

Definition of a Unitary Business

Bloomberg BNA Portfolio 1110-3rd

1. State Tax Portfolios
 2. State Tax Portfolios: Corporate Income Taxes
 3. Portfolio 1110-3rd: Income Taxes: Definition of a Unitary Business
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Description

PORTFOLIO DESCRIPTION —

Bloomberg Tax Portfolio, 1110-3rd T.M., Income Taxes: Definition of a Unitary Business , is limited to considering issues in defining a unitary business. The unitary business concept, however, is vital to the application of formulary apportionment and is an important consideration in resolving the issue of business–nonbusiness income, both of which are considered in separate portfolios: 1150-2nd T.M., Income Taxes: Principles of Formulary Apportionment and 1140-2nd T.M., Income Taxes: The Distinction Between Business and Nonbusiness Income.

In the tax world, we are accustomed to thinking of certain concepts as always “good” (for taxpayers, deductions and credits are always good), and others as always “bad” (penalties are always bad). The unitary business principle is neither good nor bad. Significantly, in some circumstances, a unitary classification will reduce the total amount of income taxes paid by the members of a purported unitary group to a specific state, while in other instances such classification will increase the amount of those taxes. Furthermore, one must first determine which entities are members of a unitary group before formulary apportionment can occur. An understanding of the unitary business principle is, therefore, a basic tool required by all tax practitioners, whether in-house, a private practitioner, or in government service.

This Portfolio addresses the unitary business principle and certain issues that have evolved from the unitary issue, i.e., the requirement by some states of a combined report from a unitary group of controlled corporations, the complexities of classification of a group or asset as unitary, and the treatment of unitary affiliates that use different apportionment formulas. Other related problems, such as water's-edge elections and the adoption of tax haven legislation, are also analyzed.

Updates to the Portfolio will be incorporated directly into the Detailed Analysis. Subscribers to the Portfolio will find late-breaking developments reported in the Bloomberg Tax Daily Tax Report - State.

This Portfolio may be cited as Fruchtmann, 1110-3rd T.M., Income Taxes: Definition of a Unitary Business. Within the Multistate Tax Portfolio Series, however, references to the Portfolios will include only the Portfolio numbers and titles.

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Authors

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(with insights from Frank C. Latcham, Esq.)

David A. Fruchtman co-chairs Steptoe & Johnson LLP's State and Local Taxation practice and has assisted clients on issues in all 50 states, on matters involving income taxes, franchise taxes, sales and use taxes, real property transfer taxes, and a variety of other state and local taxes.

Mr. Fruchtman's practice is equally divided between tax planning and tax controversy work. In contested matters, Mr. Fruchtman's clients share his philosophy of working cooperatively with state revenue departments. They recognize that saving a few dollars today in exchange for a damaged relationship is not a sound approach. However, because negotiated resolutions are not always possible, he has successfully represented clients before courts and administrative tribunals across the country. In 2003, he was a Special Deputy Attorney General to the state of Hawaii.

Mr. Fruchtman is a frequent writer and lecturer whose topics include state tax planning involving foreign operating companies, constitutional issues, tax legislation, and nonlitigated resolutions of multistate tax disputes. He is the author of the Bloomberg Tax Portfolio [1130-3rd T.M.](#), Income Taxes: Consolidated Returns and Combined Reporting. He lectured at NYU's Summer State and Local Tax Institute for 13 years, was the chairman of the Income and Franchise Taxes Subcommittee of the American Bar Association's state tax committee, and has been co-author of the Illinois chapter of the ABA's Sales and Use Tax Deskbook for more than 20 years. Mr. Fruchtman has been repeatedly recognized as a New York and Illinois Super Lawyer, an annual listing of two to five percent of the states' lawyers who have achieved significant professional accomplishment. He is a graduate of Harvard Law School and the University of Wisconsin School of Business.

