other business activity. However, if rents or royalties, gains and losses from the sale or exchange of intangible personal property, or income from intangible personal property, constitute business income, then such items are included in "sales" only if such items aggregate more than 25% of the person's total business income in the taxable year, or if the person elects to include all such items in "sales" for the taxable year. If such items are included in "sales", they shall be included in the numerator and the denominator of the sales factor in accordance with the rules set forth in paragraph (f) (2) and (3).

(b) Sales of real and tangible personal property. (1) Sales in the regular course of business. In the case of a person whose business consists of manufacturing and selling or purchasing and reselling real or tangible personal property, the term "sales" includes gross receipts from the sale of such property to customers in the regular course of trade or business. Gross receipts for this purpose means gross sales, less discounts, returns and allowances, and includes all interest income, service charges, carrying charges, or time-price differential charges incidental to such sales, regardless of the place of service or the location of the contract or other evidence of indebtedness. Federal and state excise taxes (including sales taxes) are included as a part of such receipts

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if such taxes are passed on to the buyer and included as part of the selling price of the property.

(2) Sales of real and tangible personal property used or formerly used in trade or business. Gains and losses from the sale or exchange of real and tangible personal property used or formerly used in a corporation's trade or business are generally business income (see §300-2(c)(3)(A)(ii)). Accordingly, gross receipts from such sales should generally be included in the sales factor by corporations. For example, the proceeds from the sale of an equipped factory would ordinarily be included in the sales factor for the year, but the original cost of the property would be excluded from year-end property values for purposes of the property factor.

(c) Sales of real property in Illinois. For purposes of the sales factor, sales of real property are in Illinois if the property is located in Illinois.

(d) Sales of tangible personal property in Illinois. (1) For purposes of the sales factor, sales of tangible personal property (other than to the United States Government) are in Illinois if:

(A) the property is delivered or shipped to a purchaser within Illinois 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 Illinois and the seller is not taxable in the state of the purchaser.

For the tests of taxability in another state, see §300-5. Property is delivered or shipped

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to a purchaser within Illinois if the recipient is located in Illinois, even though the property is ordered from without Illinois. Property is delivered or shipped to a purchaser within Illinois if the shipment terminates here, even though the property is later transferred by the purchaser to another state. The term "purchaser within Illinois" includes the ultimate recipient of the property if the seller, at the designation of the purchaser, delivers or ships the property directly to the ultimate recipient, a customer of the purchaser, in Illinois. When property being shipped by a seller to a purchaser in another state is diverted, while en route, to a recipient in Illinois, the sale is in Illinois. Sales to the United States Government are in Illinois if the property is shipped from an office, store, warehouse, factory, or other place of storage in Illinois. Only sales for which the United States Government makes direct payment to the seller pursuant to the terms of its contract constitute sales to the United States Government. Thus, as a general rule, sales by a subcontractor to a prime contractor, the party to the contract with the United States Government, do not constitute sales to the United States Government.

(2) Examples. §304-4(d) may be illustrated by the following examples:

Example (A). A, with inventory in Iowa, sells $100,000 of its products to a purchaser having branch stores in several states including Illinois. The order for the purchase is placed by the purchaser's central purchasing department located in New York. $25,000 of the purchase order is shipped directly by rail to the purchaser's branch store in Illinois, and the balance is shipped to other branch stores in other states.

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The branch store in Illinois is the "purchaser within Illinois" with respect to $25,000 of the $100,000 sale.

Example (B). The facts are the same as in Example (A), except that the purchaser maintains a central warehouse in Illinois which receives all merchandise purchased for branch stores located in the Middle West. The entire $100,000 order is shipped to this warehouse, from which the purchaser reships $75,000 of the goods to branch stores in other states. The entire $100,000 sale is an Illinois sale.

Example (C). B sells merchandise to a purchaser in Indiana. Pursuant to the purchaser's instructions, B ships the merchandise directly to the purchaser's customer in Illinois. The sale by B is in Illinois.

Example (D). C, a produce grower in California, begins shipment of perishable produce to a purchaser in New York. Due to delay in shipment, it becomes necessary for the purchaser to divert the shipment to its produce warehouse in Illinois. The sale is in Illinois.

