

MTC Model (from page 11)

nonbusiness income, apportionment, and combined reporting,” whether or not a filing is required. Failure to file the compilation of state tax return data “as required” is subject to a penalty of the greater of \$10,000 or 0.25 percent of the amount of net income “properly apportioned and allocated” to Montana. Additional penalties would apply for failure to retain and provide required supporting records. The state tax return data disclosure requirements and associated penalties would not take effect until tax years beginning after December 31, 2008. (The effective date is in line with the effective date for the MTC model statute, which was delayed “to

allow time for the development of software and other methods that will make it more convenient for taxpayers to file such information with the states, and for the [MTC] to work with taxpayers and other private sector representatives on a task force to identify specific filing requirements so that such software could be developed[.]”)

A “tax evasion voluntary compliance program” (VCP) would run from September 1 through December 31, 2007, applicable to “tax liabilities attributable to the use of tax evasion transactions” for tax years beginning before January 1, 2007. The VCP would include “with appeal” and “without appeal” options.

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NEW HAMPSHIRE & MINNESOTA

Taxing Income from Foreign Subsidiaries of Companies in New Hampshire and Minnesota

by Keith Martin (Chadbourne & Parke LLP)

Income from foreign subsidiaries was an issue in two states.

The New Hampshire Supreme Court told General Electric that it could not deduct dividends the company received from foreign subsidiaries in arriving at its New Hampshire tax base.

New Hampshire collects a “business profits tax” from companies doing business in the state. First, it determines the scope of any “unitary business” like GE that has lots of subsidiaries. The income of the entire unitary business is calculated, and then a share of the group income is apportioned to New Hampshire based on the property, payroll and sales of the group in the state. Dividends and royalties paid by one domestic entity in the group to another group member are ignored. The group stops at the water’s edge. Thus, income earned by offshore subsidiaries is not part of the group income that is apportioned. However, it appears that dividends any group member receives from a foreign subsidiary are counted as part of the unitary group’s income that is then apportioned partly to New Hampshire. GE wanted to deduct foreign dividends from the group income. The court said no. It cited a U.S. Supreme Court decision involving Mobil Oil Corporation in 1980 that it said

confirms that a state has the right to tax foreign-source dividends that are received by a corporation doing business in the state. The case is *General Electric Company v. Commissioner*. The court released its decision in early December.

French Subsidiary of Corporation in Minnesota

The Minnesota Supreme Court grappled with a related issue. A U.S. corporation doing business in Minnesota had a French subsidiary. It filed a “check-the-box” election with the IRS to treat the French subsidiary as transparent for U.S. tax purposes. Minnesota follows a similar procedure as New Hampshire. It first determines the unitary business and then apportions part of the group’s income to Minnesota based on the sales, payroll and property in the state. However, Minnesota law says that the income of any foreign entities that are part of the unitary group in theory are excluded from apportionment (and their sales, property and payroll are also ignored when doing the apportionment).

The issue was whether the income from the French entity had to be included when the company opted to treat the French company as transparent for U.S. tax purposes. The court said no. It said the election to treat it as transparent had meaning only for federal income tax purposes.

The case is *Manpower, Inc. v. Minnesota Commissioner of Revenue*. The decision was released in early December. □

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