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STATE TAXATION OF INCOME EARNED BEYOND ITS BORDERS: ALLOCATION AND APPORTIONMENT OF UNITARY BUSINESS INCOME IN FLORIDA

FRED F. HARRIS, JR.*

Before 1972, the Florida constitution prohibited the levy of an income tax upon any of its citizens.[1] Faced with a projected two hundred fifty million dollar deficit in revenue and required by law to operate within a balanced budget,[2] Governor Reubin Askew called a special session of the Florida Legislature and requested a constitutional amendment allowing an income tax on corporations.[3] Upon passage and ratification of that amendment, Florida entered the arena of unitary business taxation.[4]

Although legislation implementing this constitutional amendment has existed now for several years, Florida law on the taxation of multistate businesses is in many respects unclear. There have been few judicial opinions interpreting the statutory provisions and the regulations promulgated under their authority. Moreover, the regulations and the Department of Revenue's interpretations of them often vary from taxation methods used in other states, resulting in inconsistent tax liabilities for businesses operating interstate. This article will analyze the unitary business concept and the effects of its inconsistent application on multistate businesses.

THE UNITARY BUSINESS CONCEPT

The term "unitary business" is best defined as

> a business, the component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as independent units. By contrast, a dual or multiform business must show units of a substantial separateness and completeness, such as might be maintained as an independent business . . ., and [the units must be] capable of producing a profit in and of themselves.[5]

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1. FLA. CONST. art. VII, § 5 (1968, amended 1972).
2. *Id.* § 1(d).
3. Note, *Defining a Fair Share: The Proposed Revision to Florida's Corporate Profits Tax*, 6 FLA. ST. U.L. REV. 1029, 1034-35 (1978).
4. FLA. CONST. art. VII, § 5(b). The legislature enacted implementing legislation to be effective July 1, 1971; ch. 71-359, § 19, 1971 Fla. Laws 1827 (codified at FLA. STAT. ch. 214, part IV (1979)).
5. Maxwell v. Kent-Coffey Mfg. Co., 168 S.E. 397, 399 (N.C. 1933), *aff'd per curiam*, 291

The distinction between unitary and nonunitary businesses becomes important when a business operates in more than one state. In the case of a unitary business *(i.e.* one whose operations in the separate states are dependent upon and contribute to each other), a state must allocate the business' total taxable income so that it taxes only an amount proportionate to the income-producing contributions of the business operations in that state. When the business is nonunitary, the state simply taxes the income produced by the unit or units of the business operating in the state.[6]

Taxation of multistate businesses by the states is subject to constitutional limitations. These restrictions are based upon the jurisdictional concept that a state may not tax income earned outside its borders.[7] The commerce clause of the United States Constitution grants exclusive power to Congress to regulate interstate commerce and requires that interstate commerce be free from any direct restrictions or impositions by the states.[8] The due process clause as applied to the states through the fourteenth amendment also prohibits states from engaging in extraterritorial taxation because there is no nexus between such a tax and the local transactions for which the tax is imposed.[9] As Justice Holmes stated in *Wallace v. Hines:*

> The only reason for allowing a state to look beyond its borders when it taxes the property of foreign corporations is that it may get the true value of the things within it, when they are part

U.S. 642 (1934). *See also* Butler Bros. v. McColgan, 315 U.S. 501, 508 (1942) (three unities test—requires unity of ownership, operation, and use); Edison Cal. Stores Inc. v. McColgan, 183 P.2d 16, 21 (Cal. 1947) (if the portion of business done within the state is dependent upon or contributes to the operation of business without the state, the operations are unitary); Commonwealth v. ACF Indus. Inc., 271 A.2d 273, 277 (Pa. 1970) (nonunitary business activity exists where two separate and segregated enterprises are not related to each other and are conducted as separate and independent units).

6. *See* Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); Complete Auto Transit Inc. v. Grady, 430 U.S. 274 (1977).

7. Wallace v. Hines, 253 U.S. 66, 69 (1920).

8. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). *See also* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458 (1959): "[The Commerce Clause precludes the states from imposing] a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, . . . or by subjecting interstate commerce to the burden of 'multiple taxation'." (citations omitted).

9. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 461 (1959); Morewood Realty Corp. v. Pennsylvania, 294 A.2d 219, 222 (Pa. 1972): " '[A]pplication to the states of the rule of due process arises from the fact' that their spheres of activity are enforced and protected by the Constitution, and, therefore, it is impossible for one state to reach out and tax property in another without violating the Constitution." (quoting *Wheeling Steel Corp. v. Fox,* 298 U.S. 193, 209 (1936)).

> of an organic system of wide extent, that gives them a value above what they otherwise would possess. The purpose is not to expose the heel of the system to a mortal dart—not, in other words, to open to taxation what is not within the State.[10]

Although constitutional restrictions appear equitable, large multistate enterprises—later to be known as unitary businesses[11]—for many years exploited the federal restrictions to avoid state income taxation. In the typical situation an integrated, multistate business would locate its manufacturing, wholesale, and retail operations in different states; then, prices charged by each division were artificially manipulated so that the division in the state with the lowest tax rate was assigned all the profits of the business.[12] Eugene Corrigan, executive director of the Multistate Tax Commission, listed four other common devices for avoiding state taxation:

> (1) [A]ttributing income to a state that does not have jurisdiction to tax that income;
> (2) inconsistently attributing sales, property, and payroll in the numerators of the respective factors of the apportionment formula;
> (3) inconsistently differentiating between "business" and "nonbusiness" income; and
> (4) utilizing a multiple corporate structure to shield unitary business income from taxation.[13]

By 1920, methods of tax avoidance had become so prevalent that Justice Brandeis, in *Underwood Typewriter Co. v. Chamberlain,* noted that a state "attempting to put upon [a] business its fair share of the burden of taxation was faced with the impossibility of allocating specifically the profits earned by the processes conducted within its borders."[14]

To halt this loss of revenue, the states devised and the courts approved a system of formulary apportionment whereby each state multiplies the total income of a unitary business by the amount the local segment contributes to the final realization of profit.[15] To

10. 253 U.S. 66, 69 (1920).
11. *See* Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924).
12. *See generally* Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response,* 29 VAND. L. REV. 423 (1976).
13. *Id.* at 429-30.
14. 254 U.S. 113, 121 (1920).
15. Bass, Ratcliff & Gretton Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924); Adams Express Co. v. Ohio State Auditor, 165 U.S. 194 (1897). Other systems were also devised,

accurately determine contribution, factors such as property, payroll, and sales of the in-state segment are compared with identical factors of the total integrated business. The percentage of these factors located within the state is assumed to be the amount that that division contributes to the total income earned by the unitary business, and the state imposes a tax according to that ratio.