Example (E). D has its head office and factory in Pennsylvania. It maintains a branch office and warehouse in Illinois. Its only activity in Indiana is the solicitation of orders by a resident salesman. All orders by the salesman in Indiana are sent to the branch office in Illinois for approval and are filled by shipment from the inventory in this state. D is not taxable in Indiana because Indiana does not have jurisdiction to subject D to a net income tax by virtue of Public Law 86-272, 15 U.S.C.A. §§381-385 (see §300-5). Therefore,

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all sales of merchandise to purchasers in Indiana from the warehouse stock in Illinois are Illinois sales.

Example (F). E contracts with the General Services Administration to deliver a number of trucks which are paid for by the United States Government. The sale is an Illinois sale only if the trucks are shipped from a place of storage in Illinois, since the Government is the purchaser.

Example (G). F contracts with the National Aeronautics and Space Administration to build a rocket. G, a subcontractor, builds a component of the rocket and delivers the component to F in Florida. The component is shipped from Illinois. The sale is not a sale to the United States Government, even though the component becomes part of a rocket paid for by the Government. Thus, whether the sale is an Illinois sale or a Florida sale depends on whether F is taxable in Florida (see §300-5).

(e) Sales, other than sales of real or tangible personal property. In the case of a person whose business consists in whole or in part of activities other than selling real or tangible personal property, the term "sales" includes gross receipts arising from such business activity. However, if rents or royalties, gains and losses from the sale or exchange of intangible personal property, or income from intangible personal property, constitute business income, then such items are included in "sales" only if such items aggregate more than 25% of the person's total business income in the taxable year, or if the person elects to include all such items in "sales" for the taxable year. If such items are included

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in "sales", they shall be included in the numerator and the denominator of the sales factor in accordance with the rules set forth in paragraph (f) (2) and (3). If the business consists of providing services, the term "sales" includes gross receipts from the performance of such services, such as fees, commissions and the like. In the case of a person whose business consists of performing services under research and development contracts, the term "sales" includes the gross amount received pursuant to the terms of the contract.

(f) Sales, other than sales of real or tangible personal property, in Illinois. (1) In general. For purposes of the sales factor, sales, other than sales of real or tangible personal property, are in Illinois if:

(A) the income-producing activity is performed in Illinois; or

(B) the income-producing activity is performed both within and without Illinois and a greater proportion of the income-producing activity is performed within Illinois than without Illinois, based on costs of performance.

The place of performance of the income-producing activity based on costs of performance will be determined on the basis of all the facts and circumstances. However, as stated in subparagraphs (2), (3), (4) and (5) below, specific presumptions will be made with respect to certain types of sales, other than sales of real or tangible personal property. Such presumptions are in every case subject to rebuttal by clear and convincing evidence to the contrary.

(2) Rents and royalties. Rents and royalties from real and tangible personal property which constitute business income

and are included in the sales factor will be presumed to be in Illinois to the same extent that such rents and royalties would be allocable to Illinois under section 303, if they constituted nonbusiness income (see §303-1(c)).

(3) Gains and losses from the sale or exchange of intangible personal property and income from such property. Gains and losses from the sale or exchange of intangible personal property and items of income from such property which constitute business income and are included in the sales factor will be presumed to be in Illinois to the same extent that they would be allocable to Illinois under sections 301(b)(2) and 303, if they constituted nonbusiness income (see §§301-1(b)(2) and 303-1(b) (3), (d) and (f)).

(4) Services directly related to real or tangible personal property. For purposes of the sales factor, sales of services directly related to real or tangible personal property, such as services rendered in the installation, repair or maintenance of such property, will be presumed to be in Illinois, if the property is located in Illinois.

(5) Services not directly related to real or tangible personal property. For purposes of the sales factor, sales of services not directly related to real or tangible personal property, such as advertising services, legal and accounting services, management consultative services, will be presumed to be in Illinois if the place from which the service is directed or controlled is in Illinois.

