

Eversheds Sutherland (US) LLP  
700 Sixth Street, NW, Suite 700  
Washington, DC 20001-3980  
D: +1 202.331.0936  
F: +1 202.637.2933  
jeffriedman@eversheds-sutherland.com



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**Via E-mail:** [irrc@irrc.state.pa.us](mailto:irrc@irrc.state.pa.us)

**Via United States Mail**

Maria L. Miller  
Office of Chief Counsel, Department of Revenue  
P.O. Box 281061  
Harrisburg, PA 17128-1061

Re: Department of Revenue Proposed Regulations 61 Pa. Code § 153.24a  
(Corporate Net Income Tax (CNIT) – Business Income and Nonbusiness Income)

Dear Maria:

This letter contains comments relating to the Department of Revenue (“DOR”) proposed regulation regarding business income and nonbusiness income that was published in Pennsylvania Bulletin, Volume 54, No. 21 (May 25, 2024) (the “Proposed Regulation”). I am submitting these comments on behalf of myself and these comments do not necessarily represent the views of my clients, colleagues or firm. As set forth in detail below, the Proposed Regulation, among other things, exceeds the DOR’s statutory authority and lacks statutory support in certain areas.

### **1. The Proposed Regulation Incorrectly Minimizes the Multifirmity and Unrelated Income Doctrines**

The Proposed Regulation states in the preamble that “[t]o the extent they are inconsistent with the unitary business principle, the application of older Pennsylvania court-designed concepts such as ‘unrelated income’ or ‘multifirmity’ do not limit the State’s authority to tax under the unitary business principle.”

The minimization of the “multifirmity” and “unrelated income” doctrines is improper and exceeds the scope of the DOR’s authority. Changing Pennsylvania law by overturning prior cases such as *Commonwealth v. ACF Industries, Inc.*<sup>1</sup> or *RB Alden Corp. v. Commonwealth*<sup>2</sup> is the province of the court system or the legislature. Thus, the DOR should remove these references to these doctrines until a court or the legislature determines how they should be applied.

<sup>1</sup> *Commonwealth v. ACF Industries, Inc.*, 441 Pa. 129 (1970).

<sup>2</sup> *RB Alden Corp. v. Commonwealth*, 142 A.3d 169 (Pa. Commw. Ct. 2016).

## **2. The Proposed Regulation Exceeds the DOR’s Authority by Contravening the Legislature’s Separate Reporting Requirement**

The Proposed Regulation’s expansive application of the unitary business principle contravenes the legislature’s separate reporting requirement<sup>3</sup>. The unitary business principle serves as a constitutional limitation on a state’s ability to apportion and tax income. The principle also forms the basis of combined reporting, a method of tax reporting employed by several states but not Pennsylvania. The proposed regulation conflates these concepts as evidenced in the last sentence of subsection (d) which states that “[d]etermination of the scope of the unitary business being conducted in this Commonwealth is without regard to the extent to which this Commonwealth requires or permits combined reporting.” This sentence suggests that the DOR has the power to ignore the legislature’s policy decision to *not* authorize combined reporting. To the extent that the Proposed Regulation suggests that the DOR has the authority to “require or permit” combined reporting, the DOR should clarify that Pennsylvania mandates separate reporting and combined reporting is not the generally applicable filing method.

## **3. There is No Support for Requiring a Taxpayer to Report Classification of Income from Year-to-Year or State-to-State**

In subsection (g) of the Proposed Regulation, a taxpayer is required to disclose to the DOR any time the taxpayer departs or modifies the manner in which income has been classified in prior years. Subsection (g) also requires taxpayers to disclose other jurisdictions where their income classification is not uniform with the method shown on a Pennsylvania return and provide the nature and extent of the variance. The DOR provides no statutory support for these reporting disclosures. The only support the DOR provides is a statement that “[c]onsistency with other states’ interpretation of the same or substantially similar language was a goal that the Pennsylvania Supreme Court noted was favored in the determination of the proper interpretation of statutory language.”

While year-to-year or state-to-state consistency may be of interest of a court in a particular case, the general requirement to disclose these topics is burdensome and unnecessary. This annual reporting requirement will force taxpayers to keep a second set of books to monitor *other* states’ tax law changes and compare them to Pennsylvania’s tax system. This process will add nothing to Pennsylvania’s tax administration but will add significant costs to taxpayers. Given the lack of authority for the DOR to impose such requirements, any reporting requirements are best left to the legislature to determine after input from all parties. Thus, subsection (g) should be removed from the Proposed Regulation.

## **4. The Fiscal Impact Statement of the Proposed Regulation is Erroneous**

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<sup>3</sup> See 72 P.S. § 7402(a) (imposing the corporate income tax on a “corporation” and not a combined group or corporations). See also 72 P.S. § 7404 (“The department shall not permit any corporation owning or controlling directly or indirectly, any of the voting capital stock of another corporation or of other corporations ... to make a consolidated report showing the combined net income.”)

The preamble of a proposed regulation must include, among other things, its “fiscal impact.”<sup>4</sup> In the “Fiscal Impact” section of the Proposed Regulation the DOR states that the “proposed rulemaking will have no fiscal impact on the Commonwealth as it is a clarification of Commonwealth law.” Although it may be the DOR’s view that the Proposed Regulation simply clarifies Commonwealth law, it does not. The significant changes contained in the Proposed Regulation – some of which are inconsistent with, or add to, Pennsylvania law – are inconsistent with current law. Unfortunately, while the Proposed Regulation seeks to require taxpayer reporting consistency with other states, the Proposed Regulation is inconsistent with Pennsylvania law. The DOR mentions in the preamble that part of the reason for the Proposed Regulation is to “clarify when income should be classified as business versus nonbusiness income and minimize future disputes between the [DOR] and taxpayers on these issues.” However, the Proposed Regulation will necessarily influence future disputes, which can have a fiscal impact on the Commonwealth. The DOR should revise this statement and provide an accurate fiscal impact for the Proposed Regulation.

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While it is important for regulations to be updated to reflect new statutes and case law, in several ways, the Proposed Regulation goes beyond a simple update. The Proposed Regulation, among other things, exceeds the DOR’s authority when it attempts to minimize the multifirmity and unrelated income doctrines and when it contravenes the legislature’s separate reporting regime. The Proposed Regulation should be revised to fix these issues, which are better addressed through the legislative process.

Very truly yours,



Jeffrey Friedman  
Eversheds Sutherland (US) LLP  
700 6<sup>th</sup> Street, NW  
Washington, DC 20001

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<sup>4</sup> 1 Pa. Code § 301.1.