Although this system of allocation may accurately reflect the income of a segment of a multistate business, its application is restricted to businesses which are in fact unitary. As early as 1897 the Supreme Court provided guidelines for determining unity. In *Adams Express Co. v. Ohio State Auditor*, the Court held:

> [W]hile the unity which exists may not be a physical unity, it is something more than a mere unity of ownership. It is a unity of use, not simply for the convenience or pecuniary profit of the owner, but existing in the very necessities of the case—resulting from the very nature of the business.[16]

Regrettably, the Supreme Court definitions of a unitary business do not specifically delineate factors within a corporate framework which are determinative of unitary status, although certain attributes, such as central purchasing, have been held indicative of sufficient corporate integration to warrant unitary status.[17] Florida's apportionment statute does not define "unitary business,"[18] but the regulations promulgated by its authority broadly construe the phrase.[19] These regulations are modeled after those of the Multistate Tax Compact. Before discussing the Florida regulations, it will be helpful to explain the significance of the Multistate Tax Compact.

In 1964 a congressional subcommittee published a comprehensive report on state taxation of interstate business known as the Willis Report.[20] This report criticized the diversity in state apportionment formulas and recommended a federal allocation plan us-

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but this is the most prevalent.

16. 165 U.S. 194, 222 (1897); *accord*, Standard Oil Co. v. Thoreson, 29 F.2d 708, 711 (8th Cir. 1928).

17. Butler Bros. v. McColgan, 315 U.S. 501, 505 (1942).

18. FLA. STAT. § 214.71 (1979).

19. FLA. ADMIN. CODE R. 12C-1.15(4)(a).

20. SPECIAL SUBCOMMITTEE ON STATE TAXATION OF INTERSTATE COMMERCE OF THE HOUSE COMMITTEE ON THE JUDICIARY, STATE TAXATION OF INTERSTATE COMMERCE, H.R. REP. NO. 1480, 88th Cong., 2d Sess. (1964) (vols. 1 & 2); H.R. REP. NO. 565, 89th Cong., 1st Sess. (1965) (vol. 3); H.R. REP. NO. 952, 89th Cong., 2d Sess. (1965) (vol. 4) [hereinafter cited as WILLIS REPORT].

ing a two-factor (property and payroll) formula. The report suggested that differences among the state systems created the possibility of haphazard taxation, required additional recordkeeping and a concomitant increase in costs for business, and generated taxpayer disrespect for the laws which, in turn, led to mass noncompliance.[21] This, coupled with past judicial requests for federal intervention,[22] prompted the states to attempt to police themselves.

The result of the states' initiative was the Multistate Tax Compact (MTC), which went into effect August 4, 1967. Its stated objectives were to:

> 1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.
> 2. Promote uniformity or compatibility in significant components of tax systems.
> 3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.
> 4. Avoid duplicative taxation.[23]

The constitutionality of the MTC was recently upheld by the Supreme Court in *United States Steel Corp. v. Multistate Tax Commission* against charges that it violated the compact clause of the United States Constitution.[24]

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21. *See generally id.* at vol. 4, 1121-28.

22. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476-77 (1959) (Frankfurter, J., dissenting) ("The problem calls for solution by devising a congressional policy. . . . Congress alone can formulate policies founded upon economic realities, perhaps to be applied to the myriad situation involved by a properly constituted and duly informed administrative agency."); International Harvester Co. v. Department of Treasury, 322 U.S. 340, 360 (1944) (Rutledge, J., concurring); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292, 306-07 (1944) (Jackson, J., concurring); McCarroll v. Dixie Greyhound Lines, Inc., 309 U.S. 176, 188-89 (1940) (dissenting opinion); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307, 327 (1938) (Black, J., dissenting). *See also* Celler, *The Development of a Congressional Program Dealing with State Taxation of Interstate Commerce*, 36 FORDHAM L. REV. 385, 389-90 (1968) (citing four major defects in allowing each state to formulate its own policy: (1) nonenforcement and noncompliance; (2) overtaxation; (3) local business getting an unfair advantage; and (4) poor attitude generated, resulting in a disrespect for the laws).

23. *Tax Administration—Multistate Tax Compact*, STATE TAX GUIDE—ALL STATES (CCH) ¶ 35 (Feb. 1979) [hereinafter cited as ALL STATES]. The MTC is presently in use in 19 states. *Id.*

24. 434 U.S. 452 (1978). U.S. CONST. art. I, § 10, cl. 3 provides "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State . . . ."

Florida became a member of the MTC in 1967,[25] but withdrew five years later to implement its own allocation scheme.[26] Although Florida is no longer a member state, its regulations were lifted almost verbatim from the MTC, so that Florida's evolving position on the taxation of unitary businesses is revealed by noting the changes and omissions in Florida's regulations as compared with those of the MTC. The starting point for this comparison is the definition of unitary businesses. The Florida regulations state broadly that, a strong presumption is created by the presence of any of the following factors: (1) when all of the corporation's activities are in the same general line; (2) when its various divisions or segments are engaged in different steps in a large vertically structured enterprise; or (3) where there is strong centralized management.[27]

Operational Integration

A group of tax scholars, led by Jerome Hellerstein, argues that a definition of unity such as that found in Florida's regulations is too broad, and that businesses should be treated as unitary only if their divisions operating in different states are operationally integrated.[28] Operational unities are typified by integrated manufacturing, wholesaling, retailing, central purchasing, and other related features.[29] They contrast operational activities with ownership-related entrepreneurial activities such as investment, borrowing of capital funds, purchasing business insurance, and requiring financial reports from each owned business.[30]

Authority for this position, although scarce, comes in part from the Supreme Court, which held in *Adams Express Co. v. Ohio State Auditor* that "[w]hile the unity which exists may not be a

25. Ch. 67-598, §§ 1, 5, 1967 Fla. Laws 1733 (repealed 1971) (enacted to "simplify taxpayer compliance, eliminate the possibility of double taxation, prevent disputes or minimize their number between member states").

26. Ch. 71-980, § 1, 1972 Fla. Laws 51 (repealing articles III & IV of the MTC); ch. 76-149, § 1, 1976 Fla. Laws 259 (repealing all other MTC articles).

27. FLA. ADMIN. CODE R. 12C-1.15(4)(a)(1)-(3).

28. *See generally* Hellerstein, *The Unitary Business Principle and Multicorporate Enterprises: An Examination of the Major Controversies*, 27 TAX EXECUTIVE 313, 322 (1975).

29. *See* Butler Bros. v. McColgan, 315 U.S. 501, 508 (1942) (holding that central purchasing demonstrates that "functionally the various branches are closely integrated").