(6) Examples. §304-4(f) may be illustrated by the following examples:

Example (A). A corporation is engaged

Article No. 3 Continued --

in the business of leasing automobiles and trucks. It has leasing offices in 40 states, including Illinois. Its rental income is business income (see §300-2(c) (3)). A's rental income is more than 25% of its total business income and so constitutes "sales" for purposes of the sales factor. Since the location of each car and truck during the rental period is unknown, or unascertainable by A, each car or truck is utilized in the state in which it is located at the time it is leased. Thus, rents from the leasing of cars and trucks located in Illinois are in Illinois for purposes of the sales factor. Further, if A has its commercial domicile in Illinois and was not organized under the laws of or is not taxable with respect to rents in another state where A leases cars and trucks, such rents are also in Illinois for purposes of the sales factor (see §303-1(c)).

Example (B). B corporation is engaged in the business of obtaining and licensing patents. It licenses these patents to manufacturers in six states, including Illinois. Its royalty income is business income (see §300-2 (c) (2)). B's royalty income is more than 25% of its total business income and so constitutes "sales" for purposes of the sales factor. If the royalties received by B can be allocated to various states on the basis of utilization, only those royalties allocable to Illinois are in Illinois for purposes of the sales factor. If B's commercial domicile is in Illinois, and B is not taxable in any state where the patents are utilized, or if royalties cannot be allocated to various states on the basis of utilization, such royalties are also in Illinois for purposes of

of the sales factor (see §303-1(d)).

Example (C). C corporation has its commercial domicile in Illinois. It is engaged in the manufacture and sale of office equipment, having factories and offices in 12 states. C corporation also receives dividends on shares of stock which it elects to treat as business income (see §300-2(c) (A) (i)). Although C's dividend income is less than 25% of its total business income, C elects to include such income in "sales" for purposes of the sales factor. Since C's commercial domicile is in Illinois, for purposes of the sales factor, such dividends are in Illinois (see §§301-1(b) and 303-1(f).

Example (D). D corporation is engaged in the business of repairing electric typewriters in five Midwestern states. For purposes of the sales factor, only D's gross receipts from the repair of typewriters located in Illinois are in Illinois.

Example (E). E partnership is a national accounting firm, having offices in 75 cities in 50 states. For purposes of the sales factor, only E's gross receipts from services directed or controlled from an office in Illinois are in Illinois.

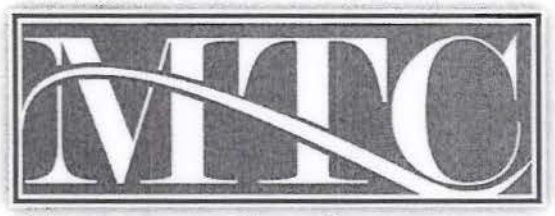
Example (F). F partnership is a law firm. Partners in F are frequently engaged in the trial of cases in states other than Illinois, but F's only office is in Chicago. All of F's gross receipts, for purposes of the sales factor, are in Illinois.

(g) Uniform treatment. A person using the sales factor under the Illinois

Article No. 3 Continued --

Income Tax Act shall compute the numerator and the denominator of such factor in a manner consistent with such person's computation of the numerator and denominator thereof in other states employing the same factor, especially states which have adopted the Multistate Tax Compact. Thus, if all states were to adopt the Multistate Tax Compact, all sales included in the denominator of the sales factor would also be included in the numerator of the factor of some state.

EXHIBIT C



MULTISTATE TAX COMMISSION

Multistate Tax Compact Article IV Recommended Amendments

May 3, 2012

Prepared for

Cory Fong, Chair
Executive Committee Members
Meeting of May 10, 2012

Prepared by

Shirley Sicilian
General Counsel

"integral" as "necessary to" or "essential to" would be too restrictive (since no asset would be sold if it were necessary or essential).[31] The Court found that "integral" should be construed somewhere between these two – e.g., "*materially* contributing to."[32] The language of the U.S. Supreme Court in *Container* and *Allied Signal* requires that the property from which the income arises performed an "operational" function, that it be "operationally related to" or "related to the operation of" the taxpayer's business, in order for the income to be apportionable.[33] This phrase – "related to the operation" – was chosen because it is more concrete than "integral part" and it satisfies the concern expressed in *Hoechst* by specifying how the property must contribute to the business – i.e., operationally.

B. Factor Weighting

1. Current Language

Under Compact Article IV, Business Income is subject to apportionment. And Compact Article IV.9 sets out the apportionment formula – an equal-weighting of property, payroll and sales factors:

> 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 three.

