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Sec. 12-221a-1. Alternate method of apportionment

(a) **In general.** (1) The standard that the Commissioner adopts under this regulation is that section 12-221a of the general statutes is to be interpreted to permit a departure from the statutory apportionment formula only in limited and specific cases, and use of an alternate method of apportionment under section 12-221a of the general statutes is appropriate only in specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the statutory apportionment formula. Where there are no such unusual fact situations producing incongruous results under the statutory apportionment formula, the statutory apportionment formula must be used.

(2) **Special industry apportionment.** With respect to certain industries, such as rail transportation, ship transportation, television, radio, magazine publishing or motion pictures, for which some jurisdictions have adopted, by statute or regulation, a substitute apportionment formula for an entire industry in lieu of an otherwise applicable statutory apportionment formula, this regulation is not intended to establish a substitute apportionment formula for an entire industry. The Commissioner, however, has the inherent power under section 12-221a of the general statutes, after adopting regulations in accordance with the provisions of chapter 54, to establish such substitute apportionment formulae.

(3) Topics not covered by this regulation. The invocation of section 12-221a of the general statutes, especially to “throw back” or “throw out” receipts from the receipts factor, is not appropriate where the issue is whether or not a company is entitled to apportion its net income or its additional tax base. Section 12-218, 12-218a or 12-219a, as the case may be, of the general statutes governs such disputes, and not section 12-221a of the general statutes. If a company is entitled to apportion its net income or its additional tax base, the statutory apportionment formula must be used, unless an alternate method of apportionment is petitioned for (and granted) under subsection (b) or required under subsection (c) of this regulation.

(b) **Invocation by company.** A company may petition for an alternate method of apportionment when the statutory apportionment formula unfairly attributes to this state an undue proportion of its net income or additional tax base. A petition for alternate method of apportionment shall be granted only in limited and specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the statutory apportionment formula. The provisions of the foregoing to the contrary notwithstanding, the Commissioner shall grant a petition for alternate method of apportionment if it is clearly established that either the Due Process Clause or the Commerce Clause or any other provision of the United States Constitution would be violated by applying the statutory method of apportionment to a company.

(c) **Invocation by Commissioner.** The Commissioner may require an alternate method of apportionment when the statutory apportionment formula has operated or will operate so as to subject the company to taxation on a lesser portion of its net income or additional tax base than is equitably attributable to this state. An alternate method of apportionment shall be used only in limited and specific cases where unusual fact situations (which ordinarily will be unique and nonrecurring) produce incongruous results under the statutory apportionment formula. Disparity among apportionment factors shall not establish (or tend to establish) that the

statutory apportionment formula has operated or will operate so as to subject the company to taxation on a lesser portion of its net income or additional tax base than is equitably attributable to this state, as the phrase is used in section 12-221a of the general statutes. For example, the invocation of section 12-221a of the general statutes, on account of a disparity between, on the one hand, a company's property factor or payroll factor and, on the other hand, its receipts factor, is not appropriate.

(d) **Alternate methods of apportionment.** (1) If it can be clearly established that the use of an alternate method of apportionment is appropriate, the company may petition for, or the Commissioner may require, (A) separate accounting; (B) the exclusion of any one or more of the factors; (c) the inclusion of one or more additional factors which will fairly represent the company's business activity in this state; or (D) the employment of any other method to effectuate an equitable apportionment of the company's income.

(2) An example of the employment of any other method to effectuate an equitable apportionment of the company's income is a situation where a company has closed and been unable to sell a manufacturing plant that it owns because the plant produced goods for which the market had permanently collapsed. Including the value of the plant in either the numerator (if the plant is situated in Connecticut) or the denominator of the property factor would distort the company's business activity inside and outside Connecticut. Therefore, it is appropriate to exclude the value of the plant from the numerator (if the plant is situated in Connecticut) and the denominator of the property factor.

(e) **Burden of proof for invoking section 12-221a.** The person, whether it is the company or the Commissioner, petitioning for or requiring, respectively, the use of an alternate method of apportionment, has the burden of proving, by clear and convincing evidence, that there are unusual fact situations (which ordinarily will be unique and nonrecurring) producing incongruous results under the statutory apportionment formula. Furthermore, if a company proposes the use of an alternate method of apportionment on the grounds that the application to the company of the statutory apportionment formula would violate either the Due Process Clause or the Commerce Clause or any other provision of the United States Constitution, the company bears the burden of proving, by clear and convincing evidence, such violation.

(f) **Definitions.** For purposes of this regulation, unless the context otherwise requires:

(1) "Statutory apportionment formula" means the apportionment formula that is prescribed in section 12-218, 12-218a or 12-219a, as the case may be, of the general statutes;

(2) "Commissioner" means the Commissioner of Revenue Services.

(g) **Effective date.** This regulation shall apply to actions that are taken by the Commissioner, permitting or requiring a company to change from using the statutory apportionment formula to using an alternate method of apportionment, on or after the date that this regulation is filed with the Secretary of the State.

(Effective November 22, 1995)