30. The operational integration theory was argued by taxpayers in Associated Dry Goods Corp. v. Department of Revenue, No. 78-1083, 78-1259 (Fla. Cir. Ct. Pinellas County 1978), *aff'd mem.*, 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979). The circuit court rejected the taxpayers' reasoning and found the business to be unitary. *Id.*

physical unity, it is something more than a mere unity of ownership. It is a unity of use. . . ."[31] Because the Supreme Court in *Adams Express* did not delineate those factors within a corporate framework which would be determinative of unitary status, much controversy and uncertainty remained.[32] Later, however, the Court cast doubt upon the operational integration theory in *Butler Brothers v. McColgan* by announcing that in order for a business to be deemed unitary, it must fulfill the requirements of a three-part test: there must be a unity of operation, ownership, and use.[33]

Despite this setback, Hellerstein believes, as does this author, that the operational integration test should be adopted. He states that "[t]he underlying reason for the development of formulary apportionment [is] that there is no viable way of separately accounting for the profits of a business where interdependent operating functions that produce the profits of the enterprise are carried on in more than one state."[34] As to nonoperating activities, Hellerstein concludes that even if centralized, they ought not necessitate the use of formulary apportionment:

> The point is that such matters require a spreading of costs which can be acceptably accomplished by distributing charges on a time, or a gross volume basis, or by other workable methods, and do not involve the elusive effort to segregate the profits between interdependent steps in operations. . . .
>
> Consequently, the nonoperating functions of an enterprise . . ., although centralized, ought not lay the basis for holding the enterprise unitary.[35]

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31. 165 U.S. 194, 222 (1897).

32. *But see* Boren, *Separate Accounting in California and Uniformity in Apportioning Corporate Income,* 18 U.C.L.A. L. REV. 478, 499-507 (1971), for a list of factors stated to be indicative.

33. 315 U.S. 501, 508 (1942). This is the so-called "three unities test," defining the necessary composition of a business which is unitary; the test must be distinguished from the three-factor (payroll, property, and sales) formula used in many apportionment schemes. *But see* Keesling & Warren, *The Unitary Concept in the Allocation of Income,* 12 HASTINGS L.J. 42, 47 (1960) (where the three-unities test of *Butler* is criticized as being at best ambiguous, and possibly meaningless).

34. Hellerstein, *Recent Developments in State Tax Apportionment and the Circumscription of Unitary Business,* 21 NAT'L. TAX J. 487, 500 (1968).

35. *Id.* at 502; *see* Keesling & Warren, *supra* note 37, at 52:

> It may well be that in many instances the central performance of certain functions on behalf of a number of commonly owned series of business activities, which from an operational standpoint, are separate businesses, may result in savings substantially similar to those just discussed. Before, however, it is concluded that the different groups of activities should be considered as constituting one business, it should clearly appear that the savings and advantages are substantial in relation

Although operational integration offers a logical basis for deeming a business unitary (and thus subject to income apportionment), the states would prefer that the courts recognize central-ownership activities as being indicative of unity in businesses operating in more than one state. The regulations of both the MTC and Florida are drawn so broadly that state taxing authorities possess considerable discretion in determining corporate tax liabilities. The push by the states is most vividly demonstrated by statements made by the drafters of the Uniform Allocation and Apportionment of Income Act;[36] for example, Frank Keesling, noted authority on formulary apportionment, stated:

> At this point it is questionable whether there is such a thing as a

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> to the income involved. Central accounting, for instance, may result in some savings, but in most instances the amount is trifling in comparison with the income of the various series of business activities for which the accounting is performed. Alone considered, it is too weak a connecting link to bind into one business, what would otherwise, from an operational standpoint, be considered separate businesses. Similar observations may be made with respect to other centrally performed functions such as management, handling of insurance, advertising, and the purchasing of supplies and equipment.

See also Morewood Realty Corp. v. Pennsylvania, 294 A.2d 219, 222 (Pa. Commw. Ct. 1972):

> We detect in these cases an on-going purpose on the part of the U.S. Supreme Court to keep state taxation of multistate corporations within definite bounds. A different attitude . . . would have a disastrous consequence to our federal system, and ultimately result in either the inability to govern exemplified by the Articles of Confederation or fifty separate economies incapable of supporting the needs of two hundred millions of persons.

Hellerstein has convinced the Pennsylvania Supreme Court that he is right. In Commonwealth v. ACF Indus., Inc. 271 A.2d 273, 280 (Pa. 1970) the court held:

> [T]he principles are clear. First, if a multistate business enterprise is conducted in a way that one, some or all of the business operations outside Pennsylvania are independent of and do not contribute to the business operations within this state, the factors attributable to the outside activity may be excluded.
>
> Second, in applying the foregoing principle to a particular case, *we must focus upon the relationship between the Pennsylvania activity and the outside one, not the common relationships between these and the central corporate structure.* Only if the impact of the latter on the *operating units* or activities is so pervasive as to negate any claim that they function independently from each other do we deny exclusion in this context.

(emphasis added).

36. The Uniform Allocation and Apportionment of Income Act was a uniform law submitted as a preliminary draft to the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1956. *See generally* Lynn, *Formula Apportionment of Corporate Income for State Tax Purposes: Natura Non Facit Saltum,* 18 Ohio St. L.J. 84 (1957). For the text of the draft, see *id.* at 100 app. The draft was adopted in substantially the same form and renamed the Uniform Division of Income for Tax Purposes Act by the NCCUSL in 1957. *See generally* Lynn, *The Uniform Division of Income for Tax Purposes Act,* 19 Ohio St. L.J. 41 (1958).

> non-unitary business. . . . The view that all income from commonly owned business activities should be combined and apportioned by a single formula without inquiring as to whether such activities are unitary or separate in nature seems preferable. . . .[37]

This move by the states has not been limited significantly by the courts. Business, once the perpetrator of tax abuses in this area, is now being subjected to a sophisticated attack by the states. The real burden, however, is upon those smaller businesses that cannot afford the substantial costs of compliance (*e.g.*, increased recordkeeping). It seems that the pendulum has now swung: The past abuses of multistate businesses in avoiding state income tax are coming full circle, with the states insisting upon expanding the definition of a unitary business. Florida appears willing to continue this trend.