But as of January 2012, only ten jurisdictions exclusively require the equal-weighted three-factor formula. Seven of these ten are Compact members. Although states are moving away from equal-weighting, they are moving away in the same direction – toward more heavily weighting the sales factor. Thirty-seven states now at least double weight the sales factor. And fourteen of the thirty-seven use the sales factor only. Five of these fourteen are Compact members. Attachment E shows factor weightings by state.

The motivation for this trend is two-fold. First, there is a desire to at least equalize the recognition given to market vs. production states. An equal-weighted formula assigns greater value to the contributions of the production state relative to the market state because two of the three factors – property and payroll – reflect factors of production. When a state double weights the sales factor, it is giving equal weight to the contributions of the production and market states.

Second, some states emphasize the sales factor, and de-emphasize the property and payroll factors, to encourage economic development. Reducing the weight given to property and payroll reduces the apportionment effect of locating jobs and investment in the state. A formula that uses only the sales factor eliminates the apportionment effect. Of course, if all states used the single-sales formula, the economic development advantage for any particular state would disappear.

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[31] Hoechst Celanese Corp. v. Franchise Tax Bd., 25 Cal. 4th 508, 529 (2001)

[32] *Id.* at 530

[33] *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159, 180, n 19 (1983); *Allied Signal v. Dir. Div. of Taxation*, 504 U.S. 765, 769 and 785 (1992)

Attachment E

NOTE: Alabama is now single sales

STATE APPORTIONMENT OF CORPORATE INCOME

(Formulas for tax year 2012 -- as of January 1, 2012)

ALABAMA *	Double wtd Sales	NEBRASKA	Sales
ALASKA*	3 Factor	NEVADA	No State Income Tax
ARIZONA *	Double wtd Sales/80% Sales, 10% Property & 10% Payroll	NEW HAMPSHIRE	Double wtd Sales
ARKANSAS *	Double wtd Sales	NEW JERSEY	70% Sales, 15% Payroll, & 15% Property (1)
CALIFORNIA *	Sales/Double wtd Sales	NEW MEXICO *	3 Factor
COLORADO *	Sales	NEW YORK	Sales
CONNECTICUT	Double wtd Sales/Sales	NORTH CAROLINA *	Double wtd Sales
DELAWARE	3 Factor	NORTH DAKOTA *	3 Factor
FLORIDA	Double wtd Sales	OHIO	Triple Weighted Sales (3)
GEORGIA	Sales	OKLAHOMA	3 Factor
HAWAII *	3 Factor	OREGON	Sales
IDAHO *	Double wtd Sales	PENNSYLVANIA	90% Sales, 5% Property & 5% Payroll
ILLINOIS *	Sales	RHODE ISLAND	3 Factor
INDIANA	Sales	SOUTH CAROLINA	Sales
IOWA	Sales	SOUTH DAKOTA	No State Income Tax
KANSAS *	3 Factor	TENNESSEE	Double wtd Sales
KENTUCKY *	Double wtd Sales	TEXAS	Sales
LOUISIANA	Sales/3 Factor	UTAH	84% Sales, 8% Payroll, & 8% Property (4)
MAINE *	Sales	VERMONT	Double wtd Sales
MARYLAND	Sales/Double wtd Sales	VIRGINIA	Double wtd Sales
MASSACHUSETTS	Double wtd Sales	WASHINGTON	No State Income Tax
MICHIGAN	Sales	WEST VIRGINIA *	Double wtd Sales
MINNESOTA	93% Sales, 3.5% Property, & 3.5% Payroll (1)	WISCONSIN *	Sales
MISSISSIPPI	Sales/Other (2)	WYOMING	No State Income Tax
MISSOURI *	3 Factor	DIST. OF COLUMBIA	Double wtd Sales
MONTANA *	3 Factor		

Source: Compiled by FTA from state sources.

Notes:

The formulas listed are for general manufacturing businesses. Some industries have a special formula different from the one shown.

* State has adopted substantial portions of the UDITPA (Uniform Division of Income Tax Purposes Act).

Slash (/) separating two formulas indicates taxpayer option or specified by state rules.

