

Income/Franchise:

New Mexico: Multinational Business Allowed to Use Alternative Apportionment Employing 30% Exclusion

Decision & Order No. 21-21, N.M. Admin. Hrgs. Off. (8/24/21). In a protest involving a multinational oil and gas company and several tax issues including whether i) its foreign subsidiaries are unitary; ii) certain sources of income are business versus nonbusiness income for New Mexico apportionment purposes; iii) an apportioned share of a combined group's foreign dividend income, Subpart F income, and other deemed foreign subsidiary income is subject to New Mexico corporate income tax; and iv) New Mexico's treatment of foreign subsidiary income violates the Foreign Commerce and/or Equal Protection Clauses of the US Constitution, the New Mexico Administrative Hearings Office (AHO) held that the company is entitled to use the New Mexico Taxation and Revenue Department's (Department) proposed "30% exclusion" alternative apportionment method to address "obvious distortion" related to certain foreign income under the original assessment.

URL: <https://klvg4oyd4j.execute-api.us-west-2.amazonaws.com/prod/PublicFiles/34821a9573ca43e7b06dfad20f5183fd/0f23406c-a118-4f45-b426-99e59bf3d25e/21-21%20Apache%20Corporation%20and%20Subs.pdf>

Rejecting use of the company's proposed "965 concept method" under "Department Bulletin B-300.17" to apportion certain foreign income to New Mexico for the 2015 tax year at issue, the AHO explained that such alternate apportionment method generally applies only to the federal Tax Cuts and Jobs Act's (*i.e.*, P.L. 115-97) 2017 deemed dividend repatriation, and that the company has neither "presented compelling evidence that Department Bulletin B-300.17, designed for a different tax year and addressing a forced repatriation, fairly reflects" its own strategic and voluntary business activities in 2015, nor has it shown "it has used or attempted to use this approach uniformly or how this concept would impact uniformity in other UDITPA jurisdictions." For similar reasons, the AHO also rejected the taxpayer's other suggested alternative apportionment approach – that is, use of Maine's "Augusta Formula" as a viable method under the facts. Lastly, the AHO rejected the Department's suggested use of the "Detroit Formula" as a reasonable apportionment method and instead held that the Department's alternatively suggested "30% foreign dividend exclusion method" resulted in "the most reasonable approach" to address both the foreign factor relief and the accumulated dividend distortion "while still being reasonably consistent with the economic reality" of the company's in-state business activities.

The lengthy 115-page ruling also references and addresses a slew of Foreign Commerce Clause, Equal Protection Clause, and fair apportionment-related caselaw in relation to other matters at issue in the case. Please contact us with any questions.

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