Florida's regulations do not recognize a distinction between operational and nonoperational aspects of a corporation's structure. Florida regulation 12C-1.15(4)(a)(3) provides that "[a] taxpayer which might otherwise be considered as engaged in more than one trade or business is properly considered as engaged in a unitary business when there is a strong central management, coupled with the existence of centralized departments for such functions as financing, advertising, research, or purchasing";[38] additionally, accounting, personnel, insurance, and legal activities may also be properly considered.[39] This regulation is based on the philosophy that all relevant factors are to be considered and that any common factor is relevant. This is also the stance of the MTC. By its terms the Florida regulation grants wide latitude to Florida's Department of Revenue. For example, in *J.L. Malone v. Department of Revenue*, the Department of Revenue, in denying the use of the statutory apportionment formula, reasoned:

> the taxpayer's return of income from projects within the State of Florida was substantially higher than its rate of income from activities in other jurisdictions. . . . The result, therefore, if formulary apportionment were used would be to apportion certain income actually earned within the State of Florida outside the

37. Corrigan, *supra* note 12, at 429.

38. FLA. ADMIN. CODE R. 12C-1.15(4)(a)(3). These regulations are similar to those suggested by the Multistate Tax Compact; *see* M.T.C. art. IV, § 1(b), ALL STATES, *supra* note 23.

39. FLA. ADMIN. CODE R. 12C-1.15(4)(a)(3).

State of Florida.[40]

As is apparent from this statement, the Department of Revenue in this instance is basing its determination of the proper accounting method not on whether the business is unitary, but, rather, on whether more tax revenue will be generated by applying a specific type of accounting method to the business. This type of consideration is the product of the broad discretion granted by an expansive definition of "unitary business" and it demonstrates how such a broad definition naturally leads to diversity between the states in the allocation of corporate income.

Regulation 12C-1.15(4)(a)(1) indicates that if a Florida taxpayer is engaged in activities which are of one general line or type, a presumption arises that the business is unitary. The regulation's example of a chain of grocery stores indeed describes a unitary business; however, the chain of stores should be considered unitary more properly because of complete central purchasing and other operational activities, not simply because the divisions all are involved in retail grocery sales.[41] In *Square D Company v. Kentucky Board of Tax Appeals* the court discussed a similar contention, stating:

> The overall operation of related businesses in different states, or the unity of ownership of stock in separate corporations engaged in a related or similar business, does not itself create the required *integration* of business operations as to justify a state in claiming a proportionate share of the income from foreign sources.[42]

The court looked to the operational integration of corporate divisions. Basing a determination of unity upon the mere similarity of businesses is unjustified because the potential for arbitrary, inconsistent tax treatment by the states is too great.

Because the regulations so broadly construe the definition of a unitary business, the true test of unity must emerge from Florida's courts. The first cases are now reaching the appellate courts, and it appears the courts are confused. For instance, in *Stan Musial & Biggie's v. Department of Revenue*, the Florida First District Court of Appeal held that even a *nonunitary* business may be sub-

40. No. 76-648, slip op. at 3 (Fla. Div. of Administrative Hearings Sept. 23, 1976).
41. *See* Butler Bros. v. McColgan, 315 U.S. at 508.
42. 415 S.W.2d 594, 600 (Ky. 1967) (emphasis added).

jected to Florida's apportionment formula.[43] Despite the inconsistency of other states' decisions on this subject, *Stan Musial* is the only case to have questioned the basic requirement of unity before income earned in other states may be allocated to the taxing jurisdiction.[44] The only other Florida appellate decision came from the Second District Court of Appeal in *Department of Revenue v. Associated Dry Goods Corp.*[45] The corporation maintained in the trial court that because it was integrated with its in-state division principally in nonoperational aspects, it should be deemed nonunitary. The trial court rejected the corporation's distinction and held the corporation to be unitary.[46] The Second District affirmed, unfortunately, without opinion.[47]

Whatever definition is adopted by the Florida courts, it will find support from one of the many varying decisions in other jurisdictions. The Supreme Court has admitted that "judicial application of constitutional principles to specific state statutes leaves much room for controversy and confusion and little in the way of precise guides to the States in the exercise of their indispensible power of taxation."[48] The Oregon Supreme Court hinted at the real issue in

43. 363 So. 2d 375, 378 (Fla. 1st Dist. Ct. App. 1978) (The corporation, however, came within an exception to the rule of application of the three-factor formula because it demonstrated "a unique and nonrecurring situation making utilization of the formula unfair.").

44. *But see,* H.R. REP. 11798, 89th Cong., 2d Sess. (1966), the original proposal of the Willis Subcommittee, which would have required formula apportionment without regard to whether the business was "unitary."

45. 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979).

46. No. 78-1083, 78-1259 (Fla. Cir. Ct. Pinellas County 1978), *aff'd mem.*, 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979).

47. 373 So. 2d at 466.

48. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959). Justice Frankfurter, in his dissenting opinion, asked for Congressional intervention, noting:

> At best, this Court can only act negatively; it can determine whether a specific state tax is imposed in violation of the Commerce Clause. Such decisions must necessarily depend upon the application of rough and ready legal concepts. We cannot make a detailed inquiry into the incidence of diverse economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.

Id. at 476.

Many bills have been introduced providing for federal legislation, although none have been enacted into law to date. *See,* S. 2080, 94th Cong., 1st Sess. (1975) (Mathias Bill); S. 1255, 93rd Cong., 1st Sess. (1973) (Muskie-Percy Bill); H.R. 1538, 92nd Cong., 1st Sess. (1971); S. 317, 92nd Cong., 1st Sess. (1971); H.R. 11798, 89th Cong., 2d Sess. (1965). *See also* STATE AND LOCAL TAXATION, ALL STATES UNIT (P-H) ¶ 5000. These defeats led to the formation of the Multistate Tax Compact.

need of resolution when it held:

> Every definition of the word "unitary" must of necessity be general, and since such must be its nature, a repetition of definitions cannot be helpful in the solution of any specific problem. In determining whether a business is unitary or otherwise in character, a knowledge of the facts is essential; in truth, the facts are all important.[49]

Florida needs a method of weighing the common attributes of two businesses. Should all common features be considered but weighted differently, or should some attributes be totally ignored as irrelevant to a "unitary" determination? The answer should come from the reason apportionment was first necessary, *i.e.* to stop the artificial manipulation of the amount of taxes due by businesses operating in more than one state. Florida has the opportunity to mold a judicial position based upon reason and tempered by a historical perspective. Such a position would be a welcome relief from the past "controversy and confusion."[50]

Double Weighted Sales Factors

A substantial difference between the MTC and the Florida allocation regulations—and the one which led to Florida's withdrawal from the MTC—concerns the weighting of factors in allocation formulas. Florida retained the property, payroll, and sales formula of the MTC,[51] but instead of weighing each factor equally, Florida assigned a double weight to the sales factor.[52]

The inclusion of a sales factor in allocation formulas was, at one time, a subject of controversy among scholars. Economists argued that income was earned exclusively by capital and labor.[53] They felt that sales, although admittedly a part of the income-producing process, were only the transfer of equivalent values or mutual benefit, not the creation of income.[54] The economists felt that the more the allocation formula mirrored economic reality, the less business decisions would be dictated by tax considerations and the

49. Edward Hines Lumber Co. v. Galloway, 154 P.2d 539, 544 (Ore. 1944).
50. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 457 (1959).
51. Fla. Stat. § 214.71 (1979); M.T.C. art. IV, § 9, All States, *supra* note 23.
52. Fla. Stat. § 220.15(4) (1979).
53. Harriss, *Economic Aspects of Interstate Apportionment of Business Income*, 37 Taxes 327, 362 (1959).
54. *Id.*

more efficient our economy would become.[55] This made economic sense, but was "contrary to tax postulates."[56] It was also politically unacceptable to marketing states.