3 Factor = sales, property, and payroll equally weighted.

Double wtd Sales = 3 factors with sales double-weighted

Sales = single sales factor

(1) Minnesota and New Jersey is phasing in a single sales factor which will reach 100% in 2014.

(2) Mississippi provides different apportionment formulas based on specific type of business. A single sales factor formula is required if no specific business formula is specified.

(3) Formula for franchise tax shown. Department publishes specific rules for situs of receipts under the CAT tax.

(4) Utah is phasing in a single sales factor which will reach 100% in 2013.

EXHIBIT D

Testimony of Joseph Henchman Before the U.S. House Committee on the Judiciary, Subcommittee on Commercial and Administrative Law--Hearing on the Impact of Congressional Legislation on State and Local Government Revenues

April 15, 2010
By Joseph Henchman

Prepared Statement of

Joseph Henchman

Tax Counsel & Director of State Projects

Tax Foundation

Hearing on

State Taxation:

The Impact of Congressional Legislation on

State and Local Government Revenues

Before the U.S. House Committee on the Judiciary,

Subcommittee on Commercial and Administrative Law

April 15, 2010

The Role of Congress in State Tax Legislation: Ensuring that State Taxation Does Not Do Harm to the National Economy

Mr. Chairman, Ranking Member Franks, and Members of the Subcommittee:

I appreciate the opportunity to testify today on the role of Congress in ensuring that state taxation does not do harm to the national economy.

This is not a new issue. One of the reasons we have a Constitution is because of states' impulse to do death-with-a-thousand-cuts to the national economy through their tax policy.[1] As Professor Daniel Shaviro put it, "Perceived tax exportation is a valuable political tool for state legislators, permitting them to claim that they provide government services for free."[2]

Frowning on these divisive and destructive practices, the Founders inserted constitutional provisions empowering Congress and the courts[3] to restrain state tax power.[4] For over a century and a half, states' power of taxation stopped at their border and did not extend to interstate commerce.[5]

That changed in the 1977 *Complete Auto* decision, where the Supreme Court permitted states to tax interstate commerce if the tax met a four-part test:[6]

- **Nexus**: there has to be a sufficient connection between the state and the taxpayer.

- **Fair Apportionment**: the state cannot tax beyond its fair share of the taxpayer's income
- **Nondiscrimination**: the state must not burden out-of-state taxpayers while exempting in-state taxpayers
- **Fairly Related**: the tax must be fairly related to services provided to the taxpayer.

The test is well-formulated but much of it is ignored today.

On apportionment, states have drifted away from a once-uniform rule, with successive rounds of states' grabbing revenue from other states (see table) through modified formulas, throwback rules, and combined reporting.[7]

Regarding nondiscrimination, states and localities put hefty taxes on rental cars and hotel rooms used primarily by out-of-state residents,[8] and taxes designed to be stealth and punitive on certain products, such as telecommunications.[9]

And regarding taxes being fairly related to services, it's assumed today that any tax is fairly related, even though only residents benefit from most state and local spending.[10]

State Apportionment Formulas: Once Uniform, Now Not

State	Kept Uniform Rule?	Formula	Statute
Alabama	Yes	Evenly weighted three-factor formula.	Alabama Code §40-27-1(IV)(9)
Alaska	Yes	Evenly weighted three-factor formula.	Alaska Stat. §43.19.010 (IV)(9)
Arizona	No	Three-factor formula with double-weighted sales factor or enhanced sales factor formula 80-10-10 (sales, property, payroll).	Ariz. Rev. Stat. §43-1139(A), Form 120, Instructions
Arkansas	No	Three-factor formula with double-weighted sales factor.	Ark. Code. Ann. §26-51-709
California	No	Three-factor formula with double-weighted sales factor.	Cal. Rev. & Tax Code §25128(a), Cal. Rev. & Tax Code §25128.5
Colorado	No	One-factor sales formula.	Colo. Rev. Stat. §39-22-303(2)(b), Colo. Rev. Stat. §24-60-1301 (IV)(9)
Connecticut	No	Single-factor gross receipts formula for income other than that derived from the sale or use of tangible personal or real property, and three-factor formula with double-weighted sales factor for income derived from the sale or use of tangible personal or real property. Three-factor formula with double-weighted sales factor for income derived from the manufacture, sale, or use of tangible personal or real property.	Conn. Gen. Stat. §12-218(b) and (c)
Delaware	Yes	Evenly weighted three-factor formula.	Del. Code Ann. tit. 30, §1903(b)(6)
Florida	No	Three-factor formula with double-weighted sales factor.	Fla. Stat. ch. 220.15(1)
Georgia	No	One-factor sales formula.	Ga. Code Ann. §48-7-31(d)
Hawaii	Yes	Evenly weighted three-factor formula.	Haw. Rev. Stat. §255-1 (IV)(9)
Idaho	No	Three-factor formula with double-weighted sales factor.	Idaho Code §63-3027(i)(1)

