

Alex Weber, Office of General Counsel

Maine Revenue Services

24 State House Station

Augusta, ME 04333-0024

RE: Proposed Amendments to Rule 801 (Apportionment) (Propose Rule #2024-P319)

 Comments and Request for Public Hearing

Dear Mr. Weber:

The Maine Society of CPA’s (MECPA) appreciates the opportunity to provide comments related to Maine Revenue Services’ (“MRS”) proposed amendments to Rule 801 (Apportionment). The Maine Society of CPAs is the state’s premier professional association for certified public accountants. Our members prepare a large share of the tax returns filed with Maine Revenue Services, particularly those involving sophisticated businesses. The tax compliance work of our members is vital to ensuring the smooth functioning of Maine’s tax collection system and the continuity of the State’s revenue stream. In many respects, MECPA members serve as the “front line” of the State’s revenue collections.

**MECPA requests a public hearing prior to the adoption of the Proposed Amendments, pursuant to 5 M.R.S. § 8052(1).**

MECPA certainly appreciates and respects MRS’s efforts to create additional guidance for taxpayers and tax professionals. However, MECPA is strongly opposed to the proposed amendments to Rule 801 insofar as they relate to the apportionment of receipts from the performance of services. We feel that these changes represent poor tax policy, are unworkable in practice, are confusing and contradictory and should certainly not be applied retroactively. Furthermore, we feel that changes of this magnitude should be the province of the Legislature, and should not be passed off as routine technical changes. **In short, we urge MRS to withdraw the proposed apportionment amendments.**

Our specific concerns are outlined below.

**Changes of this Nature Should Be the Province of the Legislature**

Apportioning services to the place where they are “acquired or experienced” will often not be the same place as where the services are “received.” It appears to us that MRS is attempting to legislate a different apportionment formula than the one enacted by the Legislature, which is based on the location that the services are “received.”

Adding the words “acquired or experienced” is not a routine technical change, as it will often result in apportionment to a different location than where the service was “received.” Accordingly, any such change should go through the legislative process, as it is, in effect, an amendment to the apportionment statute. At a minimum, the rule should be classified as a major substantive rule and be subjected to legislative review.

We also believe that effectively changing the statute in this manner usurps the power of the Legislature to formulate tax policy.

In addition, the revenue implications on the State and on taxpayers, and the compliance burdens on taxpayers of this substantive change should be thoroughly examined through the legislative process before these changes are enacted.

**The Proposed Amendments Would Impose Impossible Compliance Burdens**

Adding the “acquired or experienced” language to the rule will create major uncertainty for taxpayers and their accountants. How is a taxpayer expected to know or keep track of where his service is “experienced?” For example, a CPA firm is asked to provide tax advice to a client in New York. The client then turns around and shares the tax advice with its branch offices located in 10 different states. The CPA firm knows that the advice was received in New York, but how is it to know that the advice was then “experienced” in 10 other states? Expecting taxpayers and their accountants to have such knowledge is an impossible burden, particularly when Maine would be the only state in the country to impose the “acquired or experienced” requirement.

As another example, a law firm assists a Massachusetts based client in obtaining a patent. The patent is used to create a software program that is distributed throughout the world. Where is the law firm’s patent services “experienced”: Massachusetts? Everywhere in the world?

Even the terms “acquired or experienced” are ambiguous and confusing. These are contradictory terms. Should the service be sourced to where it was “acquired” which seems to be the same place it was “received”? Or should it be sourced to where it was “experienced” which will often be a different location. Does the taxpayer choose between the two different locations? Can the taxpayer be second-guessed if it chooses to use “acquired” vs. “experienced”?

**For all of these reasons, MECPA strongly recommends deleting the phrase “that is, where the services are acquired or experienced” from the proposed rule.**

**The Proposed Recordkeeping Requirements of the Rule are Unworkable**

The proposed rule states that “The determination of where services are received is based on all available facts and is not limited to the books and records of the taxpayer or any person related to the taxpayer.” This sentence appears to require that taxpayers maintain third-party records or information to which taxpayers may not have access when preparing their Maine corporate income tax returns. Imposing a requirement that goes beyond the taxpayer’s own records and requires obtaining the records of third parties, which may be unobtainable, to prepare tax returns would create inordinate complexity and is unworkable. Sound tax policy dictates that tax returns should be able to be produced based on information that is maintained by the taxpayer in the ordinary course of business. Preparing a tax return should not require the taxpayer to conduct investigations of its customers or other third parties.

For example, suppose ABC company provides services to 10,000 customers during the year. Should ABC company have to obtain records from its 10,000 customers to figure out where its services were actually “experienced”? What if customers refuse to comply with such requests, or the information is confidential?

**MECPA strongly recommends that any recordkeeping requirements be limited to records maintained by the taxpayer in the ordinary course of business.**

**Retroactivity**

As currently drafted, the proposed apportionment amendments are retroactive to 2010. That is egregiously unfair to taxpayers who have relied on the existing rules and interpretations of the statute, and who were obviously unaware of the MRS’s proposed “clarifications” at the time they filed their returns. Does MRS expect taxpayers to file amended returns going back to 2010 to reflect where services are “acquired or experienced”? That would obviously be unworkable for our members and their clients. Applying rule changes retroactively blindsides taxpayers, discourages voluntary compliance, and represents extremely poor tax policy. We strongly urge MRS to withdraw these proposed apportionment changes. However, at the very least, **if the Rule is promulgated, the Rule should be amended to make clear that any apportionment changes will be applied prospectively only.**

One final observation – if the Rule is enacted, for the reasons presented above there will undoubtedly be increased operational and financial burden placed on Maine businesses, many of whom are small-to-midsize organizations. This will further reinforce the perception that Maine is not a business-friendly state.

Thank you for the opportunity to provide these comments on the Proposed Amendments. Please reach out to the MECPA if we can be of further assistance.

Sincerely,

Trish Brigham

Executive Director