The sales factor endured, however, and became part of the Uniform Division of Income for Tax Purposes Act (UDITPA),[57] although its survival really was a result of compromise between the manufacturing and marketing states.[58] Additionally, the Supreme Court has recognized the propriety of the sales factor's inclusion in allocation formulas.[59]

Once the sales factor was included with payroll and property in the formulas, a dispute arose concerning the situs of the sale. The marketing states naturally wrote their allocation formulas so that sales were based on the destination of the goods sold; conversely, the manufacturing states provided for a sales-by-origin test.[60] Business, fearing taxation at both ends, wanted uniformity and demanded federal intervention.[61] The use of sales-by-origin effectively destroyed any advantage to the marketing states that the three-factor formula had afforded them, so it is not surprising that sales-by-destination became the dominant method and has been adopted by both the MTC and by Florida.[62]

The Florida method of double weighting of the sales factor is not a new concept. The 1939 Report of the National Tax Association on Allocation of Income seriously considered double weighting the

55. *See id.* at 327. ("The present diversity of state allocation formulas creates avoidable waste. Businesses are put to compliance costs (and governments to administrative expenses) which serve no useful purpose for the economy."); *accord,* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 474 (Frankfurter, J., dissenting); WILLIS REPORT, *supra* note 20, at vol. 4, 1121-28.

56. *See generally* Hellerstein, *Allocation and Nexus in State Taxation of Interstate Businesses,* 20 TAX L. REV. 259, 273-76 (1965).

57. The UDITPA was the forerunner of the MTC and now is embodied in MTC art. IV. The text of the UDITPA is reprinted in *Corporate Income Taxes—Correlator,* ALL STATES, *supra* note 23, at ¶ 10,000.

58. Lynn, *The Uniform Division of Income for Tax Purposes Act Re-Examined,* 46 VA. L. REV. 1257, 1262 (1960). The UDIPTA was endorsed by the ABA in 1957. *Id.* at 1263.

59. Butler Brothers v. McColgan, 315 U.S. at 509 ("We cannot say that property, payroll, and sales are inappropriate ingredients of an apportionment formula."). *See also* Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) (upholding a single sales factor apportionment formula).

60. *See* Studenski, *The Need for Federal Curbs on State Taxes on Interstate Commerce: An Economist's Viewpoint,* 46 VA. L. REV. 1121, 1131 (1960).

61. *Compare* Britton, *State Taxation of Extraterritorial Value: Allocation of Sales to Destination,* 46 VA. L. REV. 1160 (1960) (arguing for congressional use of the due process clause) *with* Harriss, *supra* note 53, at 328 (arguing for use of the commerce clause).

62. FLA. ADMIN. CODE R. 12C-1.15(4)(d)4; M.T.C. art. IV, § 16, ALL STATES, *supra* note 23. *See also* J. HELLERSTEIN, STATE AND LOCAL TAXATION 329 (1969).

sales factor but rejected the idea because of the wide-scale change in state laws its implementation would require.[63] Scholars have commented on its theoretical attractiveness, but invariably have come to the same conclusion as the 1951 Committee on Tax Situs and Allocation of the National Tax Association, which said: "The desirability of assigning different weights to these factors . . . was considered. However, the conclusion was reached that any such weighting would be no less arbitrary than assigning equal weights . . . ."[64]

These reports were based upon proposed uniform *national* formulas. In the case of an individual state, however, the differing weights may have advantages. The factors reflecting the economy of the state may be emphasized and the tax revenue from the formula will correspondingly increase. Florida's double weighting of its sales factor is advantageous in a number of respects. Since Florida is essentially a marketing state, the sales factor will be higher than either the property or payroll elements of out-of-state unitary businesses operating in-state. As previously noted, the application of this formula will extract increased taxes from those multistate concerns. Additionally, it will put Florida in a stronger position to persuade industries to relocate within its borders since the double-weighted sales factor would be to the advantage of businesses with plants and payrolls in the state.[65] The third advantage of the provision is the political impact. It is a "legislator's dream: a lush source of tax revenue, the burden of which falls largely upon those who cannot vote him out of office."[66]

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63. *See*, Wilkie, *A Theoretical Basis for the Allocation of Multi-state Income by Unitary Businesses Under State Corporate Net Income Taxes*, 13 TAX EXECUTIVE 157, 165 (1961).

64. Miller, *Report of the Committee on Tax Situs and Allocation*, in PROCEEDINGS OF THE FORTY-FOURTH ANNUAL CONFERENCE ON TAXATION 451, 459 (R. Welch ed. 1951). *See also* Wilkie, *supra* note 63, at 166.

65. *See also* Comment, *Apportionment of Corporate Income to the States for Tax Purposes: Fifty Ways to Lose Your Tax Dollar*, 61 MARQ. L. REV. 480, 494 (1978).

66. *Id.* at 496. *See also* Britton, *Taxation Without Representation Modernized*, 46 ABAJ 369 (1960):

> The obvious effect of such an apportionment formula [sales allocated to destination] when applied equally to all taxpayers subject to tax within and without the state is, broadly stated, to tax politically ineffectual nonresident businesses, *on account of and proportionate to shipments into the state* and to exempt home industry from tax *on account of and proportionate to* shipments out of state.

Id. (emphasis in original); Peters, *Constitutional Limitations on State Taxation Redefined by Supreme Court*, 49 J. TAX. 240, 244 (1978) ("Have out of state corporations been made a target for the implementation of tax policies which satisfy the fiscal and political exigencies of the states?").