Illinois	No	One-factor sales formula.	35 ILCS 5/304(h)(3)
Indiana	No	Three-factor formula 90-5-5 (sales, property, payroll).	Ind. Code §6-3-2-2(b)
Iowa	No	One-factor sales formula.	Iowa Code §422.33(2)(b)
Kansas	Yes	Evenly weighted three-factor formula.	Kan. Stat. Ann. §79-3279(b)(1)
Kentucky	No	Three-factor formula with double-weighted sales factor.	Ky. Rev. Stat. Ann. §141.120(8)
Louisiana	Yes	Evenly weighted three-factor formula for corporations without a specified formula (i.e., businesses other than manufacturing, merchandising, transportation, or services, etc).	La. Rev. Stat. Ann. §47:287.95(F)(2)
Maine	No	One-factor sales formula.	Me. Rev. Stat. Ann. tit. 36, §5211(8)
Maryland	No	Three-factor formula with double-weighted sales factor and a one-factor sales formula for manufacturers.	Md. Code Ann. §10-402(c)(1) and (2)
Massachusetts	No	Three-factor sales formula with double-weighted sales factor.	Mass. Gen. Laws ch. 63, §38(c)
Michigan	No	One-factor sales formula for purposes of computing Michigan Business Tax (MBT).	Mich. Comp. Laws §208.45(a)(1), Mich. Comp. Laws §208.1301(2), Mich. Comp. Laws §208.1303(1)
Minnesota	No	Three-factor formula 87-6.5-6.5 (sales-property-payroll).	Minn. Stat. §290.191(2)
Mississippi	Varies	No general apportionment formula. One-factor sales formula for taxpayers that are not required to use a designated apportionment formula based on specific type or line of in-state business activity.	Miss. Reg. 35.III.8.06(II)(B), Unofficial Tax Commission guidance
Missouri	Yes	Evenly-weighted three-factor formula or optional one-factor sales formula for corporations other than certain public utilities and transportation companies.	Mo. Rev. Stat. §32.200(IV)(9), Mo. Rev. Stat. §143.451.2
Montana	Yes	Evenly weighted three-factor formula.	Mont. Code Ann. §15-31-305
Nebraska	No	One-factor sales formula.	Neb. Rev. Stat. §77-2734.05(1)
New Hampshire	No	Three-factor formula with double-weighted sales factor.	N.H. Rev. Stat. Ann. §77-A:3(II)(a)
New Jersey	No	Three-factor formula with double-weighted sales factor.	N.J. Stat. Ann. §54:10A-6
New Mexico	Yes	Evenly weighted three-factor formula.	N.M. Stat. Ann. §7-4-10(A)
New York	No	One-factor receipts formula.	N.Y. Reg. Sec. 4-2.2(b)
North Carolina	No		