A Note of Appreciation: During Mr. Fruchtman's career, he has been privileged to work with and learn from four of the leading state tax lawyers of his, or any, era. First among these was the late Paul Frankel, whose enthusiasm, good nature, and brilliance make him the undisputed, all-time, heavyweight champion of the state tax world. Second was Richard (Rick) Hanson, whose analytical and writing skills are unsurpassed. It was Rick's insights as taxpayer's counsel in Quill Corporation that lead to the untethering of Commerce Clause analysis from Due Process analysis and, in turn, resulted in a tax presence win for remote businesses that withstood unrelenting attacks for the better part of three decades. Third is Fred Marcus, whose integrity and knowledge of the law have long made him a trusted advisor to America's largest businesses, and a pleasure to work beside. And fourth is Stanley (Stan) Kaminski, whose tremendous recall, ability to simplify complex issues, and unassuming manner have made him a welcome figure in the offices of taxpayers and tax collectors alike. Therefore, using this portfolio to its greatest advantage, Mr. Fruchtman extends a sincere "Thank you" to each of them.

Portions of this Portfolio, including especially the "Historical Insights," incorporate material from an earlier treatment of the subject in Bloomberg Tax's state tax library. This includes work authored by the late Frank

Consolidated Returns and Combined Reporting

Bloomberg BNA Portfolio 1130-3rd

Latcham, including the second edition of this Portfolio, Portfolio 1110-2nd T.M., Income Taxes: Definition of a Unitary Business . Mr. Latcham was one of the great figures in the state and local tax world, and was lead counsel for the taxpayer in *Container Corp. of Am. v. California Franch. Tax Bd.* , 463 U.S. 159, Franklin C. 166 (1983). His insights into Container are of special interest and therefore have been included in this Portfolio.

Frank Latcham (deceased) was a graduate of the University of Washington (1943) and received his legal education at the University of Washington (LL.B. 1944) and Yale University (J.S.D. 1951). He taught at Case–Western Reserve University Law School from 1948 to 1954. He became an associate of the firm of Morrison & Foerster in 1954, a partner in 1961, and Senior of Counsel in 1986. Mr. Latcham was a past chairman of the Committee on State and Local Taxes of the ABA Section of Taxation and of the Committee on Standards of Tax Practice. He has written extensively in the field of state and local taxation and co–authored (with Prentiss Willson, Jr.) “Franchise and Corporation Income Taxes,” in *California Taxes* (California Continuing Education of the Bar, 1987). He lectured regularly and has spoken at the University of Southern California Tax Institute, the Georgetown University Institute on State and Local Taxation, and the New York University Institute on State and Local Taxation. He was Chairman of the Advisory Board for the Tax Management Multistate Tax Portfolio Series and was Adjunct Director, Institute of Governmental Affairs, University of California, Davis, California. Mr. Latcham has also been in charge of state and local tax cases in all California administrative agencies and in all California courts, federal courts, administrative agencies, courts in other states, and before the United States Supreme Court.

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Portfolio DESCRIPTION SHEET —

Bloomberg Tax Portfolio Income Taxes: Consolidated Returns and Combined Reporting, No. 1130-3rd, compares state combined reports and state consolidated returns in detail and discusses the mechanics and implications of filing combined reports and the different types of state consolidated returns. At the state level, members of a multi-corporate group may, depending on the circumstances and the laws of the particular state, determine their state taxable income using the separate return, combined report, or consolidated return methods. Furthermore, this may be so regardless of whether the group files a federal consolidated return or federal separate returns.

In addition, the Portfolio addresses the state tax implications of federal consolidated returns and the federal consolidated return regulations. Issues discussed include those arising when a group files a consolidated federal income tax return, but one or more members file in a taxing state using the separate return method. The Portfolio also discusses issues that may arise in filing state combined reports and contrasts how these issues have been handled at the state level with the treatment of these issues under the federal consolidated return regulations.

Updates to the Portfolio will be incorporated directly into the Detailed Analysis. Subscribers to the Portfolio will find late-breaking developments reported in the Bloomberg Tax State Tax Developments Tracker.

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Dedication: With love and boundless admiration for my wife and children.

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