In 1917, economist T.S. Adams made this observation on allocation formulas: "What is most needed is a uniform rule. Just what rule shall be selected is less important than the general adoption of the same rule by competing jurisdictions."[67] Florida's double weighting adds another version to the multiplicity of already diverse state formulas. Even among the states that use equally weighted three-factor apportionment formulas there are disparities due to the varying definitions given to identical factors.[68] The Willis Report noted that "[f]aced with [such] diversity in State laws, taxpayers often impose their own brand of uniformity."[69]

Although diversity in tax allocation formulas creates the possibility of double taxation, the Supreme Court recently refused to strike down a formula on account of its diversity alone.[70] In *Moorman Manufacturing Co. v. Bair* the Court upheld an Iowa apportionment formula that was based solely upon the sales factor.[71] The effect of this decision is to allow states wide latitude in choosing a method of allocation, and thereby to promote diversity. Although *Moorman* is consistent with other decisions of the Court,[72] it is surprising for a number of reasons. Most important, in *General Motors Corp. v. District of Columbia* the Supreme Court invalidated a single-factor sales formula, basing its opinion on the lack of statutory authority.[73] The Court in dicta disparaged the single-factor formula, stating, "[t]he use of an apportionment formula based wholly on the sales factor, in the context of general use of the three-factor approach, will ordinarily result in multiple taxation of corporate net income . . . ."[74] The acceptance of *Moorman's* single-factor sales formula also is curious because the same

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67. Adams, *The Taxation of Business*, in PROCEEDINGS OF THE ELEVENTH ANNUAL CONFERENCE ON TAXATION 185, 194 (F. Fairchild ed. 1917). *See generally* Hellerstein, *supra* note 28.

68. *See* Hartman, *State Taxation of Interstate Commerce: A Survey and an Appraisal,* 46 VA. L. REV. 1051, 1102-03 (1960); Keesling, *A Current Look at the Combined Report and Uniformity in Allocation Practices,* 42 J. TAX. 105 (1975) (UDITPA's purpose is being frustrated by inconsistent interpretation by the states).

69. WILLIS REPORT, *supra* note 20, at vol. 4, 1125.

70. There is no federal constitutional prohibition regarding double taxation—witness subchapter C of the Internal Revenue Code. *See* Shaffer v. Carter, 252 U.S. 37 (1920). The constitutional problems arise when the tax violates due process, denies equal protection, or interferes with interstate commerce. *See id.* at 58.

71. 437 U.S. 267 (1978).

72. *See, e.g.*, Bass, Radcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920). *But see* Hans Rees' Sons v. North Carolina, 283 U.S. 123 (1931).

73. 380 U.S. 553 (1965).

74. *Id.* at 559.

year, in *United States Steel Corp. v. Multistate Tax Commission,* the Court bent over backwards to uphold the Multistate Tax Compact—the very compact that espouses uniformity in allocation formulas.[75] Justice Blackmun, in his dissent in *Moorman,* recognized this contradiction:

> Today's decision is bound to be regressive. Single-factor formulas are relics of the early days of state income taxation. The three-factor formulas were inevitable improvements and, while not perfect, reflect more accurately the realities of the business and tax world. With their almost universal adoption by the States, the Iowa system's adverse and parochial impact on commerce comes vividly into focus. But with its single-factor formula now upheld by the Court, there is little reason why other states, perceiving or imagining a similar advantage to local interests, may not go back to the old ways.[76]

The Supreme Court has often asked for congressional intervention in state taxation of multistate business, but to date none has been forthcoming.[77] Many agree that this area is better suited to federal legislative action than to judicial reaction.[78] Perhaps the Court is allowing the self-serving diversity on the part of the states to demonstrate to the Congress that federal legislative action is imperative.[79]

Although most commentators agree that uniformity is essential, the method of achieving this goal is in dispute. While most feel that federal legislation is the key, the states have maintained a continuous lobby to halt any efforts in that direction. The MTC unabashedly admits that one of its major goals is "the desire to 'guard against restrictive federal legislation and other federal action which impinges upon the ability of state tax administrators to carry out the laws of their states effectively.' "[80] Conversely, busi-

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75. 434 U.S. 452 (1978).

76. *Moorman,* 437 U.S. at 282-83. *See also* Hartman, *supra* note 68, at 1104 (This diversity results from the "desire of each state to select a method that is most advantageous, taxwise, to itself.").

77. *See* note 22 and accompanying text *supra;* note 48 *supra.*

78. *See, e.g.,* Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting) ("At best, this Court can only act negatively. . . . The problem calls for solution by devising a congressional policy."); Harriss, *supra* note 53.

79. *See* Hartman, *supra* note 68, at 1104. Summarizing the "diversity and complexity of the system," the WILLIS REPORT, *supra* note 20, at vol. 1, 249, stated: "The present system for division of income is on its face overwhelming. It will surprise no one familiar with it that in practice it works badly."

80. United States Steel v. Multistate Tax Comm'n, 434 U.S. at 487 (White, J., dissent-

ness has been lobbying for a federal allocation formula.[81] In fact, 92 of the top 100 major businesses have formed an organization called the Committee on State Taxation of the Council of State Chambers of Commerce (COST) to "discourage state cooperative solutions to interstate taxation problems."[82]

The conclusion to be drawn from the foregoing is that there is no uniformity in allocation formulas. Florida's formula certainly does not promote uniformity, and the *Moorman* decision, allowing each state to adopt whatever formula best suits its individual economic interests, makes continued diversity all the more likely.[83]

THE MTC "SEPARATE BUSINESS" REGULATION

Further comparison of the Florida and MTC regulations indicates that the two differ in still another way. The MTC regulations carefully explain that where a single taxpayer operates two or more *separate* businesses, the allocation formula will not be applied to those different businesses. The MTC then uses the term "single trade or business" (as opposed to the Florida term "unitary business") to describe a business that is subject to formulary apportionment.[84] Florida's regulations forego any discussion of the separate business concept, simply stating that where the Florida activities "are a part of a unitary business carried on within and

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ing) (citing Ninth Annual Report, Multistate Tax Commission, at 1 (1976)).

81. *See, e.g.*, congressional bills cited *supra* note 48.

82. Corrigan, *supra* note 12, at 427, 427 n.4. COST recently exerted its influence by privately pressuring the federal government to enter a tax treaty with Great Britain prohibiting the combination of income from any enterprise doing business in both Great Britain and the United States. Tax Convention, not yet ratified, United States-Great Britain and Northern Ireland, *United Kingdom*, 2 TAX TREATIES (CCH) ¶ 8103A (March 1979). Although the Senate has not yet done so, ratification of the treaty has been recommended by both the State Department and President Carter. *Id.* at ¶ 8103DB-2 (Oct. 1979). *See* Corrigan, *supra* note 12, at 441 n.42. This treaty would alter the result of such cases as Bass, Ratcliff & Gretton, Ltd. v. State Tax Comm'n, 266 U.S. 271 (1924). (a New York business-privilege tax imposed on a British corporation doing business in New York, based on a ratio between the value of corporate assets in New York and the total value of corporate assets was held not unreasonable, not a violation of due process, and not an unconstitutional burden on foreign commerce). The Multistate Tax Commission knew of the COST attempt in advance but was unable to frustrate the effort. Corrigan, *supra* note 12, at 429. Note, as this article was going to press, the long awaited tax treaty between the United States and Great Britain was ratified. The tax treaty, as ratified, did not address the combination of income issue. Convention for Avoidance of Double Taxation and the Prevention of Fiscal Evasion, March 25, 1980, United States-Great Britain, 2 TAX TREATIES II (P-H) ¶ 89030.