		Three-factor formula with double-weighted sales factor.	N.C. Gen. Stat. §105-130.4(i)
North Dakota	Yes	Evenly weighted three-factor formula.	N.D. Cent. Code §57-38.1-09
Ohio	N/A	For purposes of the commercial activity tax, the state has specific rules describing how gross receipts are sitused to the state.	Ohio Rev. Code Ann. §5733.05(B)(2)
Oklahoma	Varies	Evenly weighted three-factor formula; corporations meeting investment criteria may double-weight the sales factor.	Okla. Stat. tit. 68, §2358(A)(5)
Oregon	No	One-factor sales formula.	Or. Rev. Stat. §314.650(1)
Pennsylvania	No	Three-factor formula 90-5-5 (sales, property, payroll).	72 P.S. §7401(3)2(a)(9)(A)
Rhode Island	Yes	Evenly weighted three-factor formula.	R.I. Gen. Laws §44-11-14(a)
South Carolina	No	Three-factor formula with double-weighted sales or optional one-factor sales formula for manufacturers, sellers, distributors and renters oftangible property.	S.C. Code Ann. §12-6-2250, S.C. Code Ann. §12-6-2290, Form 1120SC Instructions, C Corporation Income Tax Return
Tennessee	No	Three-factor formula with double-weighted sales factor.	Tenn. Code Ann. §67-4-2012(a)
Texas	N/A	One-factor gross receipts formula.	Tex. Tax Code Ann. §171.105(a), Tex. Tax Code Ann. §171.106(a)
Utah	Varies	Evenly weighted three-factor formula, unless election is made to use apportionment formula with double weighted sales factor.	Utah Code Ann. §59-7-302, Utah Code Ann. §59-7-311, Utah Admin. Code R865-6F-8
Vermont	No	Three-factor formula with double-weighted sales factor.	Vt. Stat. Ann. tit 32, §5833(a)
Virginia	No	Three-factor formula with double-weighted sales factor.	Va. Code. Ann. §58.1-408
West Virginia	No	Three-factor formula with double-weighted sales factor.	W. Va. Code §11-24-7(c)
Wisconsin	No	One-factor sales formula.	Wis. Stat. §71.25(6)(a)
District of Columbia	Yes	Evenly weighted three-factor formula.	D.C. Code Ann. §47-1810.02(d)

Source: Commerce Clearinghouse; Tax Foundation.

Nexus survives as a restraint on state power, although it is now under attack.

Corporate Income Tax

IN THE
ILLINOIS INDEPENDENT TAX TRIBUNAL
COOK COUNTY, ILLINOIS

INNOPHOS HOLDINGS INC.,	)	
Petitioner,	)	
	)	
v.	)	**No. 14-TT-214**
	)	
ILLINOIS DEPARTMENT OF REVENUE,	)	**James M. Conway**
Respondent.	)	**Chief Administrative Law Judge**
	)	

NOTICE OF FILING

TO: Mr. Jonathan M. Pope
Jonathan.pope@illinois.gov
Special Assistant Attorney General
Office of Legal Services
Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, Illinois 60601

PLEASE TAKE NOTICE that on June 8, 2015, pursuant to the Illinois Independent Tax Tribunal's Order dated May 6, 2015, Innophos Holdings Inc., through its counsel Reed Smith LLP, filed by electronic mail with the Illinois Independent Tax Tribunal, **Petitioner's Motion for Partial Summary Judgment on Counts I, II, and IV of the Petition of the Taxpayer**, a copy of which is attached hereto and herewith served upon you by electronic mail.

Dated: June 8, 2015

INNOPHOS HOLDINGS INC., *Petitioner*

By: _____
Michael J. Wynne
One of the Attorneys for Petitioner

Michael J. Wynne
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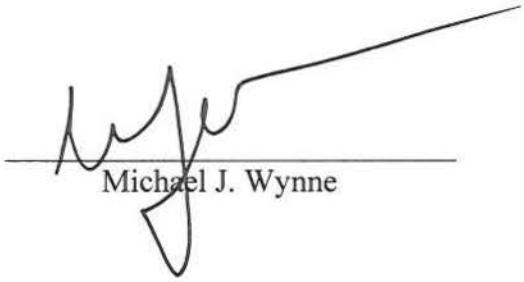
Attorneys for Petitioner, Innophos Holdings Inc.

CERTIFICATE OF SERVICE

I, the undersigned, an attorney, hereby certify that I caused to be served upon the individual listed below a copy of **Petitioner's Motion for Partial Summary Judgment on Counts I, II, and IV of the Petition of the Taxpayer**, by electronic mail sent to the below address on this 8th day of June, 2015.

Mr. Jonathan M. Pope
Jonathan.pope@illinois.gov
Special Assistant Attorney General
Office of Legal Services
Illinois Department of Revenue
100 West Randolph Street, 7-900
Chicago, Illinois 60601



Michael J. Wynne