83. *But see* Keesling & Warren, *California's Uniform Division of Income for Tax Purposes Act*, 15 UCLA L. REV. 156, 157 (1967) ("The existance of such widespread disparity in allocation practices is undesirable, but its seriousness has been greatly exaggerated.").

84. M.T.C. art. IV, § 1(b), ALL STATES, *supra* note 23.

without Florida" three-factor formulary apportionment shall generally be required.[85] Florida then follows the MTC regulations in explaining the factors to be considered in the determination of which businesses are unitary.

Florida's refinement of the MTC regulations in this area is both beneficial to the state and detrimental to those unfamiliar with the concepts of the unitary business theory. It is best to omit a discussion of separate businesses operated by one taxpayer because such a regulation can only add to the confusion in existing Florida law—separate treatment of nonunitary businesses may be inferred from the very definition of a unitary business. This separate treatment, however, may not be readily apparent to those who are inexperienced at trying to determine whether the allocation formula will apply to their corporations, especially since the definitions of unitary business are so broad.[86]

Business vs. Nonbusiness Income

The MTC regulations devote an entire section to the differences between business and nonbusiness income, illustrating the disparate treatment of rental income, capital gains, interest, dividends, and patent and copyright royalties.[87] Florida's regulations contain no reference to such a distinction. Under the MTC, nonbusiness income (which really means nonunitary business income) may be allocated to the taxing state only if the property had a situs in that state at the time of sale or transfer or if the taxpayer had a commercial domicile in the state and was not taxable in the situs state; the unitary business income must be apportioned according to the three-factor formula.[88] Florida's refusal to include the business/nonbusiness dichotomy in its regulations is supported by commen-

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85. Fla. Admin. Code R. 12C-1.15(4)(a).

86. Most corporations doing business in more than one state will have tax counsel to interpret these regulations.

87. M.T.C. art. IV, All States, *supra* note 23. For a discussion of the treatment of rental income, see Edelmann, *Should Rented Property be Included in the Property Allocation Factor?*, in Proceedings of the Forty-Second Annual Conference on Taxation 185 (R. Welch ed. 1949). *See also* Southern Pac. Co. v. McColgan, 156 P.2d 81 (Cal. Ct. App. 1945) (holding dividends unallocable because the corporation did not engage in the trading of stocks or any activity relating to stocks except the receipt and disbursement of dividends).

88. M.T.C. art. IV, §§ 5-8, All States, *supra* note 23. *See also* Nemeth and Agee, *State Taxation of Multistate Business: Resolution or Stalemate?*, 48 Taxes 237, 249 (1970) (differences in state distinctions between business and nonbusiness income are a major problem to uniformity).

tators who characterize the distinction as unsatisfactory and unworkable.[89] Other commentators question whether the MTC regulations, despite their specificity, offer any real assistance in determining whether income is to be classified as business or nonbusiness.[90] In any event, there appears to be a trend away from use of this distinction, with nine of the forty-six states taxing corporate income refusing to allow separate accounting for nonbusiness income, thereby treating all income as business income subject to apportionment.[91]

COMBINED VS. CONSOLIDATED REPORTING AND MULTIPLE CORPORATIONS

The MTC regulations include a provision that "nothing in the regulations shall preclude the use of combined reporting."[92] The Florida regulations are silent on this issue. Combined reporting is used "to insure that the income of a business conducted partly within and partly without the taxing state shall be determined and apportioned in the same manner regardless of whether the business is conducted by one corporation or by two or more affiliated corporations."[93] That is, the income of the entire enterprise, regardless of its corporate structure, is still computed as a unit, just as it would be if the business were under one corporate roof.[94]

Before combined reporting had been developed, New York attempted to require consolidated returns from an out-of-state parent corporation and its subsidiary operating in that state. Justice Cardozo, speaking for the majority in *People ex rel. Studebaker Corp. v. Gilchrist,* refused to allow the state to disregard the sepa-

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89. *See* Glaser, *Proposed Solutions to Areas of Conflict in Taxation of Interstate Business,* in NEW YORK UNIVERSITY THIRTY-THIRD INSTITUTE ON FEDERAL TAXATION 983, 992 (A. Reiner ed. 1975) (citing the Ad Hoc Committee on Taxation of Interstate Business). *See generally* Nemeth and Agee, *supra* note 88.

90. Peters, *Revised Multistate Tax Commission Regs Define "Business" and "Nonbusiness" Income,* 40 J. TAX. 122 (1974).

91. *See* Comment, *supra* note 65, at 487; Corrigan, *supra* note 12, at 435. The nine states mentioned are Florida, Idaho, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. *See* ALL STATES, *supra* note 23, at ¶¶ 10,200-10,943. Despite this trend these regulations have been upheld in Vermont in F.W. Woolworth v. Commissioner, 298 A.2d 839 (Vt. 1972), and in New Jersey in F.W. Woolworth v. Director of Div. of Tax, 213 A.2d 1 (N.J. 1965). *See* Corrigan, *supra* note 12, at 435.

92. M.T.C. art. IV, § 2(b), ALL STATES, *supra* note 23.

93. Keesling, *supra* note 68, at 106.

94. Edison Cal. Stores, Inc. v. McColgan, 183 P.2d 16, 17 (Cal. 1947) (allocation "should apply to incorporated wholly controlled branches or businesses . . . located" in other jurisdictions).

rate but autonomous corporate entities through its requiring of the filing of consolidated returns.[95] This decision precipitated the emergence of combined reporting.[96] Consolidated reporting not only computes the income of all the affiliated corporations as a unit, but taxes that income as a unit as well.[97] Combined reporting, on the other hand, merely combines all the affiliated corporations' income, disregarding intercompany transactions, and then apportions that income to the in-state segment of the business by the normal apportionment method.[98] The decisions upholding the method of combined reporting are not based on direct statutory authority, but rather on the implied authority to allocate income of unitary businesses "whenever activities are partially within and partially without the state."[99] Florida should therefore have no trouble using combined reporting to prevent the use of a multiple corporate structure to frustrate its allocation formula, despite its absence from the regulations.[100]

Relief Provisions

The Florida relief provision is to be used "[i]f the apportionment methods of [sections] 214.71 and 214.72 do not fairly represent the extent of a taxpayer's tax base attributable to this state . . .,"[101] and is identical to the relief provision of the MTC.[102] Although Florida has yet to have an appellate opinion based upon this provi-

95. 155 N.E. 68 (N.Y. 1926).

96. Keesling, *supra* note 68, at 108.

97. *Id.*

98. *See generally* Corrigan, *supra* note 12, at 441; Keesling, *supra* note 68. *See also* Keesling & Warren, *supra* note 83, at 174 ("Combined income of all sources is first allocated to sources within and without the state by the formula method, and the California income is then apportioned among the corporations which are doing business in California.").

99. Edison Cal. Stores, Inc. v. McColgan, 183 P.2d 16, 21 (Cal. 1947); *see* Zale-Salem, Inc. v. State Tax Comm'n, 391 P.2d 601, 602 (Ore. 1964) (quoting from *Edison Cal. Stores)*:

> The power flows from the authorized method of ascertaining the income attributable to a taxpayer's activities within the state; and by a parity of reasoning the authority to pursue the method is present whenever activities are partially within and partially without the state . . ., as in the case of the unitary system, whether the integral parts of the system are or are not separately incorporated.

But see Interstate Fin. Corp. v. Wisconsin Dept. of Tax, 137 N.W. 2d 38 (Wis. 1965) (wholly owned subsidiary corporation within a state should not be included in apportionment formula).

100. For a discussion of an I.R.C. § 482 reallocation approach as a possible alternative to combined reporting, *see generally* Miller, *State Income Taxation of Multiple Corporations and Multiple Businesses*, 49 Taxes 102 (1971).

101. Fla. Stat. § 214.73 (1979).

102. M.T.C. art. IV, § 18, All States, *supra* note 23.

sion, it appeared that one was forthcoming in *Associated Dry Goods Corp. v. Department of Revenue.*[103] In the trial court, Associated Dry Goods and its division, Robinson's of Florida, were held to be engaged in a unitary business. The court, however, applied the relief provision in favor of Robinson's for the "start up" expenses incurred in establishing Robinson's in the Florida market.[104] These expenses were held to be extraordinary, in part because of Associated's typical practice of purchasing already existing dry goods stores rather than starting its own, as it did with Robinson's. These expenses were sufficient to offset the income apportioned to Florida from Associated, thereby relieving Robinson's from liability for the back taxes claimed by the Department of Revenue.

On appeal to the Second District Court of Appeal, the Department of Revenue argued that when a business is unitary under section 214.71, Florida Statutes,[105] the income apportioned must fairly represent the tax base as a matter of law.[106] Because the Second District affirmed the lower court without opinion, the Department's restrictive interpretation of the relief provision has not been expressly rejected by the courts;[107] it is, however, clearly unsound, for such reasoning would render Florida's relief provision inapplicable to the very situations to which it was designed to apply, *i.e.* when the normal apportionment provisions produce an unfair result. Decisions from other jurisdictions with identical relief provisions concur.[108] The real issue when the relief provision is

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103. 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979).

104. No. 78-1083, 78-1259 (Fla. Cir. Ct. Pinellas County 1978), *aff'd mem.*, 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979).

105. (1979).

106. Initial Brief of Appellants at 10, 373 So. 2d at 466.

107. 373 So. 2d 466 (Fla. 2d Dist. Ct. App. 1979), *aff'g mem.*, No. 78-1083, 78-1259 (Fla. Cir. Ct. Pinellas County 1978). The Department of Revenue has petitioned the Florida Supreme Court for a writ of certiorari.

108. *See* Tiefel v. Gilligan, 322 N.E.2d 916, 920 (Ohio 1973) (The allocation formula section "does not create a conclusive presumption."); Utah Constr. and Mining Co. v. State Tax Comm'n, 465 P.2d 712, 713 (Ore. 1970) ("The policy of the statute and regulations is to adopt a method which will 'fairly and accurately . . . reflect the net income of the business done within the state.' "); Hellertown Mfg. Co. v. Commonwealth, 358 A.2d 424, 432 (Pa. Commw. Ct. 1976) (The relief provision "is only operative when the statutory formula does not yield an apportionment which 'fairly represents' the extent of the taxpayer's business activity in Pennsylvania."); Kennecott Copper Corp. v. State Tax Comm'n, 493 P.2d 632, 635 (Utah 1972) ("We do not construe the statute as limiting the Commission to the use of the formula in all cases."); F.W. Woolworth v. Commissioner of Taxes, 298 A.2d 839, 845 (Vt. 1972) ("The matter of adjustment of the formula is another matter quite apart from the constitutional question."); W.R. Arthur & Co. v. Wisconsin Dept. of Taxation, 118

used is whether the results of the apportionment formula are fair. This is usually a question of fact.[109]

CONCLUSION

The law of taxation of unitary businesses is inconsistent and often inequitable. The United States Supreme Court has authorized diverse formulas among the states, thereby encouraging the double taxation of multistate businesses. Florida and other states have taken advantage of the diversity sanctioned by the Supreme Court to promote their own interest in maximizing tax revenues. In addition to increasing revenues, Florida's apportionment formula encourages industries to establish their primary headquarters within the state.

The tremendous costs incurred by business as a result of diverse allocation formulas are making the business lobby increasingly vocal. Although the Supreme Court appears reluctant to take a more affirmative role in establishing an equitable system of multistate business taxation, this apparent passivity may disguise a recognition that the business community's hostility is the most effective force to prod Congress to legislate in this area. If this perception is correct, states such as Florida are indirectly contributing to the pressure on Congress to enact a national, uniform system of taxation of multistate business which will please the business community and remove from the states the power to police themselves.

N.W.2d 168, 170 (Wis. 1962) ("The legislature also recognized that no fixed formula would fairly fit all the multitudinous types of business."). *But see* Ducas Co. v. State Tax Comm'n, 184 N.E. 77, 78 (N.Y. 1932) (relief provision held "too vague to state a workable rule"). *See also* Fuqua Indus. Inc. v. Department of Revenue, 261 So. 2d 410 (Ala. 1972); Anderson, Clayton & Co. v. DeWitt, 513 P.2d 1357 (Ariz. 1973); Amoco Prod. Co. v. Armold, 518 P.2d 453 (Kan. 1974); Johns-Manville Prod. Corp. v. Commissioner of Revenue, 343 A.2d 221 (N.H. 1975).

109. *See, e.g.*, Consolidated Freightways, Inc. v. Ellis, 370 P.2d 224, 226 (Ore. 1962) ("[I]n some cases the facts may require the use of another method combining features of both [the apportionment method and the segregated accounting method].").